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Editor: Mona A. Rishmawi

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

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- organizes support for judges and lawyers who are being harassed or persecuted.

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Centre for the Independence of Judges and Lawyers

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

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

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Part One

Articles

Australia : The State of the Judicature

by

*The Hon Sir Gerard Brennan, AC KBE **

Every society has a Judicature – the dictatorship as well as the democracy, the simpler societies of earlier centuries as well as the sophisticated societies of the modern day. It is the institution which avoids self-help in resolving disputes and controls excesses of power. Its decrees give concrete effect to the laws of the State. What the Judicature does or does not do largely determines the character of the society in which we live. So the State of the Judicature is the concern not only, nor even chiefly, of the officers of the Judicature; rather it is the concern of the people of Australia who are protected by, and are subject to, its jurisdiction.

What are the functions which the Australian people expect the Judicature to perform? That question is hard to answer unless we have answers to some even more fundamental questions: should there be protection against excesses of governmental power, including the police power? How far should a majority's will or a majority's interest prevail over the will or interest of a minority? Should the powers of a democratically-elected legislature be limited? Should the policies and actions of an executive government be subject to judicial review or control? Should there be any regulation of economic and industrial power other than the market? The answers which most Australians would give to these and other fundamental

* Chief Justice of Australia. Speech during the Opening Ceremony of the 30th Australian Legal Convention in Melbourne, 19 September 1997.

questions all point to the obvious conclusion that Australians, like every civilised society, wish to be ruled by law, not by popular clamour or by raw power. Australia has no place for the police state, the show trial, the oppression of minorities, unfettered and arbitrary governmental power, or the tyranny of officialdom or great economic or industrial might. The law, impartially and competently administered, is the infrastructure of our society and the protector from conduct that would disrupt it. It is our assent to the Rule of Law that makes us a free and confident nation.

If we are to be governed by the Rule of Law, we must have a Judicature to administer it. The characteristics of that Judicature reflect the functions it is charged to perform.

First, it must be a Judicature that is and is seen to be impartial, independent of government and of any other centre of financial or social power, incorruptible by prospects of reward or personal advancement and fearless in applying the law irrespective of popular acclaim or criticism.

Second, it must be a competent Judicature; there must be judges and practitioners who know the law and its purpose, who are alive to the connection between abstract legal principle and its practical effect, who accept and observe the limitations on judicial power and who, within those limitations, develop or assist in developing the law to answer the needs of society from time to time.

Third, it must be a Judicature that has the confidence of the people, without which it loses its authority and thereby loses its ability to perform its functions.

Fourth, it must be a Judicature that is reasonably accessible to those who have a genuine need for its remedies.

These being the criteria of a Judicature required to maintain the Rule of Law in a free and confident nation, they are the reference points for considering the State of the Judicature.

1. Impartiality

Impartiality is the supreme judicial virtue.¹ Partiality and the appearance of partiality are both incompatible with the proper exercise of judicial power. The one poisons the stream of justice at its source; the other dries it up. Lord Devlin commented that:

The Judge who does not appear impartial is as useless to the process as an umpire who allows the trial by battle to be fouled or an augurer who tampers with the entrails.²

That is why judges and lawyers place such emphasis on judicial independence. In July this year, the American Bar Association Commission's *Report on Separation of Powers and Judicial Independence* noted that "Judicial independence is not an end in itself but is a means to promote impartial decision-making and to preserve the supreme law of the land". Chief Justice Lamer of Canada acknowledges that the fundamental purpose of judicial independence is the maintenance of the Rule of Law but, he observes:

There is an unfortunate tendency on the part of some to characterise judicial independence as a principle that enures primarily if not exclusively to the benefit of the judiciary itself. While it would be disingenuous to deny that the judiciary benefits from security of tenure and financial security, it must be emphasised that the primary beneficiary of the principle of judicial independence is society as a whole.³

1 "Judges and Lawmakers", (1976) 39 *Modern Law Review* 1 at 4.

2 *Ibid.*

3 "The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective" by Rt Hon Antonio Lamer, PC, Singapore Academy of Law Annual Lecture (1996) at 4.

One of the most important doctrines to emerge in recent times is the doctrine of constitutional incompatibility which precludes federal judges from being appointed to perform functions incompatible with the holding of judicial office.⁴ No occasion has arisen for determining whether a similar doctrine applies in relation to state judges.

In April 1997, the Chief Justices of the States and Territories drew pointed attention to the threat to judicial independence in the appointment of acting judges “to avoid meeting a need for a permanent appointment”.⁵ And they objected to the appointment by the Executive Government of a serving judge to any position of seniority, administrative responsibility, increased status or emoluments where continuance in the office was in the discretion of the Executive Government. Judicial independence is at risk when future appointment or security of tenure is within the gift of the Executive. Notwithstanding the clear intent of the Chief Justices’ declaration, it seems that economic considerations induce government to make acting appointments. However, the increasing volume of litigation must lead ultimately to permanent appointment sufficient to cope with the workload. In New South Wales, there are currently five acting judges on the Supreme Court and over 30 on the District Court. These appointments are said to be necessary to dispose of a temporary backlog.

In Canada, judicial independence has been held to require what the Supreme Court has called “institutional independence”, that is “the institutional independence of the court or tribunal over which [a judge] presides, as reflected in its institutional or

4 See *Wilson v The Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 70 ALJR 743; 138 ALR 220.

5 The text of the Declaration is published in this *Yearbook editors note*.

administrative relationships to the executive and legislative branches of government".⁶ Chief Justice Dickson said:

The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from all other participants in the justice system.⁷

The theory behind the concept is not hard to discern. It is the same theory that underlies the Australian doctrine of incompatibility. The courts must not be permitted to be too closely associated with or affected by the political branches of government. But some association is involved in the obtaining of resources. A government which effectively controls the administrative and financial resources required by a court could, if it were ill-advised enough to do so, withhold what the court requires if the decisions of the court were unpalatable to that government. A decision taken on those grounds would, of course, be a blatant attempt to influence judicial decision-making.

The concept of institutional independence presents some jurisprudential difficulties. The Constitution reposes the power of appropriation⁸ in the parliament on a recommendation by message from the head of the Executive Government.⁹ Similar provisions govern appropriation of funds for state courts. It has always been the practice – indeed, an essential constitutional convention – that Executive Governments, both of the

6 *Valente v The Queen* [1985] 2 SCR 673 at 687; *The Queen v Beauregarde* [1986] 2 SCR 56 at 70; see Ian Greene, "The Doctrine of Judicial Independence Developed by the Supreme Court of Canada", (1988) 26 *Osgoode Hall Law Journal* 178.

7 *Beauregarde* [1986] 2 SCR 56 at 72.

8 Constitution, ss 53, 83.

9 Constitution, s 56.

Commonwealth and the States, seek an appropriation and Parliament appropriate sufficient funds to permit the courts to perform their constitutional functions. In times of financial stringency, there is a risk that governments might regard the courts simply as another executive agency, to be trimmed in accordance with the Executive's discretion in the same way as the Executive is free to trim expenditure on the functions of its own agencies. It cannot be too firmly stated that the courts are not an executive agency. The law, including the laws enacted by parliaments or by executive regulation and including executive orders affecting the government of the country, goes unadministered if the courts are unable to deal with ordinary litigation. It is insufficiently appreciated that laws, regulations and orders, which may give effect to high government policy, would be mere points for argument if the courts were not giving them effect in ordinary litigation.

The courts cannot trim their judicial functions. They are bound to hear and determine cases brought within their jurisdiction. If they were constrained to cancel sittings or to decline to hear the cases that they are bound to entertain, the Rule of Law would be immediately imperilled. This would not be merely a problem of increasing the backlog; it would be a problem of failing to provide the dispute-resolving mechanism that is the precondition of the Rule of Law.

It should never be forgotten that the availability and operation of the domestic courts is the unspoken assumption on which the provisions of the Australian Constitution and laws are effected, on which the operation of the entire structure of government depends, on which peace and order are maintained, on which commercial and social intercourse relies and on which our international credibility is based. Constitutional convention, if not constitutional doctrine, requires the provision of adequate funds and services for the performance of curial functions.

Courts, being labour intensive, draw on the public purse for their maintenance. So do the political branches of government,

the Parliament and the Executive. Governments have been attracted to the notion of “user pays” in order to assist in the defraying of the costs of the judicial branch, seemingly disregarding the fundamental importance of ensuring the effective enforcement of the Rule of Law. Sir Richard Scott, head of the Chancery Division in England, in a recent speech said:

The civil justice system is an integral and indispensable part of the structure of administration of justice that must be put in place by every state in which public and private affairs are to be conducted in accordance with the Rule of Law; and ... a policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function.¹⁰

Recently, the English Divisional Court judicially reviewed the Lord Chancellor’s Order which increased the scale of court fees and repealed provisions that had previously relieved litigants in person who were in receipt of income support from the obligation to pay fees. In declaring the repeal to be unlawful, Laws J said:

Access to the courts is a constitutional right; it can only be denied by the government if it persuades Parliament to pass legislation which specifically – in effect by express provision – permits the executive to turn people away from the court door.¹¹

1 Cited by Lord Ackner, *House of Lords Hansard* of 14 July 1997 at 865; see also Sir Richard’s interview reported in *The Times*, 2 December 1996.

11 *R v Lord Chancellor; Ex parte Whitam* [1997] 2 All ER 779.

The Lord Chancellor did not appeal. "User pays" is consistent with the Rule of Law only to the extent that every genuine would-be user can pay. "User pays" puts a premium not on genuine need for legal protection but on financial power.

The passage of legislation which adds to a court's caseload is not always matched by an increase in the court's resources. In modern times, when so many personal and social problems have been thought to be amenable to legal solution, parliaments have created what are deemed to be appropriate rights or liabilities and thus curial jurisdiction has been extended. The impact of these laws on the Executive and its agencies may be factored in to the legislative decision, but the increase in caseloads seems to be a less pressing consideration. If economic stringency invites reconsideration of the funding levels for courts, the first question that arises is: what laws must be repealed or what special provisions must be enacted to lighten the court's caseload?

The Executive Government is not the only threat to judicial independence, though the executive's powers of appointment and preferment and its influence, if not control, over judicial remuneration and judicial resources make independence from executive influence a continual concern for the judiciary. Judges are conscious of other influences that may appear to affect their impartiality. To avoid any such appearance, judges often withdraw from political, financial or social contacts which they would otherwise enjoy. Sometimes prudence and a high regard for the judicial office are regrettably misinterpreted as a withdrawal to an ivory tower.

An embarrassing erosion of judicial impartiality can originate from a judge's expression of a view touching either a political issue or an issue that might arise in the course of litigation. If such a view is expressed in a speech, the judge has obviously thought about the topic and become publicly committed to the view. But judges must not become committed to views which might disqualify them from sitting. The public perception of judicial impartiality has been nurtured by a traditional reticence

in speaking publicly on many topics. Clearly judges must refrain from intruding into political matters and from expressing committed views on matters of public controversy. The desirable policy was expressed by my distinguished predecessor, Sir Anthony Mason, in these terms:

Putting to one side the exceptional case which requires an exceptional response, I favour a cautious approach. Judicial reticence has much to commend it. It preserves the neutrality of the judge; it shields him or her from controversy. And it deters the more loquacious members of the Judiciary from exposing their colleagues to controversy.¹²

Chief Justice Lamer has drawn attention to another matter which, if not properly understood and developed, would pose some threat to judicial impartiality. He speaks of “social context education” which is “designed to make judges both more aware of and better able to respond to the many social, cultural, economic and other differences that exist in the highly pluralistic society in which ... judges now perform their important duties”.¹³ The Chief Justice welcomes the availability of programmes of this kind. And so do I. The AIJA Seminar on Equality and Justice in October 1995 sharpened judicial awareness of the need to guard against stereotypes or assumptions based on gender, aboriginality and cultural awareness. But, the Chief Justice warns, it is essential that the ultimate control of the design of such programmes remain with the Judiciary. Again I respectfully agree. No instruction or advice about judging, however seemingly innocuous it may be, can be accepted by

12 “Judicial Independence and the Separation of Powers – Some Problems Old and New”, *The Leon Ladner Lecture*, (1989) at 21.

13 “The Tension Between Judicial Accountability and Judicial Independence: A Canadian Perspective” by Rt Hon Antonio Lamer, PC, Singapore Academy of Law Annual Lecture (1996) at 9.

judges from the Executive Government. It is equally inappropriate to permit non-governmental interest groups to control the design of judicial educational programmes touching their own special interests, especially when those interest groups are likely to appear in litigation or to stimulate litigation to promote their agenda.

2. Judicial and Practitioner Competence

The level of competence among practitioners who appear before the courts is sustained by professional structures, especially by the professional and financial independence of barristers who continue to perform most of the work of advocacy. That independence is conducive to the discharge of the advocate's duty to the Court on which the efficient disposition of cases depends. However, a recently emerging phenomenon occasions some misgiving. Some advocates have assumed the role of public relations officers for their clients, making their client's case to the media and offering comment on the court's judgment. That role is inconsistent with the advocate's duty to the court. The court can have no confidence that such an advocate will fairly and candidly assist the court on both fact and law. And the accolade or lament that the advocate presumes to express about the court's judgment belittles the court's authority. It is commendable for advocates to provide journalists with information to assist in the accurate reporting of a case, so far as the material is on the public record, but if court proceedings were the postscript or the prelude to counsel's media release or court door interview, the courtroom becomes a mere backdrop to counsel's media performance.

The competence of the judiciary has not hitherto given grounds for concern. Nevertheless, the Council of Chief Justices of Australia and New Zealand encouraged an initiative on the part of the Australian Institute of Judicial Administration to

establish a national judicial college. The project was examined but was abandoned for want of funding. The AIJA, in conjunction with the Judicial Commission of New South Wales, has instituted a highly successful and much appreciated judicial orientation course. It has the support not only of the Council of Chief Justices but also of some of the Pacific Courts which have nominated newly-appointed judges to attend. The availability of places and the frequency of courses are limited by the available resources.

In recent times and with comparatively few exceptions, the professional skills of the judge have been adequate for the discharge of his or her judicial duties. Of course, stories of judicial idiosyncrasies abound in the common rooms of the Bar, but the proportion of cases in which judicial incompetence has been the cause of a failure to do justice according to law has been small. For the most part, Executive Governments of Commonwealth and State have been conscious of the need to make judicial appointments on merit, although infrequently political or personal commitments by governments have raised a doubt about a particular appointee.

Judicial competence is not instantly acquired. It is the product of long professional study and experience. The call for more judges to deal with increasing caseloads and the diminished attractions of judicial office now give some ground for concern about the ability of governments to continue to recruit judges possessed of the desirable levels of scholarship and experience. Where are those judges to be found?

Leading advocates have traditionally been the source of judicial recruitment and, in my opinion, rightly so. That status gives an assurance that the appointee is qualified in the opinion of the court in which he or she usually practises to research, identify and refine the principle of law applicable to a case and to deal efficiently with evidentiary questions, that the appointee is accustomed to subordinate personal convenience to legal duty, that the appointee is accustomed to act in a public forum, to be

exposed to criticism in the event of a failure to live up to high professional standards and has demonstrated an independence of mind and conduct that will stand him or her in good stead in a judicial office.

The need for practical experience is not restricted to the trial courts. In the Appellate Courts, where there is more room for development of the law than in the courts of first instance, knowledge of legal authorities and a capacity for logical analysis are not a sufficient warrant of competence. Experience and the elusive quality of wisdom are needed to develop and articulate legal principle consonant with the enduring values and practical needs of society. Efficiency, no less than independence, requires that the judges of every level of courts be accustomed to the sophisticated dialogue between fact and law, between principle and practice.

But, you may ask, how can the judicial recruiting of leading advocates be maintained? The attractions of judicial office have diminished in recent years. The problem is not merely financial, although that has been significant enough. The disparity between the earnings of experienced advocates and the remuneration of judges has been notorious and governments have often been unable to obtain the services of those who are most qualified for judicial office. Practitioners are being invited to accept appointment at a younger age – an age when they are at the peak of their earning capacities and when the costs of educating their children and meeting their mortgage commitments are at a maximum. Nevertheless, many were prepared to accept the honour of judicial appointment for two reasons. First, there was the security of an indexed pension which conferred on the appointee and his spouse a security that might have been missing in the practice of the profession. Secondly, and perhaps more significantly, appointment was accepted because of the public respect shown to, and the status of, the office of a judge. The attractive force of both of these inducements has been diminished.

The Commonwealth Government is proposing in future to subject judicial pensions to a 15% reduction, on the footing that the reduction is analogous to the impost on funded superannuation schemes. I note, however, that the Senate Select Committee on Superannuation published a report in September 1997 which concluded:

... that the judicial pension scheme does indeed have a greater role than just being part of a remuneration package. The Committee recognises that judicial independence is a guarantee of the impartiality of the judiciary, which underpins the federal nature of the Commonwealth, and the protection of individual rights. The Committee shares the widespread view that secure and adequate remuneration, during retirement as well as during service, is essential to judicial independence.

In consequence the Committee's unanimous recommendation maintains with some improvement of benefits the provisions of the *Judges' Pensions Act* 1968 (Cth) which applies to federal judges.

A reduction in the non-contributory judicial pension otherwise than by the imposition of the general tax on income would create a belief that the financial security of judicial office is chancy. That would compound the problems of judicial recruitment and of premature judicial retirement. These are problems that are of real concern for the maintenance of a highly-qualified judiciary. A contrary approach was taken in Singapore, a highly-commercialised society. Terms and conditions of judicial service were raised to a level sufficient to induce professional leaders including those practising in commercial fields to accept appointment to the Bench, judicial strength was increased to match the caseload and modern technology was introduced to assist court administration. The policy was pursued to secure a highly-qualified judiciary so as to foster, *inter alia*, investment, commerce and international trade.

The respect for, and status of, the office of a judge was and, to a great extent, still is an inducement to accept judicial office. But it is clear that intemperate and ill-informed attacks on particular members of the judiciary, the trumpeting of criticism by commentators who have little knowledge of the judicial method and the absence of effective defence of judicial institutions by the political branches of government have damaged that respect and status to some extent. I shall refer to these factors in connection with public confidence in the judiciary. In the present context, the significance of these developments is that it becomes more difficult to attract practitioners who value both their reputation and their privacy.

The result is that it can no longer be said that leading advocates will necessarily regard an offer of judicial appointment as the fulfilment of a professional ambition. Consequently, there is a risk that governments will seek or will be forced to seek recruitment from sources that may not yield judges of the same competence as the judiciary of earlier times. That is not to say that competent judges have not been appointed from among the ranks of practising solicitors, academics and government lawyers but, as Sir Anthony Mason says,¹⁴ the “problem is to identify the lawyers from a different background who have the capacity to adapt”, especially in those jurisdictions in which complex evidentiary or procedural problems require speedy disposition.

Suggestions are sometimes made that the judiciary is not properly representative. In some respects, that is true. There are too few women judges and too few from what might be termed an “ethnic” background. That under-representation reflects the under-representation of women and minorities among our leading advocates. The real question is how to remove the obstacles and attitudes that restrain the under-represented groups from advancing to the ranks of the leading advocates and

14 “Fragile Bastion”, Judicial Commission of New South Wales at 3.

thence to judicial appointment. Particular and valuable insights are contributed by competent judges drawn from groups that are now under-represented. Other things being equal, it would strengthen the judiciary to have an increase in the proportion of women judges and judges drawn from minority groups.¹⁵ Yet, it would be an erroneous policy, demeaning of an appointee's dignity, to appoint a judge on grounds other than merit. The judiciary cannot be appointed to represent a class or interest; it is appointed to find the facts accurately, to apply the law impartially and to exercise judicial discretions reasonably, irrespective of the class or interest to which any litigant belongs.

3. Public Confidence

Perhaps there is no more significant issue affecting the state of the modern judicature than the issue of public confidence in the judiciary. Twenty years ago, the judiciary was revered as a treasured institution – “like the navy ... admired to excess”, said Lord Devlin.¹⁶ But Madam Justice McLachlin of the Supreme Court of Canada is close to the modern mark when she says:

Judging is not what it used to be. Judges are more important now; judges are more criticised.¹⁷

Recent criticism has often been focused on the judge personally, not on the judge's decisions, much less on the reasons for the judge's decision. And if the critic is criticised, the criticism is defended on the ground that judges must be “accountable”. Clearly the time has come when some ground rules should be spelt out.

15 As Sir Anthony Mason commended four years ago in the last “State of the Judicature” Address, (1994) 68 *Australian Law Journal* 125 at 131-132.

16 *The Judge*, (1979) at 25.

17 (1994) 110 *Law Quarterly Review* 260 at 261.

In the first place, there can be no inhibition on proper criticism of court judgments. Judgments are too important to be exempt from public discussion, especially judgments which have significance for the wider community. It would be absurd to suggest that the *Mabo*¹⁸, *Wik*¹⁹ and *Ha and Hammond*²⁰ judgments of the High Court could not and should not be subject to critical examination. They affect interests far wider than those of the particular parties and decide controversial issues touching the very nature of our society. If judges pronounce judgments of that significance, should they not be accountable for the exercise of their powers? Of course they should. And they are. They spend their days and nights giving an account of the exercise of those powers. The account is called "Reasons for Judgment". A full account of the exercise of judicial power must always be given for the reason that Sir Frank Kitto so clearly stated:

The process of reasoning which has decided the case must itself be exposed to the light of day so that all concerned may understand what principles and practice of law and logic are guiding the courts, and so that full publicity may be achieved which provides, on the one hand, a powerful protection against any tendency to judicial autocracy and against any erroneous suspicion of judicial wrongdoing and, on the other hand, an effective stimulant to judicial high performance.²¹

18 *Mabo v Queensland* (1992) 175 CLR 1.

19 *Wik Peoples v Queensland* (1996) 187 CLR 1.

20 *Ha v New South Wales; Walter Hammond & Associates Pty Ltd v New South Wales* (1997) 71 ALJR 1080; 146 ALR 355.

21 "Why Write Judgments?" (1992) 66 *Australian Law Journal* 787 at 790.

Reasons for judgment in important and difficult cases cover page after page, statute after statute, precedent after precedent. They are often technical, because they are judgments “according to law”. What else should they be? Judgments to suit the government of the day? Judgments to earn popularity or to satisfy the demands of those with power and influence? Judgments that will attract the accolades of the media? Not at all. The Rule of Law is most valuable when it protects the vulnerable and the unpopular.

Sometimes judges are reproached for exercising power without having been elected to do so. The suggestion is that judges should be accountable to the electorate as politicians are accountable. The duties of the judiciary are not owed to the electorate; they are owed to the law, which is there for the peace, order and good government of all the community.²² Change that view of judicial duty and you have destroyed your own security. I recall again the words which Robert Bolt has Thomas More saying to Roper in *A Man for All Seasons*:

This country's planted thick with laws from coast to coast ... and if you cut them down ... d'you really think you could stand upright in the winds that would blow then?²³

The real problem of accountability for the exercise of judicial power is not the giving of the account, it is the reporting and critical appreciation of the account that is given.

Some courts have appointed media officers to assist the media in the reporting of decisions. No doubt that has proved to be of assistance, especially in cases at first instance where the facts are found and a single set of reasons is delivered. A media officer can

²² See Lamer, *op cit* at 6.

²³ Act I [p 39].

ensure that every reasonable and lawful request for assistance in reporting the work of the courts is met; but a media officer is not an advertising agent, seeking to influence favourable publicity or issuing releases designed to put a favourable spin on court decisions. The prerogative of and the responsibility for reporting and offering interpretation and criticism of court decisions must rest with the media. That is one of the great services that the media perform. It is the means by which the judiciary's account for the exercise of their powers reaches the people. So regarded, legal reporting and comment are necessary elements in our constitutional arrangements. They call for a high level of journalistic skill.

By employing an informed and critical faculty, the media justifies its freedom; conversely, ill-informed criticism abuses that freedom. Of course, there are often two stories to be written about an important case. One story is the account given by judges for the decision that the court has reached: that will often be a dreary and technical story, even though it is the story in which any unwarranted departure from the Rule of Law would be found and in which the principle that will govern future cases could be stated. The other story is the political, financial or social fall-out of the decision. This is more familiar territory to the majority of journalists and, of course, to politicians. When the case is important, both stories could and should be run. But that brings me to the second ground rule: the restriction on political criticism of court decisions.

From time to time, strident and sustained criticism is made of court decisions, usually decisions on sentencing or decisions in cases of major public significance. Sentencing is one of the most anxious of judicial functions, so much depending on the particular facts of each crime and of each criminal. Community interests and standards are taken into account but the judge has to distinguish those standards from an ephemeral cry for vengeance or a stimulated wave of concern about offences of a particular kind. Political capital about sentencing can be earned

by speeches on a law and order theme and public feeling can be aroused by reports which fail to disclose all the facts, especially any circumstances of mitigation. It is difficult for judges in the criminal courts to perform their duty calmly, impartially and in accordance with law if politicians and special interest groups arouse public feeling about the level of sentences generally, ignoring the unique circumstances of each case. The safety valve for manifestly inadequate sentencing is the Crown's appeal against sentence.

Over recent years, politicians and other interested parties, showing little interest in the court's function of administering the law but versed in the techniques of political struggle, public controversy and media relations, have criticised the courts, not for their reasons for decision but for the decisions they have made. Criticism which pays little or no attention to the reasons for decision may be politically successful because, as surveys have shown, the public generally are not familiar with the Constitution and with the powers which are distributed under it. Even less is the public familiar with statute law and less again with the common law. Nor is the public familiar with the step by step reasoning that leads a judge to a conclusion in accordance with his or her understanding of the law. But the public is accustomed to the cut and thrust of political debate. Consequently, if no defence is made to a political attack on a court, some will regard that attack as unanswered or unanswerable. No effective answer can be given by the courts themselves. The courts cannot be advocates to plead their own cause in justification of their judgments. If they were, they would be induced to temper their judgments to protect their own interests. Impartiality would be gone, traded for protection from attacks. To quote Sir Frank Kitto again:

Every judge worthy of the name recognises that he must take each man's censure; he knows full well that as a judge he is born to censure as the sparks fly upwards; but neither in preparing a judgment nor in

retrospect may it weigh with him that the harvest he gleans is praise of blame, approval or scorn. He will reply to neither; he will defend himself not at all.²⁴

In earlier days, attacks on courts or judges with reference to their decisions brought an immediate response from the Attorney-General. And attacks by members of the political branches of government were almost unknown. That is no longer the case. Attorneys-General, both Federal and State, have been singularly quiet in defence of the courts at times when the courts have been subject to the most acute and often ill-informed criticisms. Of course, the Attorneys-General of today are seen and apparently see themselves as political figures rather than as ministers with a peculiar responsibility for the judicial branch of government. The consequence is that they are politically hamstrung in the response that they can make or are willing to make when one of their political colleagues launches a political attack on the courts or the judges. The Federal Attorney-General, Mr Daryl Williams, AM QC, a distinguished lawyer whose resolute integrity is not open to doubt, has recently accepted this position:

In essence, I do not believe that the public perceives that the attorney-general acts independently of political imperatives. An attorney-general cannot be a wholly independent counsel who rushes to the defence of the judiciary when under attack. This is particularly the case when the attack comes from the executive arm of government.²⁵

24 "Why Write Judgments?" (1992) 66 *Australian Law Journal* 787 at 790; see also per Lord Denning in *REg v Commissioner of Police of the Metropolis; Ex parte Blackburn* (N° 2) [1968] 2 QB 150 at 155 and Myers CJ in *Attorney-General v Blundell* [1942] NZLR 287 at 289.

25 "Who Will Defend the Courts?" In course of publication in *Australian Bar Review*.

He had earlier written that:

... it is more compatible with the independence of the judiciary from the executive government, and more compatible with being so seen, that the judiciary not rely on the attorney-general to represent or defend it in public debate in the media. The judiciary should accept the position that it no longer expects the attorney-general to defend its reputation and make that position known publicly.²⁶

Mr Williams rightly seeks the best way of keeping the courts out of the political arena. I venture to suggest that an attorney's silence is not the way.

The courts do not need an attorney-general to attempt to justify their reasons for decision. That is not the function of an attorney-general. But why should an attorney not defend the reputation of the judiciary, explain the nature of the judicial process and repel attacks based on grounds irrelevant to the application of the Rule of Law? Can an attorney not explain publicly that courts must apply the law whatever the consequences, that the facts of each case and not some unbending policy must govern the exercise of judicial discretions including sentencing discretions, that the courts have no political agenda, that the only valid ground of criticism is an error in the facts that the court has found or in a step in the legal reasoning or in the exercise of a judicial discretion? It has been suggested that the Judicial Conference of Australia might be the defender of a court against an attack on a court's decision. But no Conference spokesman, if a judge, could presume to defend another judge's or another court's decision. The Conference, which seeks to foster an understanding of judicial independence is neither intended nor equipped to respond to such attacks.

26 Collection of Papers from a National Conference, "Courts in a Representative Democracy", Canberra, 11-13 November 1994 at 193.

And, if the attack is from a political source, the response must be from a political identity.

If it be politically unrealistic to expect an attorney publicly to defend the integrity of the judicial process, it must be because governments now perceive the courts to be players in the political game. That is a false perception but – frightening though the thought may be – governments have the power to make that perception a self-fulfilling prophecy. Political attacks on courts will inevitably lead some judges into political responses. Treating courts as political players will lead politicians to make political appointments, to offer personal or institutional rewards for judicial conduct that is politically desirable and to impose penalties for decisions that are politically unacceptable. Mutual understanding of and respect for the functions of each branch of government is essential to rebuild and preserve an appropriate relationship between the judicial and the political branches. The American Bar Association, speaking of “An Independent Judiciary” has pointed out that

The key to managing interbranch tension and maintaining the essentially sound state of judicial independence and accountability in a system of separated powers is mutual restraint.²⁷

The third ground rule relates to the substance and character of legitimate criticism. Exceptional and scandalous cases aside, any valid ground for criticism of a court or judge in relation to a *judgment must be found in the reasons for judgment or in some blemish in the conduct of the proceedings*. These are on the public record. If the record shows that the facts have been properly found, that the law has been properly applied and that any discretion has been properly exercised, it is beside the point

27 “Report of the Commission on Separation of Powers and Judicial Independence”, 4 July 1997.

that the result is unpalatable. If the critic does not consult the public record or does not understand it, the criticism is mischievous. That said, there is ample room for reasoned criticism. Every dissenting judgment in an appeal court will reveal tenable grounds for criticising the majority judgment. If the criticism relates to supposed defects in legal reasoning, the critic must distinguish between reasoning which interprets the Constitution, reasoning which interprets a statute and reasoning which develops the common law. Only in the last case is there room for judicial policy to affect the reasoning and for criticism about the wisdom – as distinct from the correctness – of a judicial development of the law.²⁸

Recent criticisms of decisions of the courts, especially decisions made in sentencing offenders and in constitutional and native title cases, have seldom referred to, or even revealed any acquaintance with, the relevant facts or the reasons for judgment. Postures have been adopted and declarations have been made as to what the decisions ought to have been in order to satisfy some non-legal criterion which the critic embraces. Such criticism does not reveal a valid ground for attack on a court or the judge or judges who constitute it. By all means let defects in applying the judicial method be criticised – trenchantly criticised if need be – but unless the Rule of Law has been misapplied, criticism of a decision is destructive of public confidence in the institution on which the Rule of Law depends.

28 As I have explained in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 142-144.

4. Access to Justice

Access to justice is the immediate concern of those with genuine need for the law's protection. Two factors affect the availability of legal remedies. The first is the need for expert advice and assistance; the second is the practice and procedure that govern the obtaining of legal remedies.

Advice and assistance for those who cannot afford to retain lawyers of their own choice depends largely on government funding supplemented by *pro bono* work undertaken by the profession. Shop front legal services and legal aid schemes have allowed a legal system of increasing complexity to serve many members of the public who otherwise would have been denied justice. Moreover, these services and schemes have contributed greatly to the ability of the courts to dispose of cases efficiently. Apart from anecdotal evidence, concern about the denial of justice is raised by a survey of Victorian practitioners conducted in November 1996 by the Federation of Community Legal Centres – a survey which was not fully processed and may not be statistically accurate. But it is said to have shown that “26% of respondents – [legal practitioners] – indicated that clients had been forced to plead guilty to criminal charges inappropriately”.²⁹ If that is accurate, it is truly disturbing. Anecdotal evidence from the registries of the courts indicates that an increasing proportion of registry time is spent in managing the matters involving litigants in person. In the High Court, the estimate of that time is 25%. The Australian Law Reform Commission's Background Paper on “The Unrepresented Party” points to the consequences of parties being unrepresented. Increased judicial, courtroom and registry time is taken in dealing with litigants in person. In *Cachia v Hanes*, the majority said:

29 “Justice for All”, the Federation's “Report into the Impact of Legal Aid Guideline Changes since March 1996” at 3 par 4.

Whilst the right of a litigant to appear in person is fundamental, it would be disregarding the obvious to fail to recognise that the presence of litigants in person in increasing numbers is creating a problem for the courts.³⁰

Procedural changes have to be made in all courts not only to assist litigants but to assist the courts to cope with the burden of litigation in which one or more of the parties is unfamiliar with the practice and procedure of the court and even with the nature of the issues which the court has jurisdiction to determine. In the High Court, the rules relating to the seeking of special leave were amended to require the filing of summaries of argument identifying the facts and propositions relied on or contested and by imposing a time limitation on oral argument. These rules abrogate the special rules which previously governed applications by litigants in person but impose a greater burden on registry staff in advising litigants of the court's requirements.

Of course, the major cost of litigation for the privately funded litigant is usually professional fees. It cannot be otherwise. Professional work must be properly remunerated and litigation is labour intensive. Various proposals for limiting professional costs have been advanced and some criticism has been made of the current level of professional fees, especially those charged by the leaders of the profession. Some of those proposals are matters for government policy – for example, the abolition of tax deductibility of litigation expenses – and on those I would not comment. But two professional practices should be mentioned. The first is the “cab rank” rule which obliges a barrister, if available, to accept any brief in a field in which he or she ordinarily practises if a reasonable fee is offered. Reasonableness is a matter of assessment but it should be remembered that professional remuneration is earned within the framework of professional rules.

30 (1994) 179 CLR 403 at 415.

Next, the practice, now widespread, of charging out on a time basis seems to raise two questions worthy of consideration. First, does it not place a premium on inefficiency? And, secondly, does it involve a conflict of interest and duty to the client? I am sure most practitioners would resolve that conflict in favour of the client, but experience in the law teaches that conflicts of interest and duty are best avoided. I respectfully agree with Justice Geoff Davies of the Queensland Court of Appeal who writes:

It is not that lawyers' fees are generally too high for the work which they do. I do not believe that generally either the rate at which lawyers are paid is too high or the incomes of lawyers are too high. My main concern is rather that our system in general and our costs system in particular discourage efficiency and, on the contrary, offer incentives to inefficiency and over-servicing.³¹

The solution which His Honour advances is "a costs system based on the amount of work which should be performed, or best practice, and which will make costs more predictable".³² The Federal Review of Scales of Legal Professional Fees on which the profession is represented has engaged the Business School of Melbourne University to advise. No doubt the method of charging for litigious work will receive consideration. It is a question which warrants continued consideration also by the relevant professional bodies.

Finally, I pass to the procedural changes which the courts have introduced to streamline the handling of cases.

In the great majority of trial courts mediation has been introduced as part of the court process. The form of mediation varies: in some courts mediation is performed by court officers and is free; in others it is performed by persons outside the court

3 (1997) 15 *Australian Bar Review* 109 at 114-115.

32 "Managing the Work of the Courts", AIJA Asia-Pacific Courts Conference, Sydney, 22 August 1997 at 3.

system, but appointed by a judge, at the parties' cost. The latter form is not objectionable in principle, unless the payment of the mediator's fees is a condition of being allowed to proceed. Where that is the case, there are two in principle objections. Access to justice is denied unless a fee is paid to a third party – that is one objection – and the third party who is to receive the fee is nominated by the judge – that is another.

Some State Courts also provide a system of case appraisal which allows an experienced practitioner to make an informal assessment of the likely result of a trial. The parties may accept that assessment as binding or proceed to trial at a risk of costs in the event of not achieving a better result than that assessed.

In some courts, discovery, which can be a major cost in commercial actions, is limited to documents directly relevant to an issue in the proceeding. New rules also ensure easier access to opponents' documents. Interrogatories have been abolished in many jurisdictions except by leave. Again in some jurisdictions a wide discretion has been conferred on judges to admit evidence otherwise inadmissible and evidence is taken by video link or telephone. In Western Australia there are now rules giving judges control over the form (whether oral or in writing) and length of evidence, power to limit examination-in-chief and cross-examination and control over the length and form of addresses.

Case management, in one form or another, exists in most trial courts. Case management varies from a system of fairly automatic triggering events through to intensive individual management by judges.

In the Federal Court, after extensive investigation and expert advice and after introduction of a pilot scheme in the Melbourne Registry, an individual docket scheme has been introduced. Cases will be allocated randomly to particular judges who will monitor their cases to conclusion. Fix but few conferences will ensure, *inter alia*, compliance with directions and the diversion of

appropriate cases to non-curial assisted dispute resolution (ADR). Special panels of judges will be constituted to deal with cases requiring particular expertise.

Extensive case management is not universally accepted as desirable in all classes of litigation but it is probably true to say that all courts and their registries are now more actively engaged in managing their case flows and the preparation of complex cases for trial than they were in earlier times.³³ The Family Court, with an enormous caseload and with an especial concern for litigants in person, has been a leader in introducing mediation and user-friendly procedures. Mega litigation has also produced technologically assisted responses. The Rothwells litigation in Western Australia, the Fairfax litigation in New South Wales and the Estate Mortgages litigation in Victoria demanded the creation of courtrooms equipped with sophisticated electronic technology.

Information technology has been embraced by Australian courts. The judgments of the High Court of Australia are available on the Internet minutes after they are handed down in court. So are the judgments of the Federal Court, the Family Court, and the Supreme Courts of New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. High Court transcripts are available shortly after a matter is heard. The High Court Home Page will be providing information relating to the progress and listing of cases. All of these services are provided free of charge. In March, the Council of Chief Justices of Australia and New Zealand gave in principle support to the concept of “media-neutral” citation, which will enable reference to electronic reports of the decisions in the courts as well as to the hard copy reports.

33 See, for example, the observations of Davies JA in “Managing the Work of the Courts”, AIJA Asia-Pacific Courts Conference, Sydney, 22 August 1997, at 8-9.

The Council of Chief Justices is currently sponsoring work on an Electronic Appeals Project designed to reduce the necessity to reproduce masses of printed material from trial courts and to permit the standardising of the printed and electronic material in all appellate courts including the High Court. Appellate court rules are under review at the same time.

Courts and judges have been active in seeking ways to improve the efficiency of the courts and thereby to improve access to justice. With respect to other and grander studies about the justice system and the way it operates, I wonder whether better results can be achieved than those which are devised by practical and hard-nosed practitioners and administrators (in which I include judges) with experience in the justice system.

At base, the State of the Judicature means the quality of the judges and their ability to perform their functions. Judges, from the viewpoint of a practitioner, may be a varied group. Mostly polite in court, some judges may be sharp; mostly quick and industrious, some judges may not always reveal it; mostly with a generous view of human nature, sometimes a more straitened view emerges. But in the years I have been privileged to be a judge, I have not known a corrupt judge; none has sought to do anything except justice according to law as he or she honestly saw it; none would yield to improper pressure that might impermissibly tilt the scales of judgment. The Judicature is, and has been, in a good state. But that state has not been achieved by accident or by mere good fortune. It is the consequence of the structures, the traditions and the values of the judiciary and the profession – recognised, if not articulated – and enforced by the pressure of an honourable peer group.

As the work of the Judiciary impacts more on public than on private issues, there will be danger to the impartiality and the competence of the judiciary and to public confidence in the institution. As society and the law become more complex, obstacles to public access to justice will grow. Those dangers will be contained, and the State of the Judicature will be

strengthened, only if governments and the public generally and the profession in particular understand the fundamental significance of the Judicature to society and the conditions which must be maintained in order that it can continue to serve the people.

Brazil : Independence and Financial autonomy of the Judiciary

by

*Dalmo A. Dallari**

1. The Judiciary within the Brazilian Political System

There are three distinct phases in the history of the Brazilian judiciary, which are related to the political situation of Brazil. The first phase started in 1500, when Portuguese navigators reached the lands of the New World and established a colony in part of the territory that was to become known as Brazil. That was the beginning of the colonial period in Brazilian history, which continued until 1822, the year Brazilian independence was formally declared.

During the colonial period, the prevailing judicial system was that of the Portuguese absolute monarchy. The judges were functionaries of the Portuguese crown and owed strict obedience to the civilian rulers and the military chiefs who were agents of the colonising power. Thus, the judges enjoyed no independence in that period, and one can say that, besides other very negative consequences, the colonial system established in Brazilian territory the convention of considering the Judiciary as dependent on the Executive. This dependency existed with regard to the selection of the judges as well as the content of their decisions, especially when there was some political interest

* Professor of law, Vice-President of the International Commission of Jurists.

of the crown or even any private interests of the colonial administrators involved. In consonance with these practices, the bench also lacked financial autonomy. Evidently, there is nothing original in the statement that the judges were not independent in a colonial system, but this fact should be mentioned because it has had long-term effects, going even beyond the proclamation of Brazil's political independence.

The second phase in the history of the Brazilian judiciary is the period of the monarchy, which started in 1822, when Brazil declared its independence from Portugal, and stretches to 1889, when the monarchy was abolished and the Republic was proclaimed. The political process of Brazilian independence was marked by many ambiguities. There was no war of independence nor any radical break with the Portuguese model. It is sufficient to briefly recall a few moments of this process to perceive that there were changes without a break in continuity. In 1808, the Portuguese regent prince transferred the seat of the crown to Brazil, fleeing from Napoleon's forces which had invaded the Iberian peninsula. Perhaps because it found it illogical to have the seat of the kingdom in a colony, but also, as some have said, to increase its importance at the Vienna Congress, Portugal decided in 1815 to confer on Brazil the category of a united kingdom (united to the Portuguese Kingdom). Shortly afterwards, in 1822, at the risk of losing the crown, the former regent, by now reigning as king, returned to Portugal, leaving in the position of regent his older son, who declared the independence of Brazil in 1822, choosing the title of emperor.

In 1824, the first Constitution of Brazil came into being by decree of the emperor; to a large extent, it maintained the Portuguese model, adopting a sort of constitutional and representative monarchy with a strong hint of absolutism, as was also the case in Portugal. This Constitution says that "the Judicial power shall be independent" and that "judges shall hold their positions for life." But, the appointment of judges was the exclusive preserve of the emperor and, obviously, only men

belonging to the principal families, whose loyalty to the emperor was beyond doubt, were selected. In addition, the Constitution provided for a Supreme Court of Justice. However, the first law schools in Brazil were only founded in 1827, and inevitably, only seven of the 17 judges who constituted the court were born in Brazil, while the others were born in Portugal or one of its colonies. All of them, without doubt, had studied in Portugal and were steeped in Portuguese judicial practices. Consequently, all through the monarchy, the Brazilian bench was characterised by conservatism and loyalty to the emperor, which made it practically irrelevant that the Judiciary did not enjoy financial autonomy.

In 1891, a constituent assembly approved Brazil's first republican Constitution. For various reasons, Brazil "exchanged the English monarchical model for the American republican model", in the words of Ruy Barbosa, one of the most important jurists in Brazilian history. Adopting the system of separation of powers, the Constitution proclaimed as organs of national sovereignty "the Legislative, Executive and Judicial Powers, harmonious and independent one of the other".

Besides giving a constitutional guarantee of the principle of life tenure of judges, it was stipulated that their remuneration would be determined by law and could not be subject to reduction. With regard to the appointment of judges, the Constitution states that the members of the Supreme Court should be appointed by the President of the Republic subject to ratification by the Federal Senate. Federal judges would also be appointed by the head of the Federal Executive, but based on lists prepared by the Supreme Court. Since Brazil had adopted the American model of the Federal State, provision was made for a judicial system in each State, all of them being obliged to respect the principles established in the Federal Constitution. As for the financial independence of the Judicial Power, no mention was made. The Executive was granted powers to prepare the appropriation bill, which was subject to approval by the National

Congress; it was only understood, as a consequence of the system, that provision of financial resources should be made for the Judiciary.

In practice, only the judges' remuneration was guaranteed and there was no provision for funds to enable the courts to improve upon their organisation without depending on the good will of the other Powers. Accustomed to the situation of dependence *vis-à-vis* the Executive, which originated in the colonial period, the Judiciary passively accepted this restriction, which was preserved in the Constitutions passed by succeeding constituent assemblies, in 1934 and 1946, as well as in the Charters imposed by non-democratic regimes, in 1937, 1967 and 1969. An insignificant guarantee, of a personal nature, was introduced in the 1934 Constitution and withdrawn in 1946, stipulating that *Desembargadores*, (members of the appeal courts of the States) should earn a remuneration of equal value to that of the Secretaries of State of the respective State Governments; it was also stipulated that the remuneration of judges would be equal to a particular percentage of that of the *Desembargadores*.

2. Judicial Power: Equal but Dependent

The consequence of the constitutional provisions relating to the Judiciary was, in practice, the creation of a paradox: formal equality with the other Powers side by side with effective dependency. Indeed, the allocation of financial resources for the improvement of judicial services has always depended on the good will of the Executive and the Legislature, since the former has always had the powers to prepare appropriations bills and, considering the limitations of collected revenue, has always put its own priorities first, providing the Judiciary only with the minimum necessary for the maintenance of already existing services, with, at most, small exceptions for capital expenditure. And, in order to avoid the risk of a reaction from the bench, it

has always made concessions to ensure that the members of the Judiciary obtained some personal benefits or to ensure that the higher organs of the courts could display a semblance of power, having magnificent edifices as chambers.

Relationships with the Legislative power have never been too difficult, for during the discussion of appropriations bills, the Judiciary always participated very discreetly, negotiating modest benefits, without ever adopting a firm stance in the defence of its proposals for the creation of new services or the improvement of already existing ones. In a sense, it can be said that the budgetary restrictions served the purposes of a conformist Judicial Power, one which did not make any major effort to modernise and increase its efficiency and which found in those restrictions a good excuse for its detachment from social needs.

From a political and formal legal point of view, the Brazilian Judicial Power has always maintained its independence, even during the periods of dictatorship, for it has, indeed, conformed itself to these situations. Regardless of the changes in the Constitutions, be it in the transition from colony to monarchy or in the passage from monarchy to republic, there has never been any substantial change in the relationship of the Judiciary with the other Powers, especially the Executive, which, all over Latin America, has a clear position of superiority. The bench has always been satisfied with the formal and solemn declaration, in constitutional texts, of its independence and with the allocation of resources sufficient for it to maintain its routine. Never has there been a vigorous pronouncement by judges and the courts condemning the lack of resources for more effective activity and for them to be able to fully and efficiently discharge their important constitutional function.

This situation basically remained unchanged until 1988, when a period of military government came to an end and a new constituent assembly approved the current Constitution. A new and very significant fact is that in recent decades, motivated perhaps by the need to react to the excessive restrictions

imposed by the military governments, the Brazilian people sought to organise themselves and to participate more actively [in public matters]. This also affected the Judiciary and one of its consequences was the broadening, in the Constitution, of the political and social role of the bench. However, a close reading of the Constitution with regard to the financial autonomy of the Judicial Power shows that a new ambiguity was created, for the increase in responsibilities was not matched with a guarantee of the means for independent action.

Section 99 of the Constitution is so emphatic that it gives the impression that the Judicial Power has, effectively, won its autonomy: The Judicial Power shall be guaranteed administrative and financial autonomy. But two subsections added to this article stipulate that the courts shall prepare their budgetary proposals *within the limits jointly established, with the other Powers, in the budget-policy law*. Here, serious restrictions come into play, for according to section 165, it is within the competence of the Executive Power to introduce draft legislation to determine budget policy as well as annual budgets. And, a long and detailed listing of the issues which must be contained in this legislation makes it evident that priorities will be established by the Executive; as they have always been. It thus remains dependent on its goodwill to consider as a priority any expenditure foreseen by the Judiciary in its budget proposal.

According to section 166, the proposal prepared by the Executive, in which it has the freedom to include only those parts of the Judiciary's proposal which it considers acceptable, shall be deliberated upon by the National Congress. Congress then also makes the cuts it considers necessary. There is no provision for the participation of the Judiciary at this stage of the legislative process, or for the necessary respect for any part of its proposal. Further, in section 168, it is stipulated that the Executive, which is the revenue collecting Power, shall not withhold the resources and budgetary allocations due to the

Legislature, the Judiciary and the Office of the Attorney General; it shall transfer such sums by the 20th of each month. The result of all of this is that the Judiciary has the right to make its budget proposal, but does not have any guarantees that it will be adopted, nor does it even have the opportunity of ensuring that it will be provided with the means for those expenditures which, in its estimation, are to be considered as priorities. All that is guaranteed is that its part of the budget will be disbursed in monthly portions, which the Executive has to make available by the 20th of each month.

3. Financial conflicts and diminished independence

A number of conflicts between the Executive and the Judiciary in the last months of 1996 make it evident that the constitutional provisions relating to the Judicial Power are not sufficient to guarantee its financial autonomy, but also show that it is no longer possible to maintain the kind of complicity which has existed between these two powers since colonial times. Newspaper reports from that period contain alarming information on arbitrary cuts in the Judiciary's budget proposal and regarding threats of a suspension of judicial services and of federal intervention in various States, showing insensibility towards the importance of the delivery of justice and disrespect for constitutional norms.

As was reported in the *O Estado de Sao Paulo* daily, one of the most traditional and prestigious in Brazil, the arbitrary 47% reduction in the budgetary proposal submitted by the Federal Supreme Court to the Executive provoked indignation in the superior courts (issue of 9 September 1996 [sic]). According to the President of the Federal Supreme Court, the President of the Republic had made a commitment to forward the whole proposal to the Legislature as received from the Judiciary. However, apart from cutting the proposal by almost half, the Executive

also classified the courts allocation as contingency, a technical expression which means that these are expenditures to be incurred only in case of real necessity.

It is general knowledge that the present Brazilian government is conditioning all of its initiatives to economic objectives, seeking to conform to a model established by international financial institutions, especially the International Monetary Fund. This justifies the disregard for the Judiciary for, in the strictly economic-financial perspective, judicial services, which are not related to economic production, seem superfluous. In a bid to attenuate the importance of this influence, which the Executive is in no position to deny, the allegation is made that the Judiciary spends its money badly. The example that is cited is that of the Superior Court of Justice, which recently constructed an extremely luxurious head office in Brasilia, which Brazilian judges themselves generally considered to be an indiscretion, as it compromised the image of the whole Judiciary. Another example of wastage of financial resources that is often cited is that of the Superior Military Court, which maintains an expensive machinery, like the other Superior Courts, but which throughout 1994, heard 418 cases, while the Superior Labour Court heard 78,678 cases in the same period.

In February 1996, another very influential daily, the *Folha de Sao Paulo*, Brazil's most widely circulated newspaper, reported that the lack of financial resources was paralysing the Judiciary's activities in various States of the federation, mentioning six States in which the situation was most critical. According to the daily, various state governments, citing financial difficulties, have ceased to comply with the constitutional requirement for them to disburse the Judiciary monthly allotments by the 20th of any month. In the State of Mato Grosso do Sul, this had been happening for four months, creating the imminence of a suspension of all Judiciary activities. In these cases too, the heads of the Executives alleged wastage of financial resources by the courts. To make matters worse, asserting their constitutional

autonomy and the separation of Powers, the Courts of Justice, which are the superior courts in the states, have refused to render accounts on their expenditures, ignoring the requests of the Legislature and the Executive.

This is, in sum, the current situation of the Brazilian courts, as regards to their financial autonomy which is, indeed, precarious. The mechanism established in the Constitution to cover the expenses of the judicial system considerably reduces the effectiveness of the constitutional provision contained in section 99 which states that: "The Judicial Power shall be guaranteed administrative and financial autonomy." As is evident, there is an accumulation of foibles which impede the full and effective functioning of the Judicial Power. It should be recognised that the Judiciary is, in part, responsible for its own difficulties. Quite apart from the traditional subservience to the Executive, the Judiciary wants to operate as if it were exempt from juridical responsibility, refusing to be accountable for its administrative acts. On the other hand, the Executive has the historical foible of authoritarian command and proceeds as if Brazil had no Constitution or as if the Constitution did not provide for the separation of Powers, declaring the Legislature, the Executive and the Judiciary as "independent and harmonious." Worst of all is that this conflict between the Powers, as regards administrative and financial autonomy, seriously compromises the efficient administration of justice, with negative consequences for the entire populace, for whom the guarantee of their rights is diminished.

Indonesia : Some Challenges to the Independence of the Judiciary

by

Adnan Buyung Nasution *

1. Introduction

Since early independence, the founders of the Republic of Indonesia have shown a strong commitment to the independence of the judiciary. It was indicated by the Official Elucidation of Articles 24 and 25 of the 1945 Constitution:

The judicial power is an independent authority, meaning that it is free from government influence. Therefore a guarantee has to be provided by the Law on the position of judges.

Such a commitment was the realisation of their will to make independent Indonesia a modern State¹, a State upholding the universally accepted principle of constitutionalism. This principle essentially upholds the Rule of Law as a special norm to limit power, guided by rational principles for those with

* Advocate, Member of the International Commission of Jurists.

¹ See Logemann, *Keterangan-Keterangan baru tentang Terjadinya UUD 1945*, Transl. Darji Darmodihardjo (Jakarta: Aries Lima), at 28, etc. See also Mohammad Hatta, *Sekitar Kemerdekaan* (Jakarta: Tintamas, 1982).

decision-making powers.² It is, therefore, understandable when the Elucidation of the 1945 constitution – sub-article on the System of Government (Number 1) – clearly stated that:

Indonesia is a State based on Law (Rechtstaat)
instead of mere power (Machtstaat).

However short the explanation, the 1945 Constitution gives a minimum guarantee that the power conducted by State authority is limited. It is not an absolute power.

It means that normatively, law in Indonesia is burdened with checks and control of power, whereby the judicial institution plays an important role in its execution. For Indonesia, therefore, the existence of an independent judiciary is an absolute necessity.

However, the problem of a normative outlook – i.e. looking at things as they should be – is that it often brings disappointment in face of reality, when what actually or empirically happens is often the reverse: it is not the law that checks and controls power but it is power that abuses the law. As a result, an independent

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- 2 Wolin, Sheldon S (1960: 388-389) who stated: "A political system is designated as constitutional when it comprises
- (i) legal procedures for vesting authority among the various office holders;
 - (ii) effective restraints upon the exercises of power;
 - (iii) institutionalised procedures for insuring the responsibility and accountability of public official; and
 - (iv) a system of legal guarantees for enforcing the rights of citizens."

The gist of the modern theory of constitutionalism is formulated by him as follows: "[T]he main aim of a constitutional form of government is to limit the exercise of political power to prevent its being abused. These purposes can be achieved without sacrificing the ends of peace order which are essential to any type of political system. Constitutionalism requires both a certain organisation of public offices and a strictly prescribed method of handling business." See also Wolin, Sheldon S., *Politics and Vision: Continuity and Innovation in Western Political Thought* (Boston: Little Brown, 1970).

judiciary is difficult to uphold. And this is what happens in Indonesia.

2. The Causes

Where does the problem lie? Is it solely caused by a weak legal system and a lack of autonomy within the legal institutions, or are there more fundamental structural factors?

It is obvious that an effort to curb the independence of the judiciary in Indonesia started during the "Guided Democracy" era of 1959. Contrary to the previous era (Parliamentary Democracy), in which there was relative freedom for non-State elements (political parties, the press, social institutions, etc.) and the effective functioning of legislative and judicial branches *vis-à-vis* the executive branch, the "Guided Democracy" regime held absolute power.³ Distribution of power as outlined in the 1945 Constitution, and even the separation of power among branches of government (as based on *trias politica*) was eliminated, because President Soekarno considered it out of date.⁴ Chairmen of the State's high institutions were assigned as ministers. No less than the then President of the Supreme Court, Wirjono Prodjodikoro, was also appointed as a minister in the *Gotong Royong* cabinet. This indeed was a stab in the stomach of judges. The judicial institution, therefore, was merely an element of government bureaucracy, instead of an independent institution. What is worse, the judges in courts were also stripped of their grand robes to be replaced by a kind of military uniform.⁵ In short, if

3 For a detailed account of this era, see, for instance, Lev, Daniel S., *The Transition to Guided Democracy: Indonesian Politics 1957 - 1959* (Ithaca: CMIP, 1972).

4 *Ibid.*, at 209.

5 See Lev, Daniel S., in the *Kata Pengantar* of Karni Ilyas, *Catatan Hukum* (Jakarta: Yayasan Karyawan Forum, 1996).

during the Parliamentary Democracy era, the existence of the Rule of Law in Indonesia was not questioned as it was considered to be an inseparable part of the political systems, its existence in the Guided Democracy era was totally abused. The Rule of Law was considered to be no more than an instrument of the State power and the judiciary was treated as if it were a mere apparatus of the State.

The birth of the "New Order Government" in 1966 brought with it new hope. In line with its ideal to conduct a total correction of the various abuses of the previous regime by upholding a pure and consequent conduct of the *Pancasila* and the 1945 Constitution, many were optimistic that the existence of the Rule of Law would be revived and an independent judiciary upheld.⁶

Hopes remained to be hopes, however, especially for reformists who really sought the freedom and independence of the judiciary. They met with failure in the House of Representatives when a bill on the Basic Law on Judiciary Power was discussed.⁷ The interests of the New Order's conservative groups, including certain military factions, which have dominated the administration and the House of Representatives effectively since 1968, were dominant. It is, therefore, not surprising that when the bill was passed into Law N° 14/1970, the existence of an independent judiciary was not fully guaranteed in the law. Although Article 10 (4) of this law gives an authority to the Supreme Court for control and guidance, it is limited to technical aspects only, namely the

6 For a reflection on this birth of the New Order and the optimism that was built at the beginning, see Nasution, Adnan Buyung, *The Aspiration for Constitutional Government in Indonesia: A Socio Legal Study of the Indonesian Konstituante 1956-1959* (Jakarta: Pustaka Sinar Harapan, 1992), at 427.

7 Examine the *Risalah Penyusunan UUN° 14/1970* (Jakarta, Sekjen DPR-RI, March 1974).

judicial process. Other matters like the administration of the court, budget, posting, transfer and promotion of judges are placed under the administration of the respective government departments under which the courts are placed (Article 11 (1), Law N° 14/1970). Thus, the General Court and the Administrative Court are placed under the Justice Department; the Religious Court under the Religious Department; and the Military Court under the Defence and Security Department. This is congruent to the regulation in Article 10 (1) of the same law, which rules that judicial power is exercised by the courts within the sphere of the General Court, Religious Court, Military Court and Administrative Court.

In this light, it is obvious that the position of judges in Indonesia is no more than that of ordinary civil servants who are obliged to abide by the Basic Law N° 8/1974 on Government Employees. Consequently (in the case of the General Court), as regulated in the Elucidation of Article 13 (1) of Law N° 2/1986 on the General Court, the Minister of Justice is assigned with the duty of guiding and controlling judges in their positions as civil servants.

A further consequence is that it is difficult to avoid the intervention of the department (which is essentially the President's assistant) in judicial authority since all administrative (ranks and career) and financial (salaries and other facilities) matters for judges are wholly determined by the department.

In addition to the internal (administrative) control mechanism mentioned above, there is another coordinating body, the so-called MUSPIDA, which includes the Head of Local Government, the Commander of Military District, the Chief of Police, the Chief Prosecutor and the Chairman of the District Court. They frequently meet with each other on important problems faced by the region, and within this context they normally discuss the directives for controversial cases or those with political connotations. It is no wonder then that a prominent Supreme Court Justice, Adi Andjojo, once stated that

in cases facing the power structure, judges in Indonesia are no longer free.⁸

Worst of all, with their status as civil servants, the judges automatically become members of KORPRI (Corps of the Civil Servants). As members of KORPRI, the judges are obliged to have mono-loyalty and vote for the ruling party (GOLKAR) during general elections.⁹

3. The Role of the Supreme Court

What about the Supreme Court? Is the position of this highest judicial institution and its justices similar to that of the institution below it?

Formally, the position of the Supreme Court has been restored. It is at least indicated in Article 2, Law N° 14/1985 on the Supreme Court, which states that in executing its tasks, the Supreme Court is independent of the government's and other influences.

The Law also states that as state officials who execute judicial authority (Article 6 (1)), the Justices of the Supreme Court also exercise their own authority on administrative and financial matters which will be taken care of by a Supreme Court Secretary-General (General Elucidation, point 5.).

Nevertheless, it does not mean that the Supreme Court is fully independent. Article 8 (1) - (4) of the same Law regulates the appointment of its President, Vice-President and Justices. The Head of State, who is at the same time the Head of the

8 For comparison see also Thoolen, Hans (ed.), *Indonesia and the Rule of Law* (London: Frances Pinter, 1987), at 193.

9 KORPRI is one of the main pillars of GOLKAR, said to be the B channel/element. For further explanation around the matter, see Reeve, David, *GOLKAR of Indonesia* (London: Oxford University Press, 1985).

Executive, determines who will or will not be appointed from amongst a number of candidates nominated by the House of Representatives.

- In this way, one can assume that those who clash with the interests of the ruler will never come to lead the Supreme Court, even if he or she were nominated by the House of Representatives. Evidence of this is all the more obvious with the recent failure of the House of Representatives to name Supreme Court judges for candidacy as President and Vice-President. Two names that did appear are judges from the Air Force and Navy.¹⁰

In executing its tasks, the Supreme Court does have authority to review (examine materially) a decree or regulation below the level of law, in accordance with the provision in Article 31 (1) of Law N° 14/1985. This power of judicial review, however, is passive in nature since Article 31 (2) of the same law requires that a decision on the constitutionality of a decree or regulation be taken in connection with examination of cassation¹¹ on the Supreme Court level. It is true that on 15 June 1993, the Supreme Court issued a Supreme Court Regulation N° 1/1993 on the procedure of judicial review that made it possible to submit a case directly to the Supreme Court.¹² In reality, the new procedure, which is called constitutional procedure in submitting judicial review (material examination), is not as easy as it sounds.

10 See *KOMPAS* daily, 20 October 1996. See further *KOMPAS* daily, 3 November 1996 in which Mr Sarwata, an Airforce Marshall, was appointed as the new President of the Supreme Court.

11 Cassation is a procedure for obtaining Supreme Court ruling in question of law only in order to achieve unity in interpretation of the law. It derives from a legal notion of French origin and is adopted by Indonesia through the Dutch Legal System.

12 See *KOMPAS* daily, 16 June 1993.

This far we have seen that in light of the laws and regulations mentioned above, it is hard to say that an independent judiciary exists in Indonesia. By the fact that the organisational, administrative and financial matters of judges of first instance and high courts are regulated under the authority of the Department of Justice, it is difficult, if not impossible, for them to avoid the intervention of this Ministry, directly as well as indirectly, in executing their tasks.

It is true that the Supreme Court is not dependent on any department, but its authority is far from what is called a free and impartial tribunal, particularly in determining its personnel. Recent incidents in the Supreme Court¹³, the incessant news coverage on collusion-corruption, following earlier coverage on a number of controversial cases (such as the Kedungombo and Henoch Ohee cases) showed the strong intervention of the ruling power on the Supreme Court's affairs and only complete the suspicion of the dependence of the judiciary in Indonesia.

Actually, the dualist nature of the system refers to the Dutch judiciary system. This is not surprising as Indonesia spent a long time under Dutch colonialism. The difference lies in the fact that the Dutch system has a well-functioning Parliament, a critical press with the freedom to exert control and the existence of political parties and social organisations that actively play the role of aggregating and articulating public interests. Thus the possibility for intervention by the Minister of Justice is avoided.

To restore the independence of the judiciary in Indonesia, there is no other choice than to optimise the function of the Supreme Court as a judicative institution. This includes independence in nominating candidates for Supreme Court judges and the eradication of the role of the Department of

13 See main story in *EDITOR*, 12 July 1995 and *FORUM KEADILAN*, 12 October 1995, covering this problem.

Justice that controls the administrative, budget and personnel of the Supreme Court.

In this way, the judicial institution will, in future, be able to administer its own household like other high State institutions, whose budget needs are integrated into the State's Income and Expenditure Budget.

In the actual atmosphere in Indonesia, where political openness is still very limited, the best action to realise an independent judiciary is to guarantee full autonomy to the existence of this institution.

Part Two

Threats Against the Immunity of the UN Special Rapporteur on the Independence of Judges and Lawyers

Background

During 1997, the Centre for the Independence of Judges and Lawyers (CIJL) has been gravely concerned by the attack in Malaysia on the immunity granted under international law to Dato' Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers. The CIJL made several statements urging Malaysia to abide with its international obligations and urging the Secretary-General of the United Nations to take appropriate steps to take the matter to the International Court of Justice as required in such cases by the 1946 Convention on Privileges and Immunities of the United Nations. Malaysia acceded to this convention in 1957 without reservations.

The immunity of the Special Rapporteur was severely undermined by a civil suit filed against him in a Malaysian court. The case originated when the UN Special Rapporteur on the Independence of Judges and Lawyers and a Malaysian national, was interviewed by a reporter for the London-based *International Commercial Litigation*. He was quoted in an article published in the November 1995 issue as saying, *inter alia*, that he was investigating complaints that highly placed businessmen were manipulating the Malaysian judicial system. Several individuals in Malaysia including lawyers and journalists were interviewed in this article. Legal proceedings commenced against a number of those who were interviewed in the article.

On 6 January 1997, Dato' Param Cumaraswamy was served with a writ of summons dated 12 December 1996. A libel suit was brought against him before the High Court of Malaysia at Kuala Lumpur (Civil Division) by two Malaysian commercial companies. The Plaintiffs claim damages equivalent to approximately \$US 14.7 million against the Special Rapporteur and ask the Court to issue an injunction to restrain him from "further speaking or publishing or causing to be published ...

words defamatory of the Plaintiffs". Upon receipt of the writ, Dato' Cumaraswamy took numerous steps requesting relevant Malaysian courts of all levels to uphold the immunity of the Special Rapporteur and dismiss the case.

Dato' Param Cumaraswamy, as is clear from the published article itself, made these statements in his capacity as the UN Special Rapporteur on the Independence of Judges and Lawyers. As the Special Rapporteur, Dato' Param Cumaraswamy, is mandated by the UN Commission on Human Rights to monitor and investigate violations of legal and judicial independence wherever they occur, and to identify the structural defects responsible for them.

As a UN Special Rapporteur, Dato' Param Cumaraswamy is protected by Article VI, Section 22 of the 1946 Convention on Privileges and Immunities of the United Nations. This provision accords UN experts on mission, such as Special Rapporteurs, the privileges and immunities necessary for the independent exercise of their functions. Malaysia acceded to this Convention on 28 October 1957. Relevant excerpts of the Convention are attached as *Annex 1*. The privileges and immunities of the UN experts were confirmed by the International Court of Justice in 1989 in its Advisory Opinion on the Applicability of Article VI, Section 22, of the Convention on Privileges and Immunities of the United Nations,¹ (known as the "Mazilu case").

As a result, the Special Rapporteur first entered conditional appearance to the suit and applied to the court to set aside the suit on grounds that he was immune from legal process. The United Nations has made it clear that Dato' Param Cumaraswamy, as the UN Special Rapporteur on the Independence of Judges and Lawyers, benefits from the immunity granted by the 1946 Convention. On 7 March 1997, UN Secretary General Kofi Annan, issued a letter asserting the Special Rapporteur's immunity. But the two corporations who

1 Advisory Opinion, *I.C.J Reports* 1989, at 177.

initiated the suit resisted the claim of immunity claiming that he had exceeded his mandate. The certificate of the UN Secretary-General is attached as *Annex 2*.

The Malaysian Ministry of Foreign Affairs unfortunately did not follow suit. On 12 March 1997, the day of the scheduled hearing, Datuk Abdullah Bin Hj. Ahmad Badawi, the Malaysian Minister of Foreign Affairs, issued a letter stating that Dato Cumaraswamy "shall be accorded immunity from legal process of every kind *only* in respect of words spoken or written and acts done by him in the course of the performance of his mission." (emphasis added). The Minister thus opened the door for court interpretation on whether the Special Rapporteur was acting within his mandate or not. The letter of the Minister is attached as *Annex 3*.

The hearing of the case started on 12 March 1997 by a judicial commissioner who has yet to be confirmed as a judge. On 28 June 1997, the judicial commissioner rendered her judgment. The court held that the Secretary-General's certificate was merely an opinion with "no more probative value than a document which appears wanting in material particulars". She consequently dismissed the Special Rapporteur's application to set aside the suit and ordered him to file his Defence within two weeks. The judicial commissioner also refused a stay of execution pending application to the court of Appeal, and refused application for 30 days to file defence instead of two weeks. She also made the extraordinary order of requiring Dato' Cumaraswamy to pay the costs of the application forthwith. Excerpts of the Judgment are in *Annex 4*.

The Special Rapporteur filed notice of appeal to the Court of Appeal against this decision. He also applied to the Court for a stay of execution pending the appeal. On 8 June 1997, the President of the Court of Appeal as a single judge heard the application and dismissed it with costs. The Special Rapporteur then applied to the full court to hear the stay application. On 20 and 21 August 1997, the appeal was heard.

The CIJL sent the Chairman of its Advisor Board, Justice P.N. Bhagwati, the former Chief Justice of India, to attend the hearings as observer. The Court of Appeal delivered its judgment on 20 October 1997, unanimously dismissing the appeal and upholding the High Court judgment of 28 June save for the order directing the Special Rapporteur to pay costs as taxed "forthwith".

Dato' Cumaraswamy applied for Leave to Appeal to the Federal Court. On 18 and 19 February 1998, the application was heard by a panel of three judges. The Federal Court unanimously dismissed the application with costs. The decision, which was orally delivered, included some derogatory statements against the entire UN human rights mechanisms. The presiding judge unfortunately stated to the effect that the Court is not dealing with neither a sovereign nor a full fledged diplomat but he is someone called a rapporteur who has to act, in the present case, within mandate of, in laymen's terms, an unpaid, part-time provider of information. The UN High Commissioner for Human Rights as well as other UN experts reacted to this Statement. The Statement of the UN High Commissioner for human rights is attached in *Annex 5*, and the joint statement of the Chairperson of the Meeting of Chairpersons of Treaty Bodies and Chairperson of the Meeting of Special Rapporteurs/ Representatives/Experts and Chairpersons of Working Groups of the special procedures of the Commission on Human Rights and of the advisory services programme is attached as *Annex 6*.

Meanwhile, three related suits of defamation were also filed against the Special Rapporteur for the amount of US \$ 55 million.

It is now hoped that the UN Secretary-General will conclude that a dispute has arisen between the UN and Malaysia and see that the matter is taken to the International Court of Justice as directed by the 1946 the Convention on Privileges and Immunities of the United Nations.

Annex I

*Excerpts from the 1946 Convention
on the Privileges and Immunities
of the United Nations*

Section 22. Experts (other than officials coming within the scope of Article V) performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions during the period of their missions, including the time spent on journeys in connection with their missions. In particular they shall be accorded:

- (a) Immunity from personal arrest or detention and from seizure of their personal baggage;
- (b) In respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on mission for the United Nations;
- (c) Inviolability for all papers and documents;
- (d) For the purpose of their communications with the United Nations, the right to use codes and to receive papers or correspondence by courier or in sealed bags;
- (e) The same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

- (f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

Section 23. Privileges and immunities are granted to experts in the interests of the United Nations and not for the personal benefit of the individuals themselves. The Secretary-General shall have the right and the duty to waive the immunity of any expert in any case where, in his opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interests of the United Nations.

Section 30. All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

Section 32. Accession shall be affected by deposit of an instrument with the Secretary-General of the United Nations and the convention shall come into force as regards each Member on the date of deposit of each instrument of accession.

Section 34. It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

“Malaysia acceded to the Convention in October 1957 without any reservation”.

Annex 2

Certificate by the UN Secretary-General
7 March 1997

To Whom it May Concern

In connection with the Civil Suit N° S3-23-68 of 1996 by MBF Capital Berhad and MBF Northern Securities Sdn. Bhd. against Dato' Param Cumaraswamy, the Secretary-General of the United Nations hereby notifies the competent authorities of Malaysia that Dato' Param Cumaraswamy, national of Malaysia, is the Special Rapporteur on the Independence of Judges and Lawyers of the United Nations Commission on Human Rights. In this capacity, Dato' Cumaraswamy is entitled to the privileges and immunities accorded to experts performing missions for the United Nations under Articles VI and VII of the Convention on the Privileges and Immunities of the United Nations to which Malaysia has been a party since 20 October 1997 without any reservation.

In accordance with section 22 of Article VI of the Convention: "Experts ... performing missions for the United Nations shall be accorded such privileges and immunities as are necessary for the independent exercise of their functions ...". Section 22 (b) of the Convention further provides that "they shall be accorded, in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind". As such, the Special Rapporteur on the Independence of Judges and Lawyers, is immune from legal process of every kind in respect of words spoken or written and acts done by him in the course of the performance of his mission.

The Secretary-General has determined that the words which constitute the basis of plaintiffs' complaint in this case were spoken by the Special Rapporteur in the course of his mission. The Secretary-General therefore maintains that Dato' Param Cumaraswamy is immune from legal process with respect thereto.

Under Section 34 of the Convention, the Government of Malaysia has a legal obligation to "be in a position under its own law to give effect to the terms of this Convention". The Secretary-General of the United Nations therefore requests the competent Malaysian authorities to extend to Dato' Param Cumaraswamy the privileges and immunities, courtesies and facilities to which he is entitled under the Convention on the Privileges and Immunities of the United Nations.

signed: **Kofi A. Annan**

Annex 3

*Certificate by the Malaysian Minister
of Foreign Affairs*

INTERNATIONAL ORGANIZATIONS
(PRIVILEGES AND IMMUNITIES)

ACT 1992 (Act 485)

CERTIFICATE UNDER SECTION 7(1)

I, DATUK ABDULLAH BIN JH. AHMAD BADAWI,

Minister of Foreign Affairs, Malaysia, by virtue of the power granted to me under section 7(1) of the International Organizations (Privileges and Immunities) Act 1992 (Act 485) hereby certify that Dato' Param Cumaraswamy was appointed by the United Nations in 1994 for a period of three years as Special Rapporteur on the Independence of Judges and Lawyers, whose mandate is as follows:

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

2. Under the Convention on the Privileges and Immunities of the United Nations 1946 and under the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949, Dato' Param Cumaraswamy shall enjoy the privileges and immunities as are necessary for the independent exercise of his functions. He shall be accorded immunity from legal process of every kind only in respect of words spoken or written and acts done by him in the course of the performance of his mission.

Dated 12th day of March 1997

signed **Datuk Abdullah Bin Hj. Ahmad Badawi**
Minister of Foreign Affairs

Annex 4

*Excerpts from the Judgement
of 20 October 1997*

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN)
RAYUAN SIVIL NO: W-02 - 323- 1997

ANTRA

Dato' Param Cumaraswamy Perayu

DAN

1. MBf Capital Berhad
2. MBf Northern Securities Sdn Bhd Responden

(Dalam Perkara Memgenai Guaman Sivil No. S3-23-68-1996 dalam
Mahkamah Tinggi di Kuala Lumpur)

ANTRA

1. MBf Capital Berhad
2. MBf Northern Securities Sdn Bhd Plaintiff - Plaintiff

DAN

Dato' Param Cumaraswamy Defendan)

CORAM: Gopal Sri Ram, J.C.A.
Ahmad Fairuz, J.C.A.
Denis Ong Jiew Fook, J.C. A.

Judgment of the Court

The issues in the appeal

... [A]t the end of two days of hearing, after the dust of conflict had settled, it became plain that the appeal really turned upon two issues. They may, we think be conveniently summarised in the form of the following two questions:

- (1) Was the judicial commissioner entitled, as a matter of law, to defer the question of the defendant's immunity?
- (2) Even if she was, ought she have done so on the facts of this case?

The first question concerns the existence of a discretion. The second concerns the correctness of the exercise of that discretion by the learned judicial commissioner...

The first issue: is there a discretion?

...

It was submitted on the defendant's behalf that there is no power in the High Court under rule 7(1) of Order 12 of the Rules to postpone the determination of the question whether the court has jurisdiction over the person of a defendant. In other words, the defendant's claim of immunity must be answered either in his favour or against him upon his application to set aside the writ. Counsel for the defendant also submitted that, that is the way in which the rule has been previously applied.

In support of these arguments he referred us to **Juan Ysmael & Co. Inc. v. Government of the Republic of Indonesia** (1954) 3 All E.R. 236.

...

Counsel for the defendant has argued that the present case comes within the scope of the proposition formulated by Lord Radcliffe in the *Dolfus Mieg* case and quoted by Earl Jowitt in *Juan Ysmael*. Here too, says counsel, is a case where immunity is claimed but not established. To insist that the defendant's immunity be established at the trial of the action is to do the very thing which the court ought not to do.

The short answer to counsel's argument is that both *Dolfus Mieg* and *Juan Ysmael* were cases that concerned sovereign immunity which is absolute in nature. It is trite law that a foreign sovereign may not be impleaded in the domestic forum...

...

The present appeal falls well outside the scope of the doctrine of sovereign immunity. The defendant is not a foreign sovereign. The immunity he claims, as conceded by his counsel is not absolute. It is circumscribed by the terms of the mandate conferred upon him.

...

If O.12, r. 7 of the Rules receives the interpretation canvassed by the defendant, it would mean that in no case would the court be in a position to say whether a special rapporteur had acted within the scope of his mission. It would place the rule in a straight jacket and afford no flexibility whatsoever to the application. However abnormal a case may be, the High Court must, if counsel is correct in his submissions, resolve an immunity question summarily.

We are here dealing with a rule of court; not a statute enacted by Parliament. Rules of court are formulated to assist in the attainment of justice; not its obstruction. Hence, it is a settled principle that would not result in unfairness or produce a manifest injustice...

An acceptance of the approach suggested by counsel would produce an unjust result. It would prohibit the court from dealing with which case according to its peculiar facts when dealing with an application under Order 12, rule 7 of the Rules. Justice will not be achieved by a rigid and unbending approach to the terms of that rule of court.

We must, therefore, dissent with the propositions advanced by counsel. In our judgment, the learned judicial commissioner was not duty bound to decide the defendant's application in a summary fashion. She was, if the facts merited further investigation, entitled, as a matter of law, to put off the determination of the defendant's immunity until after she had the benefit to *viva voce* evidence upon that issue. Whether she was correct in doing so in the present instance goes to exercise of discretion. It falls within the scope of the second question to which we now turn.

The second issue: was discretion correctly exercised?

The alternate submission made in support of the appeal ... is that even if O. 12, r. 7 permits a postponement of immunity issue, the judicial commissioner was wrong in doing so in the present case. This argument, as we observed a moment ago, goes to the exercise of discretion by judicial commissioner.

...

For the purpose of addressing the question at hand, it is necessary, as a first step to identify some of the salient issues that form the axis of the dispute between the parties. For the purposes of the present appeal, three are readily identifiable. They are as follows:

- (1) Whether the defendant spoke and published the words complained of while on mission, that is to say, in his capacity as Special Rapporteur;
- (2) Whether it is the court or the Secretary-General who should determine the defendant exceeded the terms of his mandate when he spoke and published the alleged defamatory words; and
- (3) If it is the court and not the Secretary-General who should make the determination, then, whether the defendant did in fact exceed the terms of his mandate.

Although each of these questions flows from one to the next, it is preferable to deal with these separately.

The capacity in which the defendant spoke

Dr. Das argues that the question of capacity is capable of summary determination, and, because the evidence in relation to it has not been credibly denied, it ought to be resolved in defendant's favour...

The primary evidence relied on by the defendant in support of this submission is the impugned article itself. Counsel read two passages, which he said, concluded the point in the defendant's favour. The first passage in the article in question is as follows:

Param Cumaraswamy who has a global mandate from the United Nations to investigate complaints such as those circulating in Malaysia at present, reports that he received enquires about Malaysia from foreign businessmen...

... Datuk Lingham, however, pointed out that the article contains a material error... It was further argued that the truth of the whole of the impugned article was under challenge, including the allegation by the author that the defendant was interviewed and spoke in his capacity of Special Rapporteur. The plaintiffs also argue that the defendant wore several hats and that he made the alleged defamatory statements in his capacity as an advocate and solicitor and not as Special Rapporteur.

...

... We are of the view that it would be patently unsafe to determine, in a summary fashion, the capacity in which the defendant uttered the impugned words.

Suffice to say that the article in itself does not expressly declare that the defendant was interviewed and spoke the alleged defamatory words as Special Rapoporteur. What his counsel has done is to invite this Court to infer, from the tenor of the language employed by the author of the article, that the defendant spoke solely as Special Rapporteur.

With respect, we must decline this invitation. The issue under discussion is substantially an issue of fact. Like any other fact it must be determined at trial, after hearing all the evidence led upon it and

after a mature consideration of the submissions to be made on both sides.

... In the circumstances of the present case, and in fairness to both sides, it would have been most unwise of the judicial commissioner to embark upon a summary resolution of the point at issue. In our judgment she was entirely correct in reserving her decision until after the trial of the action.

Who decides excess of mandate?

Dr. Das has argued that it is for the Secretary-General of the United Nations to decide whether the defendant exceeded the mandate granted him. If the Secretary-General took the view that the defendant had exceeded the terms of his mandate, the former would have waived the latter's immunity. This did not happen. Counsel points out that instead of a waiver of immunity, there has been an assertion of it. In support he referred to the letter from the Secretary-General.

...

The letter from the Secretary-General is dated March 7, 1997. Five days later, that is to say, on March 12 1997, the Minister issued his certificate under Section 7(1) of the International Organisations (Privileges and Immunities) Act, 1992 ("the Act")

...

Relaying upon these two documents, Dr Das submitted that the defendant's immunity from suit for the words spoken was beyond argument. He drew our attention to the relevant provisions in the Convention on Privileges and Immunities of the United Nations ("the General Convention"), the Diplomatic Privileges (United Nations and International Court of Justice) Order 1949 ("the 1949 Order") and the Act.

...

With respect, we are unable to agree with Dr. Das' submission that the defendant's immunity from suit is a matter beyond a peradventure because the Secretary-General has already expressed his view that the

words complained of were uttered by the defendant (to quote from his letter) "in the course of his mission." We are also unable to agree with his argument that the Minister's certificate, which is evidence of the facts therein stated, concluded the matter in the defendant's favour. Our reasons are as follows.

First..., [i]ndeed counsel for the defendant has plainly failed to demonstrate that the Federation of Malaysia has, by treaty or legislation, surrendered its sovereign judicial power to any organ of the United Nations to make a finding of fact of the nature that forms the core of the litigation in the instant case. It is axiomatic that the judicial power of the Federation of Malaysia, which is vested in its courts, is not to be lightly treated as having been excluded by treaty or even municipal legislation.

...

... [T]here is absent any power in the Secretary-General to make the kind of determination of fact he has made in his letter, namely, that the defendant spoke and published the words complained of in his capacity as Special Rapporteur. That is a question for our courts to decide. And the stage for making such a determination has not as yet arrived. The suggestion that the Secretary-General may by the stroke of his pen exclude the power of the High Court to make the factual determination upon which the defendant's immunity is postulated is, with respect, an invitation to journey from sublime to the ridiculous, which we must with respect, decline to accept. In our judgment, the learned judicial commissioner was plainly correct in refusing to act upon mere *ipse dixit* of the Secretary-General on the question of the capacity in which the defendant spoke the words complained of.

Second, in so far as the Minister's certificate is concerned, it adds nothing in the defendant's favour. That certificate is, as the second subsection to section 7 declares, "evidence of the facts certified." Dr. Das says that phrase means "conclusive evidence". Datuk Lingham disagrees. He submits that "evidence" is miles apart from "conclusive evidence."

...

... We do, of course, take full cognisance of the Minister's certificate and give it all the weight Parliament says it shall have. But the certificate, beyond stating as a fact that the defendant is a Special Rapporteur, does not go further to certify that the words complained of were spoken by the defendant in that capacity. The Minister has therefore, very properly left open that fact to be determined by the court.

...

To reiterate, the question whether the defendant uttered the alleged defamatory words in his private capacity or as Special Rapporteur is one of fact to be determined at the trial of the action. If the trial court finds that the defendant spoke the alleged defamatory words in his personal capacity, no question of immunity can arise. For, neither the Secretary-General nor the Minister may assert immunity on behalf of the defendant in respect of words uttered by him in his capacity as advocate and solicitor. If the court comes to the conclusion that the defendant did in fact speak as Special Rapporteur, it must go on and decide whether he acted within the terms of his mandate. Clearly, these are matters that amount to serious questions calling for a trial of the action.

However, before we move further, there is one other comment we wish to make about the Secretary-General's letter. It appears that the Secretary-General asserted the defendant's immunity in terms that clearly fall outside the scope of the General Convention and the 1949 Order.

Section 22 of Article VI of the General Convention confers upon experts on mission immunity for acts done and words written or spoken "in the course of the performance of their mission." Article 12 (b) of the 1949 Order, on the other hand, confers immunity upon persons employed on missions on behalf of the United Nations, "in the exercise of these functions". These words mean, of course, that persons, such as the defendant, are immune from suit or persecution so long as their acts were done, or their words were spoken or written, in the exercise of their functions.

However, the Secretary General has, in his letter, taken the position that the defendant uttered the words complained of “in the course of his mission”, and is therefore immune from suit. We are however of the view that the phrase employed by the Secretary-General in his letter is much wider important than that appearing in either the General Convention or the 1949 Order. For, a person may be “in the course of his mission”, and yet commit acts that are not “in the exercise of these functions”. The point comes into sharp focus in cases where it is shown that a defendant wears, so to speak, more than one hat. That appears to be the case here. The same would apply with equal force where a trial court finds that acts were done or statements made in circumstances that *prima facie* fall outside the terms of a Rapporteur’s written mandate.

...

Did the defendant exceed his mandate?

...

In short, the scope of the defendant’s function is to inquire and report to the Commission on Human Rights upon matters that concern the independence of judges and lawyers. Nowhere by its terms does the mandate authorise interviews to members of the press. Thus, in our view, upon the very limited material available at this early stage of the proceedings, it is not entirely beyond dispute whether the words complained of were published by defendant in the exercise of his functions as Special Rapporteur.

It follows from our interpretation of Article 12 that the question of the independence of the defendant in the exercise of his functions as Special Rapporteur is a matter that must *ex necessitate rei* be determined with reference to the terms of his mandate. Accordingly, the question whether the defendant exceeded his mandate in the context of the immunity claimed by him under Article 12 of the 1949 Order, as well as the construction of that Article, are matters for the trial judge to decide. Indeed, they are serious questions to be tried.

Dr. Das’ argument that the defendant’s mandate includes not only a right to interview, but also to be interviewed, is one that must await

pronouncement on its merits until the trial of the action. It is not an argument upon which we would give any concluded view at this stage of the proceedings.

In our judgment, each case must be decided according to its own facts. There may be circumstances in which statements made by a Special Rapporteur during an interview come well within the scope of his mandate. On the other hand a fact pattern may emerge that leads to the conclusion that what was said or done at such an interview was in excess of the authority given to a Special Rapporteur.

...

Exercise of discretion: an overview

To summarise, the three issues earlier identified by counsel during argument are serious questions to be tried. They were manifestly unsuitable to be resolved in a summary fashion having regard to the peculiar facts of this case.

...

In our judgment the defendant failed to demonstrate that the learned judicial commissioner has committed an error that warrants appellate interference. She asked herself the right questions, took into account all relevant considerations and directed herself correctly on the applicable law. Above all, the order she made has not resulted in any injustice to the defendant. There has been no ruling against immunity, the judicial commissioner taking much care to leave that issue open to be decided at the trial of the action. The defendant is entitled, at the conclusion of the trial, to a verdict in his favour in the event he establishes his claim to immunity on the facts.

The approach

Dr. Das reminds us that we must ensure that we ought not to, by our decision, set a dangerous precedent by adopting a robust approach to the question of the defendant's immunity. We respect, we need no reminder of our duty of which we are most conscious. But it must be borne in mind, by all concerned, that an assertion of immunity is not

to be linked to the rubbing of the lamp by Aladdin. There is no magic in it. Any belief entertained to the contrary must be abandoned soonest.

Each case where immunity is asserted has to be dealt with on its own facts. Whether a particular fact pattern attracts immunity is for the courts to decide in the exercise of their constitutional function. If a court holds that immunity does not attach to an individual in a given set of circumstances, that is an end of the matter. The governing principles are well settled. But their application varies according to the peculiar circumstances of each case. The present appeal is merely one such instance.

...

The result

For the reasons we have set out in this judgment, we are of the view that this appeal must fail. The orders by the High Court are affirmed. In so far as costs are concerned, we agree with Dr. Das that the order made by the judicial commissioner directing that costs be paid forthwith is an unusual order to make on the facts of this case. The order as to costs made by the High Court is therefore set aside. Those costs shall be in the cause. However, the costs of this appeal shall be taxed and be paid by the defendant to the plaintiffs. The deposit lodged in the court by the defendant is hereby ordered to be paid out to the plaintiffs to account of their taxed costs.

Dated October 20, 1997

Seal
Salinan Diakui Sah
Nurhaniah Abdul Hanan
Setiausaha Kepada
Y.A. Dato' Gopal Sri Ram Hakim
Mahkamah Rayuan
Malaysia

T.T.
Gopal Sri Ram
Judge, Court of Appeal, Malaysia

Annex 5

*The Reaction of the UN High Commissioner
for Human Rights*

UNITED NATIONS

Press Release

24 February 1998

HR/98/10

The United Nations High Commissioner for Human Rights, Mrs. Mary Robinson, made the following statement today:

I am gravely concerned to learn that the Federal Court of Malaysia has decided that defamation suits filed against the Special Rapporteur on the Independence of Judges and Lawyers, Mr. Param Cumaraswamy, can proceed, effectively finding that he is not immune from legal process in Malaysia domestic courts.

In its decision of 19 February 1998 dismissing the Special Rapporteur's application for leave to appeal, the Federal Court, the highest court in Malaysia, stated that the Special Rapporteur was neither a sovereign nor a diplomat but in layman's terms an "unpaid, part-time provider of information." I believe this profoundly misconstrues the role of Special Rapporteurs of the Commission on Human Rights.

The Court ignored a certificate presented in March 1997 by the Secretary-General, Mr. Kofi Annan, asserting that Mr. Cumaraswamy, as Special Rapporteur, enjoys the protection provided under the Convention on Privileges and Immunities of the United Nations. The Secretary-General had determined that the words which constitute the basis of the complaints in this

case were spoken by the Special Rapporteur in the course of his mission. Mr. Cumaraswamy was therefore immune from legal process with respect to those words.

The Court's decision also ignores the 1989 Advisory Opinion of the International Court of Justice in the *Mazilu* case in which the Court advised that independent experts, such as a Special Rapporteur, are entitled to all the privileges and immunities, including immunity from legal process of every kind, as provided in Section 22 of the Convention on Privileges and Immunities of the United Nations.

I agree fully with the Chairman of the Meeting of Special Rapporteurs, Mr. Paulo Sergio Pinheiro, who told the Secretary-General in July last year that "threatening the immunity of one expert constitutes an attack on the entire system and institution of the United Nations special procedures and mechanisms."

The Special Rapporteur mechanism covering both country and thematic mandates is a vitally important component of the United Nations work in the promotion and protection of human rights. It is essential that the independent experts who accept to act as Special Rapporteur without payment for their services enjoy the protection offered by the Convention on Privileges and Immunities.

I would urge the Government of Malaysia to respect its obligations under the Convention and ensure that Mr Cumaraswamy is protected from further action in this matter.

Annex 6

*The Reaction
of the UN Human Rights Experts*

The United Nations
Department of Public Information
Press Releases

27 February 1998

UNITED NATIONS HUMAN RIGHTS EXPERTS
EXPRESS PROFOUND CONCERN
OVER MALAYSIAN COURT DECISION ON IMMUNITY
OF SPECIAL RAPPOREUR

The following is a statement by Professor Philip Alston (Australia), Chairperson of the Meeting of Chairpersons of Treaty Bodies, and Professor Paulo Sergio Pinheiro (Brazil), Chairperson of the Meeting of Special Rapporteurs/Representatives/Experts and Chairpersons of Working Groups of the special procedures of the Commission on Human Rights and of the advisory services programme.

'We are dismayed and profoundly concerned over the recent decision of the Federal Court of Malaysia denying the application for leave to appeal filed by our colleague, Mr. Param Cumaraswamy, the Special Rapporteur on the independence of judges and lawyers. As a result of this decision, defamation suits filed against Mr. Cumaraswamy for statements made in his capacity as Special Rapporteur can proceed in the domestic courts of Malaysia.

By ignoring Malaysia's obligations under the Convention on Privileges and Immunities of the United Nations, the Federal Court, Malaysia's apex court, has set a dangerous precedent which exposes independent experts of the United Nations to the threat of future legal suits.

This decision is an attack on the entire system of the United Nations human rights mechanisms. If allowed to stand, it could have a chilling effect on the ability of independent experts to speak out against violations of international human rights standards. It threatens to undermine our independence and impartiality.

We believe the language used in the Federal Court decision describing the Special Rapporteur as an 'unpaid, part-time provider of information' is demeaning and agree with the High Commissioner for Human Rights statement of 24 February that it 'profoundly misconstrues the role of Special Rapporteurs of the Commission on Human Rights.'

If the Special Rapporteurs are to carry out the mandates to which they have been entrusted by Member States, they must be entitled to all privileges and immunities including immunity from legal process of every kind, as provided in Section 22 of the Convention on Privileges and Immunities of the United Nations.

We join with the High Commissioner for Human Rights in urging the Government of Malaysia to respect its obligations under the Convention and ensure that Mr. Cumaraswamy is protected from further action in this matter.

We also call upon the Secretary-General to declare that a dispute exists between the United Nations and Malaysia under the provisions of the Convention on Privileges and Immunities of the United Nations and to take as soon as possible the necessary steps to seek an advisory opinion from the International Court of Justice.'

Part Three

Declarations

*1. The Beijing Statement of Principles
of the Independence of the Judiciary*

A: Introduction

*The Hon. David K. Malcolm AC**

The 6th Conference of Chief Justices of Asia and the Pacific was held in Beijing, People's Republic of China from 16-20 August 1995. On the last day, the Conference adopted the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* ("the *Beijing Principles*"). "LAWASIA" is the acronym of the Law Association of Asia and the Pacific. The LAWASIA Region is co-extensive with the region covered by the United Nations Economic and Social Committee for Asia and the Pacific ("ESCAP").

For some years now I have been the Chair of the Judicial Section of LAWASIA and I have been responsible for the organisation of the Conference of Chief Justices of Asia and the Pacific since 1989.

The Conference of Chief Justices of Asia and the Pacific is convened on behalf of the LAWASIA Judicial Section and as is now the practice held contemporaneously with the LAWASIA Conference. The Conference is held on a biennial basis. The First Conference took place in Penang, Malaysia (1985) and subsequent Conferences have been held in Islamabad, Pakistan (1987); Manila, Philippines (1989); Perth, Australia (1991); Colombo, Sri Lanka (1993); Beijing, People's Republic of China (1995); and Manila, Philippines (1997).

The 7th Conference of Chief Justices of Asia and the Pacific held at Manila, Philippines from 25-30 August of this year in

* Chairman, Judicial Section LAWASIA, Chief Justice of Western Australia.

conjunction with the 15th LAWASIA Conference was arguably the most successful yet. Some 28 Chief Justices or their representatives were in attendance, including the Chief Justices of Japan and Russia who attended the Conference for the first time.

In addition to further discussion of the *Beijing Principles* the Conference Programme covered five other broad topics: *Judicial Corruption, Development of the Internet for Asian Law, Court Administration and Resources, Funding Judicial Education* and *Case Management*.

At the Judicial Section Sessions of the 15th LAWASIA Conference, in which Chief Justices also participated, the topics included the *Beijing Principles, Judicial Education and Means of Funding* as well as *Current Challenges in the Management of Lower Courts*.

Plans are already underway for the 8th Conference of Chief Justices of Asia and the Pacific to be held in Seoul, Korea in conjunction with the 16th LAWASIA Conference in 1999.

Background to the Beijing Principles

The importance of public confidence in the independence and impartiality of the judiciary to the proper functioning of a system of justice cannot be overstated.

The Judiciary makes an important contribution to that sense of public confidence simply by the way it conducts itself, that is, by its manifest impartiality. However, the link between the principles of judicial independence, understood as a set of protective safeguards, and judicial impartiality is not well understood, even among lawyers. Thus, the Judiciary can make an important additional contribution to public confidence in the justice system by taking the lead in the articulation and promotion of the principles of judicial independence.

One of the means by which that process of articulation and promotion can be achieved is by the setting, at international and regional level, of the minimum standards which must be observed in order to safeguard judicial independence and preserve judicial impartiality. Such activities do not, of themselves, guarantee that the principles of judicial independence will be observed. However, the setting of standards is an important first step. As Adama Dieng, the Secretary-General of the International Commission of Jurists, observed while it is sometimes true that:

... a gap exists between the vision informing these standards and the actual situation, it is important to emphasise that the acceptance of these standards as international norms is a great step forward.¹

Since the early 1980s, development of the concept of judicial independence at the international level, in particular by the enumeration of its key features, has proceeded apace through instruments such as the International Bar Association's *Minimum Standards of Judicial Independence* (1982) ("*New Delhi Standards*") and the United Nation's *Draft Principles on the Independence of the Judiciary* (1981) ("*Siracusa Principles*"), *Basic Principles on the Independence of the Judiciary* (1985) ("*Basic Principles*") and *Draft Universal Declaration on the Independence of Justice* (1989) ("*Singhvi Declaration*").

The *Revised Draft Statement* was derived from Principles formulated by the LAWASIA Human Rights Standing Committee following a meeting held in Tokyo on 17 and 18 July 1982 to discuss the application of the principles of judicial

1 Dieng, A "The Rule of Law and the Independence of the Judiciary: An Overview of Principles" (1992) 1 *CIJL Yearbook* 21 at 30.

independence in the Asian region² ("the *Tokyo Principles*"). It also drew upon those other international statements of principle to which I have referred.

The purpose of the *Revised Draft Statement* was to restate and enlarge upon the *Tokyo Principles*, incorporating a synthesis of the other international instruments relating to judicial independence, from a purely judicial perspective and with particular relevance to the LAWASIA Region. Because of the differences in history, culture, religions and other belief systems as well as differences in size, population, political organisation and legal systems of the countries in the ESCAP Region, the task of elaborating a set of common principles expressing the minimum standards for maintaining the independence of the judiciary to which the Chief Justices of the countries in the region could subscribe was a daunting one. It is a tribute to the Chief Justices that they were prepared to tackle it.

The decision to consider the possible adoption of such a statement was taken at the 4th Conference of Chief Justices in Perth in 1991.

The *Revised Draft Statement*, in its original form, was presented, to the 5th Conference of Chief Justices held at Colombo in 1993. The Chief Justices then present affirmed the importance of a clear statement in relation to the matters contained in the *Revised Draft Statement* and it was generally acknowledged, as the then Chief Justice of Pakistan³ put it, to be "a laudable amalgam".⁴

2 Attended by the then Chief Justices of India, Philippines, Sri Lanka, the President of the Supreme Court of Thailand, the Former President of the Supreme Court of Japan, former judges of the Supreme Court of Japan, the former Chief Justice of the Nagoya High Court, as well as eminent Japanese lawyers and academics.

3 The Hon Justice Dr Nasim Hasan Shah.

4 Nicholson, RD *5th Conference of Chief Justices of Asia and the Pacific: Evaluation Report* (1993) at 24.

A further *Revised Draft Statement* incorporating additional amendments as a result of discussion at the 5th Conference of Chief Justices and comments received in the interim period between Conferences was circulated in advance of the 6th Conference of Chief Justices, with the aim that it be adopted at that Conference as a statement of minimum standards to be observed in order to maintain the independence and effective functioning of the Judiciary in the LAWASIA Region.⁵

At the 6th Conference the further *Revised Draft Statement* was further amended and then adopted as the *Beijing Principles* by unanimous resolution by all of the Chief Justices present or represented.

At the 7th Conference a further three amendments of a textual nature to the *Beijing Principles* were approved by all of the Chief Justices or their representatives. A copy of the *Beijing Principles* in its final form is published in this *Yearbook*.

Key Aspects of the Beijing Principles

The Judicial Function

An appreciation of the parameters of the judicial function is central to an understanding of the concept of judicial independence. It is these parameters which provide the legitimate foundation for the set of safeguards which we call the principles of judicial independence.⁶ They find expression in

5 Nicholson, RD *5th Conference of Chief Justices of Asia and the Pacific: Evaluation Report* at 24.

6 See comments by McGarvie, RE "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 *JJA* 3 at 7 on need to place claims to judicial independence on appropriate foundation.

Article 10 of the *Beijing Principles*⁷ which provides that the objectives and functions of the Judiciary include:

- (i) to ensure that all persons are able to live securely under the Rule of Law;⁸
- (ii) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights within its own society;⁹ and
- (iii) to administer the law impartially between citizen and citizen and between citizen and State.¹⁰

These functions complement and overlap each other. For example, it is to the Judiciary that the power of, and responsibility for, resolving disputes according to law is given.¹¹ The natural consequence of this allocation of responsibility is that, the judicial power must be exercised by a consistent and unwavering application of the Rule of Law. It follows that the Judiciary must apply the Rule of Law impartially to matters brought before it. As one judge has put it:

The exercise of ... judicial power ... requires that judicial decisions be made 'according to law'. If the power is exercised on some other basis, and particularly as the consequence of influences whether of power, policy, private thoughts or money, it follows that an essential requirement of the judicial power is negated.¹²

7 See also *Singvi Declaration* Art. 1.

8 *Beijing Principles* Art. 10 (a).

9 *Beijing Principles* Art 10 (b).

10 *Beijing Principles* Art. 10 (c).

11 See generally Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 410-411.

12 *Ibid.* at 405.

In turn, a consistent, impartial and unwavering application of the Rule of Law tends to protect persons from the infringement of human rights, to the extent that they are recognised by the Rule of Law which applies in a particular country. There is room, within the historical and cultural context of a country, for a legitimate debate about the appropriate scope of human rights within that country. However, in so far as those rights are recognised, the Judiciary can play an important part in upholding them, whenever the powerful attempt to abridge them in an *ad hoc* or arbitrary manner. As Mr L.V. Singhvi observed in his Final Report to the United Nations Commission on Human Rights in 1985:

The strength of legal institutions is a form of insurance for the rule of law and for the observance of human rights and fundamental freedoms and for preventing the denial and miscarriage of justice.¹³

The Concept of Judicial Independence

I have suggested that it is the parameters of the judicial function that provide the legitimate foundation for claims to judicial independence. The corollary is that maintenance of judicial independence is essential to the fulfilment of the judicial function. This finds expression in Article 4 of the *Beijing Principles*.

What judicial independence means in this context is set out in Article 3 of the *Beijing Principles*¹⁴ which provides that independence of the judiciary requires that:

- (a) the Judiciary shall decide matters before and in accordance with its impartial assessment of the facts and its

¹³ Singhvi, LM *Final Report* (1985) at n44.

¹⁴ See also *Siracusa Principles* Art. 2; *New Delhi Principles* Art. 1; *Basic Principles* Arts. 2 & 3; *Singhvi Declaration* Arts. 2, 4 & 5(a).

understanding of the law without improper influences, direct or indirect, from any source¹⁵; and

(b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.¹⁶

The separation of the definition into the freedom from interference to which a judge is entitled and the independence from the Executive and Legislative branches to which the Judiciary is entitled, reflects a theoretical distinction which has been drawn between what is usually referred to as individual independence and institutional independence.¹⁷

Individual independence is an essential safeguard for the maintenance of impartiality. Impartiality is the duty of a judge. The guarantee of freedom from improper influence is the means by which performance of that duty by all judges can best be achieved. As Justice Michael Kirby of the High Court of Australia has put it:

A decision-maker who must evaluate evidence and submissions fairly and reach conclusions affecting powerful and opinionated interests, must be put beyond the risk of retaliation and retribution. Otherwise human nature, with its mixed elements of cowardice and ambition, may tempt the decision-maker to ignore the merits of the case under consideration and ... favour the interests of the powerful.¹⁸

15 *Beijing Principles* Art. 3(a).

16 *Beijing Principles* Art. 3(b).

17 See Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 405; Dieng, A *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (1992) at 25.

18 Kirby, MD *The Abolition of Courts and Non-re appointment of Judicial Officers in Australia* (1994) at 3.

Institutional independence is no less important than individual independence. The most independent judge will find it difficult to perform his or her duty in an institution which is not permitted to be similarly independent. However, the requirements of institutional independence tend to be more difficult to come to grips with, simply because in so many areas in which it is an issue, such as court resources and judicial administration, the line between the Executive and the Judiciary is a shifting one.

The Executive may be entirely well meaning. It may have legitimate policy reasons for its proposals. The way in which such proposals impinge on institutional independence may be difficult to explain. Nevertheless, the effort must be made, the line between the Executive and the Judiciary, albeit a shifting one, must be conscientiously policed.

Judicial Appointments

If we seek from our judges an attitude of impartiality and the ability and determination to enforce the Rule of Law, it is important that the selection process which leads to judicial appointments should, as far as possible, be calculated to supply individuals of this calibre.

This requirement finds expression in Articles 11 and 12 of the *Beijing Principles*¹⁹ which provide that:

- (11) To enable the Judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.²⁰

19 See also *Siracusa Principles* Art. 3; *New Delhi Principles* Art. 26; *Basic Principles* Art. 10; *Singhvi Declaration* Arts. 9 & 11 (b) & (d).

20 *Beijing Principles* Art. 11.

(12) The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.²¹

In addition to promoting the appointment of impartial judges, a selection process which is free from improper influence, also has the advantage of encouraging public confidence in the respective appointees. Conversely, a clearly partial appointment will, whatever the appointee's capacity to be genuinely impartial, do damage to public confidence. As one commentator has noted:

Independence and accountability are in a sense in conflict whenever a government appoints a judge or is perceived publicly ... as having appointed a judge because of his or her politics, race, religion or sex. If any of these factors become the apparently principle reason for appointment there is scope for public concern that the necessary impartiality is lacking in the appointee and that there is a diminishment of the principle of judicial independence.²²

As a matter both of fairness to the individual, and consistent with the aim of finding the best person for the job, the *Beijing Principles* also contains a prohibition on any form of discrimination in the selection process, subject to the important exception that a requirement that an appointee be a citizen of the country concerned should not be considered discriminatory.²³

21 *Beijing Principles* Art. 12.

22 Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 417.

23 *Beijing Principles* Art. 13. See also *Siracusa Principles* Art. 5; *Basic Principles* Art. 10; *Singbvi Declaration* Art. 10.

Subject to these limitations, and according due respect for national differences in the organisation of legal professions, the precise mode of selection process is not particularly important. However, to minimise the potential for improper considerations, the influence of the Executive should be kept to a minimum and, in the interests of public confidence in the impartiality of appointees, the selection process should, as far as possible, be open and formal.²⁴

Security of Tenure

One of the most important aspects of individual independence is security of tenure. Without a guarantee of tenure, subject to the proper performance of his or her judicial function, there is no guarantee that the fear of losing his or her appointment will not, even subconsciously influence the decision of judge, thereby infringing the principle of judicial impartiality and diminishing the Rule of Law. This must particularly be so in countries where the Judiciary is called upon to adjudicate between the rights of the State and the citizen on a regular basis, for example where a Bill of Rights falls to be interpreted.

Holding an appointment at the pleasure of the Executive can do irreparable damage to both the appearance, and fact, of impartial decision making. In contrast, tenure promotes both the appearance, and the fact, of impartiality, because it: "*...insulates judges from the need to worry about political reaction to their decisions.*"²⁵

24 See *Beijing Principles* Art. 16.

25 Dieng, A *The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (1992) at 29.

The need for security of tenure finds expression in Articles 18 and 21 of the *Beijing Principles*²⁶ which provide that:

(18) Judges must have security of tenure.²⁷

(21) A judge's tenure must not be altered to the disadvantage of a judge during his or her term of office.²⁸

Due recognition is given to national differences which incorporate confirmation procedures for tenure.²⁹ However, recognition is also given to the ideal of judicial appointments which, in the ordinary course, only terminate upon the attainment of a set age.³⁰

There will inevitably, if infrequently, be occasions upon which the Executive has an apparently legitimate claim to the termination of a judicial appointment, that is failure to carry out the judicial function.³¹ In these cases, it is vital that the processes adopted to test that claim are carefully handled if damage to the appearance, and fact, of judicial independence is not to be compromised. As one commentator has observed of this situation:

There is at this point a clash between two 'polar needs': the need to preserve judicial independence and the need to deal with the judge who does not properly discharge the functions of the office.³²

26 See also *Siracusa Principles* Art. 12; *New Delhi Principles* Art. 22; *Basic Principles* Art. 18; *Singhvi Declaration* Art. 16.

27 *Beijing Principles* Art. 18.

28 *Beijing Principles* Art. 21.

29 See *Beijing Principles* Art. 19.

30 See *Beijing Principles* Art. 20.

31 See *Beijing Principles* Art 22.

32 Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 419.

Again there will be national differences in respect of the precise process for removal of a judge which is used. However, as a minimum, the process for removal should incorporate a right to a fair hearing³³, thorough and impartial investigation of the reasons put forward for removal³⁴ and a judgment which is based on established standards of judicial conduct.³⁵

A related issue is the non-re-appointment of a judge upon the abolition of the court of which he or she was a member. This, as has been pointed out by Justice Kirby, has the potential to damage judicial independence, because:

If judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is, effectively, at the will of the Executive.³⁶

This result is avoided if, upon abolition of a court, the judges of the former court are appointed to the new court, offered an equivalent appointment or full compensation.³⁷

Conditions of Judicial Service

Related to the question of security of tenure, is that of an adequate and secure remuneration. That judicial remuneration should be commensurate with the office of a judge is important from a number of points of view. First, it assists to attract suitable people to judicial service. Second, it minimises the potential for litigants to exercise financial influence over the

33 See *Beijing Principles* Art. 26.

34 See *Beijing Principles* Art. 25.

35 See *Beijing Principles* Art. 27.

36 Kirby, MD *The Abolition of Courts and Non-re appointment of Judicial Officers in Australia* 1994) at 37.

37 See *Beijing Principles* Art. 29.

decision making process. Third, it helps contribute to, and helps maintain, the status of the Judiciary as an institution.

That remuneration should be secure, in the sense that it cannot be altered to the detriment of a judge during the term of office, is of also of particular importance.³⁸ A judge who faces the possibility of financial disadvantage if his or her decisions displease the Executive is not placed in a position from which it is easy to exercise the judicial function with true impartiality.

A legitimate exception to this principle may be made where the reduction in remuneration is an across the board, non-discriminatory reduction in the national economic interest, which is agreed to by the Judges concerned. Such a reduction has no adverse implications for judicial independence.

Jurisdictional Issues

Another potential threat to institutional independence is the failure to recognise the exclusive jurisdiction of the Courts over matters of a justiciable nature. The benefits of an impartial and independent judiciary are of no value to persons in our community, if a matter within the jurisdiction of a court is diverted to a specialist tribunal in which none of the hallmarks of impartiality and independence are observed. As one commentator has noted:

For judicial independence to have meaning the courts must be vested with jurisdiction on all conflicts arising in relation to the law so that the courts in which independence exists are courts of general jurisdiction capable of hearing and

38 See *Beijing Principles* Art. 31. See also *New Delhi Principles* Art. 15; *Basic Principles* Art. 11; *Singhvi Declaration* Art. 16(a).

determining issues of concern to the polity and to its members.³⁹

This concern is met in Articles 33 and 34 of the *Beijing Principles*⁴⁰ which provide as follows:

- (i) The Judiciary must have jurisdiction over all issues of a justifiable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.⁴¹
- (ii) The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.⁴²

Resources and Administration

In relation to funding and control over administration, the Judiciary will always be in a weak position *vis-à-vis* the Executive. Lacking any independent source of funds, it will always be dependent on the Executive for the resources which are necessary for it to carry out the judicial function.

This fact makes institutional independence in all matters of funding and administration an ideal, rather than something which can be realised. As one commentator has observed: "... *in the end there can be no complete independence without access to an independent source of funding.*"⁴³

39 Nicholson, RD *Judicial Independence and Accountability: Can they Co-exist?* at 415.

40 See also *Basic Principles* Art. 3; *Singhvi Declaration* Art. 5 (a).

41 *Beijing Principles* Art. 33.

42 *Beijing Principles* Art. 34.

43 Eichelbaum, Sir Thomas *Judicial Independence - Fact or Fiction?* [1993] at 90.

As a result, it is important that the Judiciary, if not autonomous in relation to such matters, at least have an input into these matters and exclusive control in areas of particular importance, such as the assignment of cases.⁴⁴

Declaration of Principles of Judicial Independence

On 14 April 1997, Brennan CJ announced in the course of opening the 12th South Pacific Conference, in Sydney that the eight Chief Justice's of Australia's States and Territories had that day released a *Declaration of Principles of Judicial Independence* ("the *Declaration*") relating to judicial appointments. The *Declaration* contains a set of principles adopted by the Chief Justice's applicable to Australian circumstances.

Coinciding with this public announcement the Chief Justices publicised a media release to the same effect. In the media release the Chief Justices refer to the *Beijing Principles* indicating that the *Declaration* specifically takes them into account.

The Chief Justices state further that:

...in any State or country, the key to public confidence in the judiciary is its manifest impartiality.

There is a crucial link between judicial impartiality and the principles of judicial independence, understood as a set of protective safeguards. This Declaration of Principles, like the Beijing Principles, has as its aim the articulation and promotion of the principles of judicial independence.

⁴⁴ See *Beijing Principles* Art. 35 - 37.

Conclusion

In conclusion I would like to emphasise that the *Beijing Principles*, by allowing the principles of judicial impartiality and the Rule of Law to flourish, have the potential to make an immeasurable contribution to both the social and economic development of the Asian region and I cannot but agree with the comment of the current Secretary-General of the International Commission of Jurists that:

Far from being a luxury for a poor State, a legal structure which is quantitatively and qualitatively sufficient to carry out the services expected of it must be considered one of the necessary components of a society and a precondition for its progress.⁴⁵

The adoption of the *Beijing Principles* represented the achievement of a remarkable consensus between the Chief Justices of a range of countries - from the two countries with the world's largest populations to some of the smallest. It was also necessary to accommodate the differences between those countries within the common law tradition and those within the continental or civil law systems. The common law tradition is reflected in a high degree of judicial independence and the absence of a career judicial service, with appointments made largely from the ranks of the private profession. The civil law system reflects both a collegiate system and a career judicial service undertaken as an alternative to private practice. There are also significant differences in the approach to procedure as between the common law adversarial system and the inquisitorial system. The authoritarian traditions of some countries mark them off from those with more democratic traditions. There are numerous variations across a wide spectrum, many of which

45 Dieng, *A The Rule of Law and the Independence of the Judiciary: An Overview of Principles* (1992) at 35.

reflect the divergent cultures of the different countries in the region. The achievement of a consensus on the principles of the independence of the Judiciary in the Asia-Pacific Region was a tribute to the determination of the Chief Justices to reach agreement on the minimum standards necessary to secure judicial independence in their respective countries.

B: Text of the Beijing Statement of Principles of the Independence of the Judiciary

(as amended 28 August 1997)

Preamble

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

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

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

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

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

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

Whereas the Sixth United Nations Congress on the Prevention of Crime and the treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations 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 the *Basic Principles on the Independence of the Judiciary* by consensus,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders recommended the *Basic Principles on the Independence of the Judiciary* for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country,

Whereas on 17-18 July 1982 the LAWASIA Human Rights Standing Committee met in Tokyo, Japan and in consultation with members of the Judiciary formulated a *Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* ("the *Tokyo Principles*") in the context of the history and culture of the region,

Whereas the 5th Conference of Chief Justices of Asia and the Pacific at Colombo, Sri Lanka on 13-15 September 1993 recognised that it was desirable to revise the *Tokyo Principles* in the light of subsequent developments with a view to adopting a clear statement of principles of the independence of the Judiciary, and considered a first draft of a *Revised Statement of Principles of the Independence of the Judiciary* and requested the Acting Chairman of the Judicial Section of LAWASIA to prepare a second draft of the *Revised Statement* taking into account the views expressed at the 5th Conference of Chief

Justices and comments and suggestions to be made by the Chief Justices or their representatives, and

Noting that the 6th Conference of Chief Justices of Asia and the Pacific is being held in Beijing in conjunction with the 14th Conference of LAWASIA, the primary object of which is:

“To promote the administration of justice, the protection of human rights and the maintenance of the rule of law within the region.”

The 6th Conference of Chief Justices of Asia and the Pacific:

Adopts the Statement of Principles of the Independence of the Judiciary contained in the annex to this resolution to be known as the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*.

**Beijing Statement of Principles
of the Independence of the Judiciary
in the Lawasia Region**

(As Amended at Manila, 28 August 1997)

Independence of the Judiciary¹

1. The Judiciary is an institution of the highest value in every society.
2. The *Universal Declaration of Human Rights* (Art. 10) and the *International Covenant on Civil and Political Rights* (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent Judiciary is indispensable to the implementation of this right.
3. Independence of the Judiciary requires that;
 - (a) the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
 - (b) the Judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.
4. The maintenance of the independence of the Judiciary is essential to the attainment of its objectives and the proper performance of its functions in a free society observing the Rule of Law. It is essential that such independence be guaranteed by the State and enshrined in the Constitution or the law.

1 This heading was originally "Judicial Independence".

5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary.
6. In the decision-making process, any hierarchical organisation of the Judiciary and any difference in grade or rank shall in no way interfere with the duty of the judge exercising jurisdiction individually or judges acting collectively to pronounce judgment in accordance with article 3 (a). The Judiciary, on its part, individually and collectively, shall exercise its functions in accordance with the Constitution and the law.
7. Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities.
8. To the extent consistent with their duties as members of the Judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly.
9. Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate.

Objectives of the Judiciary

10. The objectives and functions of the Judiciary include the following:
 - (a) to ensure that all persons are able to live securely under the Rule of Law;
 - (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

- (c) to administer the law impartially among persons and between persons and the State.

Appointment of Judges

11. To enable the Judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.
12. The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office. It must provide safeguards against improper influences being taken into account so that only persons of competence, integrity and independence are appointed.
13. In the selection of judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.
14. The structure of the legal profession, and the sources from which judges are drawn within the legal profession, differ in different societies. In some societies, the Judiciary is a career service; in other, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, different procedures and safeguards may be adopted to ensure the proper appointment of judges.
15. In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen as judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives of the higher Judiciary and the independent

legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.

16. In the absence of a Judicial Services Commission, the procedures for appointment of judges should be clearly defined and formalised and information about them should be available to the public.
17. Promotion of judges must be based on an objective assessment of factors such as competence, integrity, independence and experience.

Tenure

18. Judges must have security of tenure.
19. It is recognised that, in some countries, the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.
20. However, it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.
21. A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.
22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.
23. It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse.

24. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply, procedures for the removal of judges must be under the control of the judiciary.
25. Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.
26. In any event, the judge who is sought to be removed must have the right to a fair hearing.
27. All disciplinary, suspension or removal proceedings must be determined in accordance with established standards of judicial conduct.
28. Judgments in disciplinary proceedings, whether held *in camera* or in public, should be published.
29. The abolition of the court of which a judge is a member must not be accepted as a reason or an occasion for the removal of a judge. Where a court is abolished or restructured, all existing members of the court must be reappointed to its replacement or appointed to another judicial office of equivalent status and tenure. Members of the court for whom no alternative position can be found must be fully compensated.
30. Judges must not be transferred by the Executive from one jurisdiction or function to another without their consent, but when a transfer is in pursuance of a uniform policy formulated by the Executive after due consultation with the Judiciary, such consent shall not be unreasonably withheld by an individual judge.

Judicial Conditions

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public economic measure to which the judges of a relevant court, or a majority of them, have agreed.
32. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Jurisdiction

33. The Judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
34. The jurisdiction of the highest court in a society should not be limited or restricted without the consent of the members of the court.

Judicial Administration

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

36. The principal responsibility for court administration, including appointment, supervision and disciplinary control of administrative personnel and support staff must vest in the Judiciary, or in a body in which the Judiciary is represented and has an effective role.
37. The budget of the courts should be prepared by the courts or a competent authority in collaboration with the courts having regard to the needs of the independence of the Judiciary and its administration. The amount allotted should be sufficient to enable each court to function without an excessive workload.²

Relationship with the Executive

38. Executive powers which may affect judges in their office, their remuneration or conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.
39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.
40. The Executive authorities must at all times ensure the security and physical protection of judges and their families.

Resources

41. It is essential that judges be provided with the resources necessary to enable them to perform their functions.

2 The first sentence of Article 37 originally read: "The budget of the courts should be prepared by the courts or a competent authority in collaboration with the judiciary having regard to the needs of judicial independence and administration."

42. Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.

Emergency

43. Some derogations from independence of the Judiciary may be permitted in times of grave public emergency which threaten the life of the society but only for the period of time strictly required by the exigencies of the situation and under conditions prescribed by law, only to the extent strictly consistent with internationally recognised minimum standards and subject to review by the courts. In such times of emergency the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts and detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of *habeas corpus* or similar procedures.³

44. The jurisdiction of military tribunals must be confined to military offences. There must always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or other remedy by way of an application for annulment.

³ The first line of Article 43 originally read: "Some derogations from judicial independence may be permitted in times of grave...".

It is the conclusion of the Chief Justices and other judges of Asia and the Pacific listed below that these represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the Judiciary.

Signatories at Beijing, 19 August 1995:

The Hon Sir Gerard Brennan AC KBE
Chief Justice of Australia

The Hon Mr Justice A. T. M. Afzal
Chief Justice of Bangladesh

HE Mr Wang Jingrong
Vice-President Supreme People's Court of the People's
Republic of China
(Representing HE President Ren Jianxin, President of the
Supreme People's Court)

The Hon Sir Ti Liang Yang
Chief Justice of Hong Kong

The Hon Shri Justice S. C. Agrawal
Justice of the Supreme Court of India
(Representing The Hon Mr Justice A. M. Ahmadi, Chief
Justice of India)

The Hon Justice S. H. Soerjono
Chief Justice of Indonesia

The Hon Yun Kwan
Chief Justice of the Republic of Korea

The Hon D. Dembereltseren
Chief Justice of Mongolia

The Hon U Aung Toe
Chief Justice of the Supreme Court of The Union of
Myanmar (Burma)

The Rt Hon Mr Justice Biswanath Upadhyaya
Chief Justice of Nepal

Monsieur le Premier Président Olivier Aimot
Premier Président of the Court of Appeal of New Caledonia

The Rt Hon Sir Thomas Eichelbaum GBE
Chief Justice of New Zealand

The Hon Mr Justice Sajjad Ali Shah
Chief Justice of Pakistan

The Hon Sir Arnold K. Amet
Chief Justice of Papua New Guinea

The Hon Andres R. Narvasa
Chief Justice of the Philippines

The Hon Justice Yong Pung How
Chief Justice of Singapore

The Hon Mr Justice P. R. P. Perera
Justice of the Supreme Court of Sri Lanka
(Representing The Hon Mr Justice G. P. S. De Silva, Chief
Justice of Sri Lanka)

The Hon Charles Vaudin d'Imecourt
Chief Justice of Vanuatu

The Hon Mr Justice Pham Hung
Chief Justice of Vietnam

Tiavaasue Falefatu Maka Sapolu
Chief Justice of Western Samoa

The Hon Sir Timoci Tuivaga
Chief Justice of Fiji

Subsequent Signatories:

The Hon Kim Yong Joon
President of the Constitutional Court of Korea

The Hon Tun Dato' Sri Mohd Eusoff b. Chin
Chief Justice of Malaysia

The Hon Justice V Allair
Chief Justice of the Republic of the Seychelles

The Hon Sir John Muria
Chief Justice of the Solomon Islands

The Hon Nigel Hampton
Chief Justice of Tonga

Signatories at Manila, 28 August 1997:

The Hon Richard Brunt Lussick
Chief Justice of the Republic of Kiribati

The Hon Daniel Cadra
Chief Justice of the High Court
(Representing the Hon Allan Fields, Chief Justice of the
Marshall Islands)

Chief Justice Sir Gaven Donne
Chief Justice of Nauru and Tuvalu

Chief Justice Vyacheslav M. Lebedev
Chief Justice of the Supreme Court, Russian Federation

Subsequent Signatory:

The Hon Toru Miyoshi
Chief Justice of Japan
(Subject to reservation in attached Statement, as regards
Article 9.)

The Hon. Justice Sadka Mookamakkul
President of the Supreme Court of Thailand

*C. CIJL Observations
on the 1995 Beijing Statement
of Principles of the Independence of the Judiciary*

Introduction

The 6th Conference of Chief Justices of Asia and the Pacific was held in Beijing, People's Republic of China from 16-20 August 1995. On the last day, the Conference issued the Beijing Statement of Principles of the Independence of the Judiciary.

On this occasion, the Centre for the Independence of Judges and Lawyers (CIJL) congratulated the 20 Asian Chief Justices for their statement on the independence of the judiciary. The CIJL felt that the Statement should play a positive role in advancing the independence of the judiciary in Asia. The CIJL made, however, the following comments:

- **The Preamble**

The CIJL welcomed the reference to the international human rights instruments, particularly the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights. The CIJL particularly welcomes the reference to the 1985 UN Basic Principles on the Independence of the Judiciary.

- **Article 3**

Article 3 of the UN Basic Principles on the independence of the Judiciary states that the judiciary "shall have jurisdiction over all issues of a judicial nature and shall have exclusive

authority to decide whether an issue submitted for its decision is within its competence as defined by law.”

The exclusive authority of the judiciary to decide its own jurisdiction is not reflected in the Beijing Statement. Article 3 of Beijing gives the judiciary authority over only “justiciable” issues. Practice demonstrates that the Executive, or even the legislature often decides that certain matters are not justiciable. The language of the UN Principles is clearer and more appropriate.

- **Article 10**

The CIJL welcomed this important provision. The CIJL particularly welcomed the explicit reference to promoting the observance of human rights as a main objective and function of the judiciary.

- **Article 15**

This provision is inadequate. It referred to the independence of the **Judicial Services Commission** only in relation to the inclusion of members of legal profession in it.

The problem in many countries is that the Commission is controlled by the Executive. It is often either composed entirely of government appointees or that they form the majority in the Commission. While the provision requests that “the higher Judiciary and the independent legal profession” be represented, there is no request for them to form at least the majority.

- **Article 16**

It should have referred to articles 12 and 13 emphasising again the need for the selection to be based on merit and that it is made without discrimination. It should have also emphasised that no selection shall be made for improper motives.

- **Articles 19**

The CIJL wonders if it was necessary to refer to this limitation on tenure. The provision also clashes with Article 22 of the Statement.

- **Articles 23, 24, and 25**

Article 23 is awkward. It deals with too many issues and it is confused. The CIJL also wonders if the reference to "differences in history and culture" was necessary. This phrase reminds of some governments reference to cultural specificity to justify their lack of respect of human rights principles, although it is clearly not intended in this way. It does not seem to be necessary.

The three articles refer to the role of parliament in the removal of judges. They simply state that some societies grant such a role to their Parliaments and others do not. The role of the Legislative Authority in overseeing judicial work is complex. The provision does not advance the debate or help resolving this difficult issue.

- **Article 30**

While this article affirms a very important principle of not transferring judges without their consent, it then states that "... the consent shall not be unreasonably withheld by an individual judge." Was this necessary? and is it possible to qualify "consent" in this way?

- **Article 33**

It refers again to the authority of judiciary over "justiciable" matters. The CIJL has the same concerns mentioned under Article 3 above.

- **Articles 35, 36, & 37**

The CIJL welcomed these provisions.

- **Article 42**

The CIJL welcomed this provision.

- **Articles 43**

This provision attempts to re-regulate a very difficult area in law, i.e., the derogation requirements under a state of emergency. Although the provision only refers to derogation from judicial independence, it has impact on many other issues.

The provision falls short of internationally accepted requirements for such derogation. Article 4 (1) of the International Covenant on Civil and Political Rights (ICCPR), for example, requires that:

- there be a public emergency;
- this emergency threatens the life of the nation;
- the existence of this emergency is officially declared;
- the measures taken are to “the extent strictly required by the exigency of the circumstances”;
- the measures taken are not inconsistent with States’ obligations under international law;
- the measures taken do not involve discrimination;
- the State reports to the UN Secretary-General on which provisions it has derogated from and the reasons for the derogation; and
- the State reports to the UN Secretary-General on the duration of the derogation.

Article 43 of the Beijing Principles gives the State allowance to derogate from principles of judicial independence in times of emergency. It requires that:

- there be a public emergency;
- this emergency is *grave*;
- it threatens the life of the *society* ;
- the derogation is “only for the period of time strictly required by the exigencies of the situation and *under conditions prescribed by law*;
- the derogation be *only to the extent strictly consistent with internationally recognised minimum standards*; and
- *the derogation be subject to review by the courts.*

The provision adds some requirements on the state of emergency which are not mentioned the ICCPR. The additions are emphasised above in Italics.

Most of the additions are welcomed, specially the requirement of the emergency to be grave and that there be judicial review of the state of emergency. But if the judiciary is not independent during the emergency, how can judicial review constitute an effective guarantee against the Executive’s abuse? In other words, courts can only play a meaningful role, specially in times of emergency if they are independent.

Some additions, however, such as those which allow for a state of emergency be declared when the life of the society, rather the nation, is threatened, permit States to derogate from judicial independence for more flexible reasons.

Above all however, not all international instruments allow for the derogation of due process rights. Article 27 of the Inter-American Convention on Human Rights, for instance, lists the provisions pertaining to non-derogable rights. They are: Article 3 on the right to juridical personality, Article 4 on the right to life, Article 5 on the right to humane treatment, Article 6 on freedom

from slavery, Article 9 on freedom from *ex post facto* laws, Article 12 on freedom of conscience and religion, Article 17 on the rights of the family, Article 18 on the right to a name, Article 19 on the rights of the child, Article 20 on the right to a nationality, and Article 23 on the right to participate in government. Following this list, the provision prohibits the derogation from “judicial guarantees essential for the protection of such rights.”

Article 43 of the Beijing Statement further declares that the State “shall endeavour to provide that civilians charged with criminal offences ... be tried by ordinary civilian courts...”. Exceptional courts normally lack adequate guarantees for independence and impartiality. The CIJL would have hoped that the Beijing Principles express concern in the same absolute terms of Article 44 over the phenomena of trying civilians before exceptional courts. The word “endeavour” is hardly adequate.

There are also serious omissions. For instance, there is no requirement in the Beijing Principles that the emergency be officially declared, or the measures taken are not inconsistent with States obligations under international law. There is also no requirement that the measures taken do not involve discrimination.

- **Article 44**

The CIJL would have welcomed an absolute prohibition in article 44 to try civilians before military courts. The CIJL believes that military courts should have jurisdiction on specific military offences committed by the Military. International norms are now moving solidly in this direction.

29 August 1997
(revised)

*2. Australian States'
and Territories' Declaration
of Principles on Judicial Independence*

Declaration of Principles on Judicial Independence Issued by the Chief Justices of the Australian States and Territories

Whereas the Universal Declaration of Human Rights enshrines in particular the principle of the right to a fair and public hearing by a competent, independent and impartial tribunal established by the law,

Whereas the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights both guarantee the exercise of that right,

Whereas the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region prescribes minimum standards for judicial independence making due allowance for national differences in the LAWASIA Region,

Whereas the Chief Justices of the States and Territories of Australia consider it desirable to state in more detail in terms applicable to the circumstances of the States and Territories of Australia certain of those principles relating to judicial appointments and to the exercise of judicial office.

Now they *adopt* the following principles relating to the appointment of judges of the Courts of the States and Territories:

- (1) Persons appointed as Judges of those Courts should be duly appointed to judicial office with security of tenure until the statutory age of retirement. However, there is no objection in principle to:
 - (a) the allocation of judicial duties to a retired judge if made by the judicial head of the relevant court in exercise of a statutory power; or

- (b) the appointment of an acting judge, whether a retired judge or not, provided that the appointment of an acting judge is made with the approval of the judicial head of the court to which the judge is appointed and provided that the appointment is made only in special circumstances which render it necessary.
- (2) The appointment of an acting judge to avoid meeting a need for a permanent appointment is objectionable in principle.
- (3) The holder of a judicial office should not, during the term of that office, be dependent upon the Executive Government for the continuance of the right to exercise that judicial office or any particular jurisdiction or power associated with that office.
- (4) There is no objection in principle to the Executive Government appointing a judge, who holds a judicial office on terms consistent with principle (1), to exercise a particular jurisdiction associated with the judge's office, or to an additional judicial office, in either case for a limited term provided that:
- (a) the judge consents;
 - (b) the appointment is made with the consent of the judicial head of the Court from which the judge is chosen;
 - (c) the appointment is for a substantial term, and is not renewable;
 - (d) the appointment is not terminable or revocable during its term by the Executive Government unless:
 - (i) the judge is removed from the first mentioned judicial office; or
 - (ii) the particular jurisdiction or additional judicial office is abolished.
- (5) It should not be within the power of Executive Government to appoint a holder of judicial office to any position of

seniority or administrative responsibility or of increased status or emoluments within the judiciary for a limited renewable term or on the basis that the appointment is revocable by Executive Government, subject only to the need, if provided for by statute, to appoint acting judicial heads of Courts during the absence of a judicial head or during the inability of a judicial head for the time being to perform the duties of the office.

- (6) There is no objection in principle to the appointment of judges to positions of administrative responsibility within Courts for limited terms provided that such appointments are made by the Court concerned or by the judicial head of the Court concerned.

Dated this 10th day of April 1997

Part Four

From Our Database of Court Decisions

The Centre for the Independence of Judges and lawyers (CIJL) is now collecting judicial decisions that affect the independence of judges and lawyers. We thought that the ability to access these decisions from one source, such as the CIJL, would be beneficial not only to judges and lawyers, but also to those responsible for law reforms, policy makers, and legal researchers.

We have written to most of the Chief Justices of the world seeking their assistance. Until today, we have received judgments from Austria, Canada, France, South Korea, Malaysia, Norway, Pakistan, Poland, and Sri Lanka. We intend to publish extracts of the selected decisions we have received in this *Yearbook*.

Below are three landmark decisions from the Supreme Courts of Canada, Norway, and Pakistan. The case from Canada deals with the question of reduction of the salaries of provincial court judges. The case from Norway concerns the independence of temporary judges. The case from Pakistan deals with the appointment of the Chief Justice.

Decision N° 1

Supreme Court of Canada:

Reference Re: Independence of Judges of Provincial Court

Below is a summary of the decision of the Supreme Court of Canada in the Matter indexed as: Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island (File N°: 24508, 24778); *R. v. Campbell*; *R. v. Ekmecic*; *R. v. Wickman* (File N°: 24831); and, Manitoba Provincial Judges Assn. v. Manitoba (Minister of Justice) (File N°: 24846).

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

The Chief Justice wrote the 152-page decision. In his 44-page opinion, Justice La Forest dissented in part.

Dates of hearing: 1996: 3, 4 December; 1997: 18 September.

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These four appeals raise a range of issues relating to the independence of provincial courts, but are united by a single issue: whether and how the guarantee of judicial independence in s. 11(d) of the *Canadian Charter of Rights and Freedoms* restricts the manner by and the extent to which provincial governments and legislatures can reduce the salaries of Provincial Court judges. In these appeals, it is the content of the collective or institutional dimension of financial security for judges of Provincial Courts which is at issue.

In PEI, the province, as part of its budget deficit reduction plan, enacted the *Public Sector Pay Reduction Act* and reduced the salaries of Provincial Court judges and others paid from the public purse in the province. Following the pay reduction, numerous accused challenged the constitutionality of their proceedings in the Provincial Court, alleging that as a result of the salary reductions, the court had lost its status as an independence and impartial tribunal under s. 11(d) of the *Charter*. The Lieutenant Governor in Council referred to the Appeal Division two constitutional questions to determine whether the Provincial Court judges still enjoyed a sufficient degree of financial security for the purposes of s. 11(d). The Appeal Division found the Provincial Court judges to be independent, concluding that the legislature has the power to reduce their salary as part of an “overall public economic measure” designed to meet a legitimate government objective. Despite this decision, accused persons continued to raise challenges based on s. 11(d) to the constitutionality of the Provincial Court. The Lieutenant Governor in Council referred a series of questions to the Appeal Division concerning all three elements of the judicial independence of the Provincial Court: financial security, security of tenure, and administrative independence. The Appeal Division answered most of the questions to the effect that the Provincial Court was independent and impartial but held that Provincial Court judges lacked a sufficient degree of security of tenure to meet the standard set by s. 11(d) of the *Charter* because s. 10 of the *Provincial Court Act* (as it read at the time) made it possible for the executive to remove a judge without probable cause and without prior inquiry.

In Alberta, three accused in separate and unrelated criminal proceedings in Provincial Court challenged the constitutionality of their trials. They each brought a motion before the Court of Queen’s Bench, arguing that, as a result of the salary reduction of the Provincial Court judges pursuant to the *Payment to Provincial Judges Amendment Regulation* and s. 17(1) of the

Provincial Court Judges Act, the Provincial Court was not an independent and impartial tribunal for the purposes of s. 11(d). The accused also challenged the constitutionality of the Attorney-General's power to designate the court's sitting days and judges' place of residence. The accused requested various remedies, including prohibition and declaratory orders. The superior court judge found that the salary reduction of the Provincial Court judges was unconstitutional because it was not part of an overall economic measure – an exception he narrowly defined. He did not find s. 17 of the *Provincial Court Judges Act*, however, to be unconstitutional. On his own initiative, the superior court judge considered the constitutionality of the process for disciplining Provincial Court judges and the grounds for their removal and concluded that ss. 11(1)(b), (c) and (2) of the *Provincial Court Judges Act* violated s. 11(d) because they failed to adequately protect security of tenure. The superior court judge also found that ss. 13(1)(a) and (b) of that Act, which permit the Attorney-General to designate the judges' place of residence and the court's sitting days, violated s. 11(d). In the end, the superior court judge declared the provincial legislation and regulations which were the source of the s. 11(d) violations to be of no force or effect, thus rendering the Provincial Court independent. As a result, although the Crown lost on the constitutional issue, it was successful in its efforts to commence or continue the trials of the accused. The Court of Appeal dismissed the Crown's appeals, holding that it did not have jurisdiction under s. 784(1) of the *Criminal Code* to hear them because the Crown was "successful" at trial and therefore could not rely on s. 784(1), and because declaratory relief is non-prohibitory and is therefore beyond the ambit of s. 784(1).

In Manitoba, the enactment of the *Public Sector Reduced Work Week and Compensation Management Act* ("Bill 22"), as part of a plan to reduce the province's deficit, led to the reduction of the

salary of Provincial Court judges and of a large number of public sector employees. The Provincial Court judges through their Association launched a constitutional challenge to the salary cut, alleging that it infringed their judicial independence as protected by s. 11(d) of the *Charter*. They also argued that the salary reduction was unconstitutional because it effectively suspended the operation of the Judicial Compensation Committee ("JCC"), a body created by the *Provincial Court Act* whose task it is to issue reports on judges' salaries to the provincial legislature. Furthermore, they alleged that the government had interfered with judicial independence by ordering the withdrawal of court staff and personnel on unpaid days of leave, which in effect shut down the Provincial Court on those days. Finally, they claimed that the government had exerted improper pressure on the Association in the course of salary discussions to desist from launching this constitutional challenge, which also allegedly infringed their judicial independence. The trial judge held that the salary reduction was unconstitutional because it was not part of an overall economic measure which affects all citizens. The reduction was part of a plan to reduce the provincial deficit solely through a reduction in government expenditures. He found, however, that temporary reduction in judicial salaries are permitted under s. 11(d) in case of economic emergency and since this was such a case, he read down Bill 22 so that it only provided for a temporary suspension in compensation, with retroactive payment due after the Bill expired. The Court of Appeal rejected all the constitutional challenges-

Held (La Forest J. dissenting): The appeal from the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* should be allowed in part.

Held (La Forest J. dissenting on the appeal): The appeal and cross-appeal from the *Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* should be allowed in part.

Held: The appeal in the Alberta case from the Court of Appeal's judgement on jurisdiction should be allowed.

Held (La Forest J. dissenting in part): The appeal in the Alberta case from the Court of Queen's Bench's judgement on the constitutional issues should be allowed in part.

Held (La Forest J. dissenting in part): The appeal in the Manitoba case should be allowed.

Per Lamer C.J. and L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.: Sections 96 to 100 of the *Constitution Act, 1867*, which only protect the independence of judges of the superior, district and county courts, and s. 11(d) of the *Charter*, which protects the independence of a wide range of courts and tribunals, including provincial courts, but only when they exercise jurisdiction in relation to offences, are not an exhaustive and definitive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognised and affirmed by the preamble to the *Constitution Act, 1867* – in particular its reference to “a Constitution similar in Principle to that of the United Kingdom” – which is the true source of our commitment to this foundational principle. The preamble identifies the organising principles of the *Constitution Act, 1867* and invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text. The same approach applies to the protection of judicial independence. Judicial independence has now grown into a principle that extends to all courts, not just the superior courts of this country.

Since these appeals were argued on the basis of s. 11(d) of the *Charter*, they should be resolved by reference to that provision. The independence protected by s. 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the State. The three core characteristics of

judicial independence are security of tenure, financial security, and administrative independence. Judicial independence has also two dimensions: the individual independence of a judge and the institutional or collective independence of the court of which that judge is a member. The institutional role demanded of the judiciary under our Constitution is a role which is now expected of provincial courts. Notwithstanding that they are statutory bodies, in light of their increased role in enforcing the provisions and in protecting the values of the Constitution, provincial courts must enjoy a certain level of institutional independence.

While s. 11(d) of the *Charter* does not, as a matter of principle, automatically provide the same level of protection to provincial courts as s. 100 and the other judicature provisions of the *Constitution Act, 1867* do to superior court judges, the constitutional parameters of the power to change or freeze superior court judges' salaries under s. 100 are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges.

Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has three components.

First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticise the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the

salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart from them, it has to justify its decision according to a standard of simple rationality – if need be, in a court law. Across-the-board measures which affect substantially every person who is paid from the public purse are *prima facie* rational, whereas a measure directed at judges alone may require a somewhat fuller explanation.

Second, under no circumstances is it permissible for the judiciary – not only collectively through representative organisations, but also as individuals – to engage in negotiation over remuneration with the executive or representatives of the legislature. Any such negotiations would be fundamentally at odds with judicial independence. That does not preclude chief justices or judges, or bodies representing judges, however, from expressing concerns or making representations to governments regarding judicial remuneration.

Third, any reductions to judicial remuneration cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation. In order to guard against the possibility that government inaction could be used as a means of economic manipulation, by allowing judges' real salaries to fall because of inflation, and in order to protect against the possibility that judicial salaries will fall below the adequate minimum guaranteed by judicial independence, the body must convene if a fixed period of time has elapsed since its last report, in order to consider the

adequacy of judges' salaries in light of the cost of living and other relevant factors. The components of the institutional dimension of financial security need not be adhered to in cases of dire and exceptional financial emergency precipitated by unusual circumstances.

Prince Edward Island (PEI) References

The salary reduction imposed by s. 3(3) of the *Provincial Court Act*, as amended by s. 10 of the *Public Sector Pay Reduction Act*, was unconstitutional since it was made by the legislature without recourse to an independent, objective and effective process for determining judicial remuneration. In fact, no such body exists in PEI. However, if in the future, after PEI establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be *prima facie* rational, and hence justified, because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds. Since the province has made no submissions on the absence of an independent, effective and objective process to determine judicial salaries, the violation of s. 11(d) is not justified under s. 1 of the *Charter*.

Section 12(1) of the *Public Sector Pay Reduction Act*, which permits negotiations "between a public sector employer and employees" to find alternatives to pay reductions, does not contravene the principle of judicial independence since the plain meaning of a public sector employee does not include members of the judiciary.

Sections 12(2) and 13 of the *Provincial Court Act*, which confer a discretion on the Lieutenant Governor in Council to grant leaves of absence due to illness and sabbatical leaves, do not affect the individual financial security of a judge. Discretionary benefits do not undermine judicial independence.

The question concerning the lack of security of tenure created by s. 10 of the *Provincial Court Act* has been rendered moot by the adoption in 1995 of a new s. 10 which meets the requirements of s. 11(d) of the *Charter*.

The location of the Provincial Court's offices in the same building as certain departments which are part of the executive, including the Crown Attorneys' offices, does not infringe the administrative independence of the Provincial Court because, despite the physical proximity, the court's offices are separate and apart from the other offices in the building. As well, the fact that the Provincial Court judges do not administer their own budget does not violate s. 11(d). This matter does not fall within the scope of administrative independence, because it does not bear directly and immediately on the exercise of the judicial function. For the same reason, the Attorney-General's decision both to decline to fund and to oppose an application to fund legal counsel for the Chief Judge and judges of the Provincial Court as interveners in a court case did not violate the administrative independence of the court. The designation of a place of residence of a particular Provincial Court judge, pursuant to s. 4 of the *Provincial Court Act*, does not undermine the administrative independence of the judiciary. Upon the appointment of a judge to the Provincial Court, it is necessary that he or she be assigned to a particular area. Furthermore, the stipulation that the residence of a sitting judge only be changed with that judge's consent is a sufficient protection against executive interference. Finally, s. 17 of the *Provincial Court Act*, which authorises the Lieutenant Governor in Council to make regulations respecting the duties and powers of the Chief Judge (s. 17(b)) and respecting rules of court (s. 17(c)), must be read subject to s. 4(1) of that Act, which confers broad administrative powers on the Chief Judge, including the assignment of judges, sittings of the court and court lists, the allocation of courtrooms, and the direction of administrative staff carrying out these functions. Section 4(1) therefore vests with the Provincial Court, in the person of the Chief Judge, control over decisions

which touch on its administrative independence. In light of the broad provisions of s. 4 (1), s. 17 does not undermine the administrative independence of the court.

Alberta Cases

The Court of Appeal had jurisdiction to hear the Crown's appeals under s. 784(1) of the *Criminal Code*. First, it is unclear that only unsuccessful parties can avail themselves of s. 784(1). In any event, even if this limitation applies, the Court of Appeal had jurisdiction. Although the Crown may have been successful in its efforts to commence and continue the trials against the accused, it lost on the underlying findings of unconstitutionality. Second, this is a case where the declaratory relief was essentially prohibitory in nature, and so came within the scope of s. 784(1), because the trial judgement granted relief sought in proceedings by way of prohibition. This Court can thus exercise the Court of Appeal's jurisdiction and consider the present appeal.

The salary reduction imposed by the *Payment to Provincial Judges Amendment Regulation* for judges of the Provincial Court is unconstitutional because there is no independent, effective and objective commission in Alberta which recommends changes to judges' salaries. However, if in the future, after Alberta establishes a salary commission, that commission were to issue a report with recommendations which the provincial legislature declined to follow, a salary reduction such as the impugned one would probably be *prima facie* rational because it would be part of an overall economic measure which reduces the salaries of all persons who are remunerated by public funds.

Section 17(1) of the *Provincial Court Judges Act*, which provides that the Lieutenant Governor in Council "may" set judicial salaries, violates s. 11(d) of the *Charter*. Section 17(1) does not comply with the requirements for individual financial security because it fails to lay down in mandatory terms that Provincial Court judges shall be provided with salaries.

Section 13(1)(a) of the *Provincial Court Judges Act*, which confers the power to “designate the place at which a judge shall have his residence”, and s. 13(1)(b), which confers the power to “designate the day or days on which the Court shall hold sittings”, are unconstitutional because both provisions confer powers on the Attorney-General to make decisions which infringe upon the administrative independence of the Provincial Court. Section 13(1)(a)’s constitutional defect lies in the fact that it is not limited to the initial appointment of judges. Section 13(1)(b) violates s. 11(d) because the administrative independence of the judiciary encompasses, *inter alia*, “sittings of the court”.

The province having made no submissions on s. 1 of the *Charter*, the violations of s. 11(d) are not justified. The *Payment to Provincial Judges Amendment Regulation* is therefore of no force or effect. However, given the institutional burdens that must be met by Alberta, this declaration of invalidity is suspended for a period of one year. Sections 13(1)(a) and (b) and 17(1) of the *Provincial Court Judges Act* are also declared to be of no force or effect.

Since the accused did not raise the constitutionality of s. 11(1)(b), (c) and (2) of the *Provincial Court Judges Act*, it was not appropriate for the superior court judge to proceed on his own initiative, without the benefit of submissions and without giving the required notice to the Attorney-General of the province, to consider their constitutionality, let alone make declarations of invalidity.

Manitoba Case

The salary reduction imposed by s. 9(1) of Bill 22 violated s. 11(d) of the *Charter*, because the government failed to respect the independent, effective and objective process – the JCC – for setting judicial remuneration which was already operating in Manitoba. Moreover, at least for the 1994-95 financial year, s. 9(1)(b) effectively precluded the future involvement of the JCC. Although Manitoba may have faced serious economic

difficulties in the time period preceding the enactment of Bill 22, the evidence does not establish that it faced sufficiently dire and exceptional circumstances to warrant the suspension of the involvement of the JCC. Since Manitoba has offered no justification for the circumvention of the JCC before imposing the salary reduction on Provincial Court judges, the effective suspension of the operation of the JCC is not justified under s. 1 of the *Charter*. The phrase "as a judge of the Provincial Court or" should be severed from s. 9(1) of Bill 22 and the salary reduction imposed on the Provincial Court judges declared to be of no force or effect. Even though Bill 22 is no longer in force, that does not affect the fully retroactive nature of this declaration of invalidity. Mandamus should be issued directing the Manitoba government to perform its statutory duty, pursuant to s. 11.1(6) of the *Provincial Court Judges Act*, to implement the report of the standing committee of the provincial legislature, which had been approved by the legislature. If the government persists in its decision to reduce the salaries of Provincial Court judges, it must remand the matter to the JCC. Only after the JCC has issued a report, and the statutory requirement laid down in s. 11.1 of the *Provincial Court Judges Act* have been complied with, is it constitutionally permissible for the legislature to reduce the salaries of the Provincial Court judges.

The Manitoba government also violated the judicial independence of the Provincial Court by attempting to engage in salary negotiations with the Provincial Judges Association. The purpose of these negotiations was to set salaries without recourse to the JCC. Moreover, when the judges would not grant the government an assurance that they would not launch a constitutional challenge to Bill 22, the government threatened to abandon a joint recommendation. The surrounding circumstances indicate that the Association was not a willing participant and was effectively coerced into these negotiations. No matter how one-sided, however, it was improper for government and the judiciary to engage in salary negotiations. The expectations of give and take, and of threat and counter-

threat, are fundamentally at odds with judicial independence. It raises the prospect that the courts will be perceived as having altered the manner in which they adjudicate cases, and the extent to which they will protect and enforce the Constitution, as part of the process of securing the level of remuneration they consider appropriate. The attempted negotiations between the government and the judiciary were not authorised by a legal rule and thus are incapable of being justified under s. 1 of the *Charter* because they are not prescribed by law.

Finally, the Manitoba government infringed the administrative independence of the Provincial Court by closing it on a number of days. It was the executive, in ordering the withdrawal of court staff, pursuant to s. 4 of Bill 22, several days before the Chief Judge announced the closing of the Provincial Court, that shut down the court. Section 4 is therefore unconstitutional. Even if the trial judge had been right to conclude that the Chief Judge retained control over the decision to close the Provincial Court throughout, there would nevertheless have been a violation of s. 11(d), because the Chief Judge would have exceeded her constitutional authority when she made that decision. Control over the sittings of the court falls within the administrative independence of the judiciary. Administrative independence is a characteristic of judicial independence which generally has a collective or institutional dimension. Although certain decisions may be exercised on behalf of the judiciary by the Chief Judge, important decisions regarding administrative independence cannot be made by the Chief Judge alone. The decision to close the Provincial Court was precisely this kind of decision. Manitoba has attempted to justify the closure of the Provincial Court solely on the basis of financial considerations, and for that reason, the closure of the court cannot be justified under s. 1. Although reading down s. 4 of Bill 22 to the extent strictly necessary would be the normal solution in a case like this, this is difficult in relation to violations of s. 11(d) because, unlike other *Charter* provisions, s. 11(d) requires that judicial independence be secured by "objective

conditions or guarantees". To read down s. 4 to its proper scope would in effect amount to reading in those objective conditions and guarantees. This would result in a fundamental rewriting of the legislation. If the Court, however, were to strike down s. 4 in its entirety, the effect would be to prevent its application to all those employees of the Government of Manitoba who were required to take leave without pay. The best solution in the circumstances is to read s. 4 as exempting provincial court staff from it. This is the remedy that best upholds the *Charter* values involved and will occasion the lesser intrusion on the role of the legislature.

Per La Forest J. (dissenting in part): There is agreement with substantial portions of the majority's reasons but not with the conclusions that s. 11(d) of the *Charter* prohibits salary discussions between governments and judges, and forbids governments from changing judges' salaries without first having recourse to "judicial compensation commissions". There is also disagreement with the assertion concerning the protection that provincially appointed judges, exercising functions other than criminal jurisdiction, are afforded by virtue of the preamble to the *Constitution Act, 1867*. Only minimal reference was made to this issue by counsel and, in such circumstances, the Court should avoid making far-reaching conclusions that are not necessary to the case before it. Nevertheless, in light of the importance that will be attached to the majority's views, the following comments are made. At the time of the confederation, there were no enforceable limits on the power of the British Parliament to interfere with the judiciary. By expressing, by way of preamble, a desire to have "a Constitution similar in Principle to that of the United Kingdom", the framers of the *Constitution Act, 1867* did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, by virtue of ss. 99-100 of the *Constitution Act 1867* did not give courts the power to strike down legislation violating the principle of judicial independence. The framers did, however, by virtue of ss. 99-100 of the *Constitution Act, 1867*, entrench the

fundamental components of judicial independence set out in the *Act of Settlement* of 1701. Because only superior courts fell within the ambit of the *Act of Settlement* and under "constitutional" protection in the British sense, the protection sought to be created for inferior courts in the present appeals is in no way similar to anything found in the United Kingdom. Implying protection for judicial independence from the preambular commitment to a British-style constitution, therefore, entirely misapprehends the fundamental nature of that constitution. To the extent that courts in Canada have the power to enforce the principle of judicial independence, this power derives from the structure of Canadian, and not British, constitutionalism. Our Constitution expressly contemplates both the power of judicial review (in s. 52 of the *Constitution Act, 1982*) and guarantees of judicial independence (in ss. 96-100 of the *Constitution Act, 1867* and s. 11(d) of the *Charter*). Given that the express provisions dealing with constitutional protection for judicial independence have specifically spelled out their application, it seems strained to extend the ambit of this protection by reference to a general preambular statement. It is emphasised that these express protections for judicial independence are broad and powerful. They apply to all superior court and other judges specified in s. 96 of the *Constitution Act, 1867* as well as to inferior (provincial) courts exercising criminal jurisdiction. Nothing presented in these appeals suggests that these guarantees are not sufficient to ensure the independence of the judiciary as a whole. Should the foregoing provisions be found wanting, the *Charter* may conceivably be brought into play.

While salary commissions and a concomitant policy to avoid discussing remuneration other than through the making of representations to commissions may be desirable as matters of legislative policy, they are not mandated by s. 11(d). To read these requirements into that section represents both an unjustified departure from established precedents and a partial usurpation of the provinces' power to set the salaries of inferior

court judges pursuant to ss. 92(4) and 92(14) of the *Constitution Act, 1867*. The guarantee of judicial independence inhering in s. 11(d) redounds to the benefit of the judged, not the judges. Section 11(d) therefore does not grant judges a level of independence to which they feel they are entitled. Rather, it guarantees only that degree of independence necessary to ensure that tribunals exercising criminal jurisdiction act, and are perceived to act, in an impartial manner. Judicial independence must include protection against interference with the financial security of the court as an institution. However, the possibility of economic manipulation arising from changes to judges' salaries as a class does not justify the imposition of judicial compensation commissions as a constitutional imperative. By employing the reasonable perception test, judges are able to distinguish between changes to their remuneration effected for a valid public purpose and those designed to influence their decisions. Although this test applies to all changes to judicial remuneration, different types of changes warrant different levels of scrutiny. Changes to judicial salaries that apply equally to substantially all persons paid from public funds would almost inevitably be considered constitutional. Indeed, a reasonable, informed person would not view the linking of judges' salaries to those of civil servants as compromising judicial independence. Differential increases to judicial salaries would warrant a greater degree of scrutiny, and differential decreases would invite the highest level of review. In determining whether a differential change raises a perception of interference, regard must be had to both the purpose and the effect of the impugned salary change. In considering the effect of differential changes on judicial independence, the question is whether the distinction between judges and other persons paid from public funds amounts to a "substantial" difference in treatment. Trivial or insignificant differences are unlikely to threaten judicial independence. Finally, in most circumstances, a reasonable, informed person would not view direct consultations between the government and the judiciary over salaries as imperilling judicial independence. If

a government uses salary discussions to attempt to influence or manipulate the judiciary, the government's actions will be reviewed according to the same reasonable perception test that applies to salary changes.

Since the governments of Prince Edward Island and Alberta were not required to have recourse to a salary commission, the wage reductions they imposed on provincial court judges as part of an overall public economic measure were consistent with s. 11(d) of the *Charter*. There is no evidence that the reductions were introduced in order to influence or manipulate the judiciary. A reasonable person would not perceive them, therefore, as threatening judicial independence. As well, since salary commissions are not constitutionally required, the Manitoba government's avoidance of the commission process did not violate s. 11(d). Although Bill 22 treated judges differently from most other persons paid from public funds, there is no evidence that the differences evince an intention to interfere with judicial independence. Differences in the classes of persons affected by Bill 22 necessitated differences in treatment. Moreover, the effect of the distinctions on the financial status of judges *vis-à-vis* others paid from public moneys is essentially trivial. The Manitoba scheme was a reasonable and practical method of ensuring that judges and other appointees were treated equally in comparison to civil servants. A reasonable person would not perceive this scheme as threatening the financial security of judges in any way. However, the Manitoba government's refusal to sign a joint recommendation to the JCC, unless the judges agreed to forego their legal challenge of Bill 22, constituted a violation of judicial independence. The government placed economic pressure on the judges so that they would concede the constitutionality of the planned salary changes. The financial security component of judicial independence must include protection of judges' ability to challenge legislation implicating their own independence free from the reasonable perception that the government might penalise them financially for doing so."

Decision N° 2

Supreme Court of Norway:

Jens Viktor Plahte vs. The State

Below is the judgment pronounced by the Supreme Court of Norway on 19 December 1997 in case N° 82 B/1997, N° 108/1997: Jens Viktor Plahte (Advocate Knut Rognlien) versus The State by the Ministry of Justice (The Attorney General by advocate Fredrik Charlo Borchsenius).

Present: Justice Matningsdal, Justice Flock, Justice Tjomsland, Justice Aarbakke, Justice Aasland.

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“Justice Matningsdal: In a case concerning the exemption of a conscientious objector from military service, it is appealed principally against procedural error. It is stated that one of the high court of appeal judges was not competent; alternatively against the decision’s contents.

Jens Viktor Plahte, born 1963, did his initial military service in the Navy in 1983 and 1984. He was thereafter transferred to the Home Guard. When Norway in the winter of 1991 participated with medical service and a naval vessel in the Gulf War, Plahte came to the conclusion that the Norwegian defence had become of a more offensive character than it had before when it was merely a defence against invasion. As a result of this he found that he could no longer do his military service and applied in 1994 for exemption. In a resolution 16 September 1994 by the Ministry of Justice his application was dismissed.

Plahte did not agree to serving further military service. He was summoned by the State by the Ministry of Justice for Oslo City Court which on 21 September 1995 pronounced judgment with this conclusion:

“The conditions to exempt Jens Viktor Plahte born 5.10.63 from military service in accordance with act of 19.3.65 N° 3 are fulfilled.”

Borgarting High Court of Appeal pronounced on 9 December 1996, on appeal, judgment with this conclusion:

“The conditions to exempt Jens Viktor Plahte, born 5 October 1963, from military service in accordance with act of 19 March 1965 No. 3 are not fulfilled.”

The facts of the case and the parties' arguments for the earlier instances can be seen from the judgments.

The appeal hearing for the high court of appeal was held on 12 November 1996.

One of the high court judges was temporary appointed judge Erik Chr. Stoltz. Up until 1996 he had been engaged in different private activities, in the latest years as managing director of an insurance company. This last position came to an end due to reorganisation.

Stoltz had been an applicant for the office as judge in Borgarting - at that time called Eidsivating - High Court of Appeal which was announced vacant 31 January 1995. He was not appointed to the position.

In a letter of 12 June 1996 from the Ministry of Justice he was appointed - without public announcement of the vacancy - temporary judge at Borgarting High Court of Appeal for the period 12 August - 31 December 1996. At the same time he had applied for three high court judge offices that were publicly announced 1 June 1996, and which were decided by royal decree of 27 September 1996. He was not appointed to any of these positions.

Stoltz applied also for one of the six temporary offices as high court judge which were publicly announced 31 August 1996, for a time period of one year from 1 January 1997, and with the possibility of prolongation up to 1/2 year. These offices were announced as a part of an elimination of arrears project at Borgarting High Court of Appeal. The closing date for the applications was 27 September 1996 and by royal decree of 29 November 1996 he became temporary engaged in one of these offices.

In the spring of 1997 a vacant office as ordinary judge was announced at Borgarting High Court of Appeal. Stoltz applied for the position and was appointed by royal decree 13 June 1997.

At the opening of the appeal hearing the legal representative for Plahte made an objection to Stoltz' competence. Stoltz withdrew from the proceedings concerning his competence, and he was replaced by the president of the court. The high court decided that Stoltz should not recede his position.

Jens Viktor Plahte has appealed the high court's decision to the Supreme Court. The appeal concerns procedural error and misapplication of the law.

Plathe's arguments:

The grounds for the appeal against procedural error is that temporary high court judge Stoltz was incompetent according to the Courts of Justice Acts section 108 which states that a judge is incompetent when there exist "other special circumstances ... that can impair the confidence in his impartiality". The question is not whether Stoltz would let himself be influenced by the circumstances, but whether they from an objective point of view are of such a character that they are liable to impair the public's confidence in that the case is administered by a competent judge. It is underlined that there is no reason to believe that Stoltz in

his decision actually was influenced by the fact that he was a temporary judge.

In the evaluation of the question of competence one must first of all emphasise that it is in general inappropriate to use temporary judges for other reasons than to substitute a judge who for one reason or another is called out of office for a period of time. Temporary appointments that are not made on this background will hereafter be referred to as non-ordinary temporary appointments. It must moreover be pointed out that in the present case it was a question of a short temporary appointment of 4 1/2 months.

The temporary high court office positions were initially given to the high court for one year, but the possibility for prolongation was not improbable. A prolongation of temporary appointments was dependent on the Ministry of Justice - this makes in general the temporary appointments more questionable than for substitutes for appointed judges, hereafter referred to as ordinary temporary appointments.

When the appeal hearing was held, Stoltz had applied for one of the ordinary temporary offices. At the relevant time there could be no doubt that Stoltz aimed at a career as judge, finally as permanently appointed judge. This factor has to be emphasised as a temporary appointed judge cannot expect automatically to be appointed as a permanent judge, see the decision in Rt. (The journal of the Supreme Court jurisprudence) 1995 page 506.

It is essential that it is the State represented by the Ministry of Justice that is party to the case. Even though the judges are appointed in cabinet meetings, it is in ordinary practice the Ministry of Justice that is the deciding factor. When appointed, the applicants do not have insight into the evaluations that have been made. In this regard, it cannot be decisive that cases concerning conscientious objectors are dealt with by another department in the ministry, i.e. the Civilian National Service

Section of the Rescue and Stand-by Department, while the appointment of judges are dealt with by the Court of Justice Department. The public is not acquainted with this division of departments and which connections there are between them. This case differs from the decision in Rt. 1993 page 1566 where the Ministry of Agriculture was party to the case.

A factor in this case is, furthermore, that the ministry's political leadership has considered both Stoltz' position and Plahte's case. The city court's decision concerning Plahte was on request presented to one of the secretaries of State before the appeal, and the temporary appointments had to be considered in cabinet meeting as they were of long duration. The significance of this is strengthened by Plahte's case being considered controversial, and that it was interesting both from a political point of view and as a matter of principle.

It is stated that no consideration of a practical nature justifies that Stoltz should be accepted as judge in the case. This is illustrated by among other things that Oslo City Court previously practised an arrangement where temporary judges never decided cases with the State as party.

The question of competence is not dependent upon whether any one of the above mentioned factors alone can make Stoltz incompetent. The subject of the evaluation is whether the sum of them leads to incompetence.

When deciding this issue it must also be taken into consideration that there have been raised objections to Stoltz' competence in the present case.

As regards Norway's responsibilities according to the European Convention on Human Rights and the United Nations Covenant on Civil and Political Rights, it is pointed out that the Court of Justice Act does not contain any provision incorporating them into the national legal order as law of the land. The Convention must nevertheless be considered incorporated in Norwegian procedural law - both the Civil

Procedure Acts section 36 a , the Enforcement Acts section 1-4, and the Criminal Procedure Acts section 4 contain such provisions. Alternatively, it is stated that these conventions, as a result of the principle of presumption, nevertheless, are important factors in the interpretation.

Both the European Convention on Human Rights Article 6 and the United Nations Covenant on Civil and Political Rights Article 14 require that cases shall be conducted by an independent and impartial court. Cases concerning conscientious objectors do indeed lie outside of what the European Convention on Human Rights Article 6 considers as cases concerning "civil rights", but it is nevertheless certain that the requirement for impartial and independent courts applies equally in these cases.

As I have come to the conclusion that the appeal concerning procedural error must succeed, I shall not go any further into what was argued in regard to the application of law.

Jens Viktor Plahte has made this demand:

"Principally: Borgarting High Court of Appeals judgement is set aside.

Alternatively: The conditions to exempt Jens Viktor Plahte, born 5.20.1963 from military service in accordance with act of 19.3.1965 N° 3 are fulfilled."

The State's arguments:

The State by the Ministry of Justice contests that Stoltz was incompetent according to the Court of Justice Acts section 108.

The State agrees that the question is whether there existed conditions that from an objective point of view have relevance for Stoltz' competence. It is contested that the invoked conditions are "qualified" to create doubt as to Stoltz' impartiality.

It is pointed out that the different departments in the Ministry of Justice do not have contact with each other in the

consideration of individual cases. The Civilian National Service Section of the Rescue and Stand-By Department considers each year about 4.000 individual cases, and only a small number of these are referred to the department's leadership for decision. The reason why the present case was referred to one of the State secretaries is that the city court's unusual result had attracted the interest of the State secretary. The case was both referred and returned without any comments. Since the reference was made at least one year before the temporary appointment, no one in the ministry could have seen any relationship between the two cases.

This case differs very little from the one reported in Rt. 1993 page 1566, where the Selection Committee of the Supreme Court decided that the temporary appointed high court judge was not incompetent. It is not decisive that the case was directed against the State represented by the Ministry of Agriculture. The King in Council, who appoints judges and temporary judges for longer periods of time, is also superior to the Ministry of Agriculture. As the different departments within the Ministry of Justice function independently from one another, the difference is not a great one.

The State agrees that it is important how the situation is viewed from the outside. The public at large would nevertheless not have reactions against Stoltz being judge in the present case. According to the State's point of view, a judge can only be incompetent as a result of a temporary appointment if the case directly touches upon the Court of Justice Department's area or concerns the administration of the courts.

The State has furthermore pointed out examples from recent years where temporary appointed judges have taken part in cases concerning conscientious objectors and other cases that directly involve the Ministry of Justice, where there has not been made objections to the competence of the judge in question.

Nor can an overall assessment of the relevant considerations lead to incompetence. Norway is a small country where one must accept to a certain degree connections between parties without this leading to incompetence. The use of temporary appointed judges is moreover necessary, so that one must be cautious in stating incompetence.

It is argued that there do not exist clear international law rules in this area. With background in existing practice it cannot be maintained that Stoltz was incompetent according to the European Convention on Human Rights Article 6 and the United Nations Covenant on Civil and Political Rights Article 14 requiring independence and impartiality.

The State by the Ministry of Justice has made this demand:

“The high court of appeal’s judgement is confirmed.”

The Supreme Court:

My conclusion is that the appeal concerning procedural error must succeed and that the high court’s judgment with its appeal hearing is set aside and the case referred back for retrial, see the Civil Procedure Acts section 384 second paragraph N° 1 and section 385 as compared to section 386 second paragraph.

The situation of temporary appointed high court judge Stoltz is not regulated by the specific grounds for incompetence stated in the Court of Justice Acts sections 106 and 107, but section 108 lays down that, in addition, no one can be judge when there exist “other special circumstances ... that can impair the confidence in his impartiality”. This case concerns the question of whether there exist circumstances that from an objective point of view entails incompetence, more precisely if Stoltz’ situation as temporary judge gives reason to doubt his competence.

The Court of Justice Acts section 108 second subsection states that in cases of doubt it is relevant whether the party has claimed that the judge recedes his position. This was done in this

case and distinguishes it therefore from other cases where temporary judges have participated in corresponding cases.

A substantial aim of the rules concerning competence is that the law-seeking public shall be able to trust that the case is decided by a judge who does not have a dependence or other ties to the parties in question that can influence his objectivity. In court practice great significance is therefore placed on how the relationship objectively is viewed from the outside.

The courts guarantee the rule of law for citizens in their relations to the legislative power and the executive power - they can try the constitutionality of laws and have judicial power to review the decisions of the executive. Since the State is party in a considerable amount of cases decided by the courts, it is especially important that the law-seeking public can have full confidence in the individual judge making his judgement without having to consider any negative consequences for his position. The judges' irremovability in accordance with the Norwegian Constitutions section 22 is therefore fundamental for the trust that the law-seeking public can have in their objectivity.

Temporary judges do not have the same protection of their positions as permanently appointed judges in office have. For practical reasons one cannot completely avoid the use of temporary appointed judges, but because of the difference in the protection of their positions, the use is open to objections and should be restricted as far as possible. This has also been emphasised by the Supreme Court, see especially in Rt. 1984 page 979 and Rt. 1995 page 506.

Corresponding statements have also been expressed in the public debate. In this connection I can point out first of all Supreme Court Justice, later Chief Justice Wold, who in the periodical of the Norwegian Association of Judges stated:

In my view it is in conflict with due consideration for the independence of the administration of justice that a major part of the courts' work through a longer

period of time has been carried out by summoned or temporary appointed judges because one does not wish to organise the courts with the permanent judge offices that the large amount of cases necessitates.

I think that it is quite fundamental for the confidence in the courts that the demand for permanent judge offices is maintained as much as possible unabridged in all instances. It has already been stated that the temporary appointed and provisional judges should not take part in cases where the State is party, and I am informed that Oslo City Court, where most of the cases concerning public administration are decided, follows the practice that only permanently appointed judges consider cases against the State. Whether or not this is formally absolutely correct I shall not say, but I can understand it. I believe there can be reason to bring up the topic of the use of temporary appointed and provisional judges in a discussion of principle aimed at bringing the temporary appointments of judges into more established forms.

Castberg, *Norges Statsforvaltning*, volume II (1964) page 74 underlines also the problems of principle that are connected with the temporary appointment of judges. He emphasises that it is only compatible with section 22 of the Norwegian Constitution to appoint temporary judges if they are equally as protected from removal as permanently appointed senior civil servants in "every respect that does not affect the reason for which the senior civil servant is only temporary appointed." One can also refer to Supreme Court Justice Hiorthøy, from the book *Den dømmende makt* (1967) pages 101-104.

I can also mention that the Storting's (Parliament's) Protocol Committee in 1956 was critical to the extensive use of temporary judges, see Innst. O IV C (1956) page 3.

In addition, I can mention that in a question in the Storting 26 April 1961 the representative Wikborg emphasised the danger of using non-ordinary temporary appointments of judges. In his answer Cabinet Minister Haugland pronounced that he, to a large extent, agreed and stated that the ministry had as an aim to make as many as possible of the offices permanent. In the further debate the representative Ramndal also expressed similar points of view, see *The Storting's Discussions 1960-61*, starting on page 296.

Similar attitudes have also been expressed in the Storting in later years. I can especially point out that in the Storting's Proposition No. 1, 1992-93 on page 36 the ministry states:

The ministry will continue with temporary appointments of judges in the high court in the period when the elimination of arrears operation is in progress. After this period it will be evaluated whether or not the offices should be made permanent. The use of temporary appointments is in general questionable, but the department cannot see any problems in this practice as a measure in a time limited operation.

To this the Judiciary Committee stated in Budget-innst. S. No. 4 1992-93 p 13:

The committee agrees with the ministry that one must be cautious when appointing judges on a temporary basis. With regard to the foreseeable development in the number and dimension of cases in the high court, the committee asks the ministry to consider permanent appointments of judges and a possible further strengthening of the staff in general when reviewing the budget.

Among other critical views to the use of temporary judges I can point to Eivind Smith, *The Supreme Court and Democracy* (1993) page 331 and Kåre Willoch in *Lov og Rett* 1997 page 146-154 on page 152.

Even though strong arguments can be raised against the use of temporary appointed judges, they cannot for practical reasons be completely avoided. It is my evaluation that it is especially the non-ordinary temporary appointments that can give cause for doubt. But both for non-ordinary and ordinary temporary appointed judges one must consider the constitutional uncertainties that are linked to the use of temporary judges when deciding in which cases the individual judge can take part. It is extremely important that conditions are such that these judges can be deemed to have the same independence as the permanently appointed judges in office, see Rt. 1995 page 506 on page 512 and Rt. 1995 page 861. But because the mentioned arguments may have different impact according to the nature of the case, the result does not necessarily have to be the same for both groups. I therefore emphasise that the further discussion deals with non-ordinary appointments.

When assessing the temporary appointed judges' competence it is an important factor that they, as was the situation for Stoltz, often are interested in a future career as judge. Taking into consideration that they cannot even rely on having any priority in becoming appointed as judge or obtaining a prolongation of the temporary position, see Rt. 1995 page 506, the law-seeking public may raise the question whether this situation can influence them in their decision making.

The significance of this circumstance is not the same in all cases that touch upon public interests. As the prosecuting authority has a completely independent position, it must be clear that a temporary appointed judge on this basis hardly can be incompetent in a criminal case. Nor can it be in every respect decisive that the State is party. See in this connection Rt. 1993 page 1566 where one of the parties was the State represented by the Ministry of Agriculture. Here, however, the high court stated in its grounds, which the Selection Committee of the Supreme Court essentially agreed with, that it could be otherwise if the case "should involve a body closely tied to the appointing power".

The question comes in my opinion in another position when the State represented by the Ministry of Justice is party. It is true that judges are appointed by the King in Council. This is the case also for temporary appointments for longer periods. But it is the Ministry of Justice that prepares the cases, and which practically speaking has the decisive influence on the choice of person.

In this regard it cannot according to my view be decisive that the appointment of judges and cases concerning conscientious objectors are prepared in different departments within the ministry. This is an internal working arrangement, and it is also a reality that when the two departments belong to the same ministry, they have mutual administrative and political leadership with what this implies. It cannot be expected that the law-seeking public is informed of or understands the importance of a ministry's division in departments. For the public it is natural to view the Ministry of Justice as one entity.

I find that when the State by the Ministry of Justice is a party, the nature of the case or its complexity should not be taken into consideration.

I have on this background come to the conclusion, as mentioned, that temporary appointed judge Stoltz was incompetent, in such a way that the judgement in the present case must be set aside and the case referred back to the high court for retrial in accordance with the Civil Procedure Acts section 384 second paragraph N° 1, as compared to section 386 second paragraph.

With reference to the procedural hearing, I underline that the outcome would have been the same even if Stoltz, at the time of the appeal hearing, had not had a new application for appointment under evaluation. The situation illustrates the objections that may be raised when judges who have a non-ordinary appointment, are judges in cases of this nature. And for the public it may have as a result that the question of the objectivity of judges is raised more often.

I vote for this

judgement:

The high court's judgement with its appeal hearing is set aside, and the case referred back to the high court for retrial.

Justice **Flock**: I agree on the essential points and in the result of the first voter

Justice **Tjomsland**: Likewise.

Justice **Aarbakke**: Likewise.

Justice **Aasland**: Likewise.

After the vote the Supreme Court pronounced this

judgement:

The high court's judgement with its appeal hearing is set aside, and the case referred back to the high court for retrial."

Decision N° 3

Supreme Court of Pakistan:

Re. Appointment of Justice Sajjad Ali Shah as Chief Justice of Pakistan

Below is the order passed by the Supreme Court of Pakistan (original jurisdiction) in Constitution Petition N° 248-q/1997; const. P N° 1-P/97; CMA N° 992/97 in CP N° 140-q/97 & const. P N° 55/97 (under article 184(3) of the constitution of the Islamic Republic of Pakistan, 1973).

Present: Mr Justice Saiduzzaman Siddiqui, Mr Justice Fazal Illahi Khan, Mr Justice Irshad Hasan Khan, Mr Justice Raja Afrasiab Khan, Mr Justice Nasir Aslam Zahid, Mr Justice Munawar Ahmad Mirza, Mr Justice Khalil-ur-Rehman Khan, Mr Justice Sh. Ijaz Nisar, Mr Justice Abdur Rehman Khan, Mr Justice Sh. Riaz Ahmad.

Dates of hearing: 2-5, 10-12, 15-19, 22 and 23 December 1997.

* * *

“Order

For detailed reasons to follow, we pass the following short order disposing of constitution Petition N° 1-P of 1997,

Akhunzada Behrawar Saeed vs. Mr Justice Sajjad Ali Shah and others; Constitutional Petition N° 248-Q of 1997, Malik Asad Ali vs. Federation of Pakistan and others and Constitutional Petition N° 55 of 1997, Nihal Hashmi vs. Federation of Pakistan and others, all three petitions filed under article 184(3) of the Constitution of the Islamic Republic of

Pakistan (hereinafter referred to as 'the constitution') challenging directly the appointment of Mr Justice Sajjad Ali Shah as the Chief Justice of Pakistan, and a miscellaneous application N° 992 of 1997 in CP N° 140-Q of 1996, Munir Ahmed vs. Barra Khan and others, attacking collaterally the validity of the appointment of Mr Justice Sajjad Ali Shah, as the Chief Justice of Pakistan.

2. Preliminary objections as to the maintainability of the above petitions have been raised on the grounds that the petitions have been raised on the grounds that the petitioners have no locus-standi and no question of violation of any of the fundamental rights guaranteed under Chapter 1 of Part II of the constitution arisen in these cases.
3. Right of access to impartial and independent courts/tribunals is a fundamental right of every citizen. The exercise of this right is dependent on the independence of the judiciary which can be secured only through appointment of persons of high integrity, repute and competence, strictly in accordance with the procedure prescribed under the constitution to the high office of the judges of superior courts.

The selection of a person to the high office of the Chief Justice of Pakistan is a pivotal appointment for maintaining the independence of the judiciary and for providing a free and unobstructed access to impartial and independent courts/tribunals to the ordinary citizens. Therefore, any deviation from the method prescribed under the constitution for appointment to the high office of Chief Justice of Pakistan would give rise to the infringement of the right of a citizen to have free, fair and equal access to an independent and impartial court/tribunal, thus violating the rights guaranteed under Articles 9 and 25 of the constitution.

4. A similar contention, raised about the maintainability of the petition in the case of Al-Jehad Trust vs. Federation of

Pakistan (PLD 1996 SC 324), was repelled by this court, as follows:

“12. As regards the locus standi of Mr Khairi, I may observe that Mr Khairi has referred to Rule 165 of Pakistan Legal Practitioners and Bar Councils Rules, 1976, hereinafter referred to as the rules, framed under Section 55 of the Bar Councils Act, 1973, which provides as follows:

165. It is the duty of advocates to endeavour to prevent political considerations from outweighing judicial fitness in the appointment and selection of judges. They should protest earnestly and actively against the appointment or selection of persons who are unsuitable for the bench and thus should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character which may embarrass their free and fair consideration of the questions before them for decision. The aspiration of advocates for judicial positions should be governed by an impractical estimate of their ability to add honour to the office and not by a desire for the distinction the position may bring to themselves.”

- (i) Sharaf Faridi and three others vs. The Federation of the Islamic Republic of Pakistan through the Prime Minister of Pakistan and another (PLD 1989 Karachi 404);
- (ii) The Government of Sindh through Chief Secretary, Karachi vs. Sharaf Faridi and others (PLD 1994 SC105);
- (iii) S.P. Gupta case (AIR 1982 SC 149); and
- (iv) Supreme Court Advocates-on-Record Association vs. Union of India (AIR 1994 SC 268).

13. Rule 165 of the rules relied upon by Mr Khairi enjoins the advocates to endeavour to prevent political considerations

from outweighing judicial fitness in the appointment and selection of judges. It also enjoins the advocates that they should protest earnestly and actively against appointment and selection of persons who are unsuitable for the bench and thus should strive to have elevated thereto only those willing to forego other employments whether of business, political or other character which may embarrass their free and fair consideration of the questions before them for decision.

14. The above reports relied upon also support Mr Khairi's contention. I am inclined to hold that not only a practising advocate but even a member of the public is entitled to see that the three limbs of the state, namely the legislature, the executive and the judiciary act not in violation of any provision of the constitution, which affect the public at large. The fundamental rights which are enshrined in our constitution and which also have the backing of our religion Islam, will become meaningless if there is no independent judiciary available in the country. The independence of the judiciary is inextricably linked and connected with the constitutional process of appointment of judges of the superior judiciary. If the appointments of judges are not made in the manner provided in the constitution or in terms thereof, the same will be detrimental to the independence of the judiciary which will lead to lack of confidence among the people. In my view, the appellants/petitioners have locus standi as the constitutional questions raised in the appeal as well as in the aforesaid constitution petition are of great public importance as to the working of the judiciary as an independent organ of the state. Even otherwise, the question of locus standi in the present case has lost significance for the reason that we have admitted the above constitution petition under Article 184(3) of the constitution for examining the scope and import of the provisions relating to judiciary. It may be observed that under Article 184(3) of the constitution, this court is entitled to take cognisance of any

matter which involves a question of public importance with reference to the enforcement of any of the fundamental rights conferred by Chapter 1 of Part II of the constitution even *suo moto* without having any formal petition.”

- “18. At this juncture, I may point out the right to have access to justice through an independent judiciary is a fundamental right as held in the case of Sharaf Faridi (*supra*) by Saleem Akhtar J. In this regard, reference may be made to the following observation:

“The right of ‘access to justice to all’ is a well-recognised inviolable right enshrined in Article 9 of the constitution. This right is equally found in the doctrine of ‘due process of law’. The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial court or tribunal. This conclusion finds support from the observation of Willoughby on the Constitution of United States, second edition, Vol. II, at page 1709 where the term ‘due process of law’ has been summarised.”

The above view has been affirmed by this court in the case of the Government of Balochistan through Additional Chief Secretary vs. Azizullah Memon and 16 others (PLD 1993 SC 341).

We are, therefore, of the view that the petitioners, who are not only the citizens of Pakistan but practising advocates and one of them is the chairman of the Civil Liberties Union of Pakistan, have necessary *locus standi* to file the above petitions.

The petitioners have alleged violation of their fundamental rights to have free and equal access to the independent and impartial court/tribunal on account of appointment of Mr Justice Sajjad Ali Shah as the Chief Justice of Pakistan, in violation of the provisions of the constitution and, therefore, these petitions are maintainable.”

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Centre for the Independence of Judges and Lawyers
Geneva, Switzerland