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

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to promote the independence of the judiciary and the legal profession. It is supported by contributions from lawyers organisations and private foundations. The Danish, Netherlands, Norwegian and Swedish bar associations and the Netherlands Association of Jurists have all made contributions of \$1,000 or more for the current year, which is greatly appreciated. The work of the Centre during its first two years has been supported by generous grants from the Rockefeller Brothers Fund, but its future will be dependent upon increased funding from the legal profession. A grant from the Ford Foundation has helped to meet the cost of publishing the Bulletin in english, french and spanish.

There remains a substantial deficit to be met. We hope that bar associations and other lawyers' organisations concerned with the fate of their colleagues around the world will decide to provide the financial support essential to the survival of the Centre.

### **Affiliation**

Inquiries have been received from associations wishing to affiliate with the Centre. The affiliation of judges', lawyers' and jurists' organisations will be welcomed. Interested organisations are invited to write to the Secretary, CIJL, at the address indicated below.

### **Individual Contributors**

Individuals may support the work of the Centre by becoming Contributors to the CIJL and making a contribution of not less than SFr. 100.— per year. Contributors will receive all publications of the Centre and the International Commission of Jurists.

### **Subscription to CIJL Bulletin**

Subscriptions to the twice yearly Bulletin are SFr. 10.— per year surface mail, or SFr. 15.— per year airmail. Payment may be made in Swiss Francs or in the equivalent amount in other currencies either by direct cheque valid for external payment or through a bank to Société de Banque Suisse, Geneva, account No. 142.548; National Westminster Bank, 63 Piccadilly, London W1V OAJ, account No. 11762837; or Swiss Bank Corporation, 4 World Trade Center, New York, N.Y. 10048, account No. 0-452-709727-00. Pro-forma invoices will be supplied on request to persons in countries with exchange control restrictions to assist in obtaining authorisation.

*Inquiries and subscriptions should be sent to the  
CIJL, P.O. Box 120, CH-1224 Chêne-Bougeries/Geneva, Switzerland*

It was with sadness and a deep sense of loss that the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers received the news of the death of Chandra Kisan Daphtary, a member of the ICJ and Chairman of its Indian Section.

Reprinted below is a resolution passed by the Bar Association of India, which is a fitting tribute to Mr. Daphtary.

*"The Bar Association of India deeply mourns the passing away of Mr. C.K. Daphtary. He was not just in name the President of this Association, he was one of its founders and till the end an active worker. He was not just a brilliant Advocate, he was also a most cheerful and courageous one. When he spoke, the entire legal fraternity listened and responded. Of late, in view of his pre-eminence he had become the Conscience of the Bar. The last of the Giants has now passed on and those who had the good fortune to know him, to work with him and to laugh with him are left only with memories - but happy memories. When a great oak falls the entire landscape changes. So when a great man dies. May his soul rest in peace.*

*To his loving wife and the family, we convey not only our condolences but also a message, sincere as it is true:*

*'Both as Man and as Advocate, we shall not see the like of him again.'*

## C A S E   R E P O R T S

### E G Y P T

#### Mission to Egypt by the Secretary of the Centre

The Secretary of the Centre for the Independence of Judges and Lawyers undertook a mission to Egypt from 26 February to 9 March 1983. The purpose of the mission was to investigate the facts surrounding the dissolution of the elected Bar Council in July 1981, and if possible, to make attempts to resolve the situation. For this purpose the observer obtained information about the text of a new law being drafted by the People's Assembly, which is intended to govern the future organisation and operation of the Bar Association.

After extensive discussions with all parties to the dispute, it became clear that there was general agreement that the dissolution of the Bar Council had infringed the independence of the legal profession and was to be regretted. The dispute centred on the best method of rectifying the matter. The members of the dissolved Council believed the best solution for preserving the independence of the legal profession was the restoration of the old Council. The parliament, apparently for political reasons, refused to agree to this.

During the discussions the Secretary of the Centre offered a compromise which was acceptable to the Bar Association but not to the representatives from parliament or to the government. Under the terms of the compromise new elections would take place immediately pursuant to the provisions of the old law and the new Council would be given an opportunity to review the text of the draft legislation and would submit a final version of the legislation to the parliament within six or eight months.

Based on the detailed information she received, the Secretary of the Centre concluded that the Rule of Law and the independence of the legal profession would best be preserved by allowing the members of the old Bar Council to return, but at the least it was to be hoped that a compromise agreement could be reached between the government, the parliament and the Bar Association.

Concerned organisations have been invited to write to the Egyptian government urging a resolution of this controversy which would protect and preserve the Rule of Law and the independence of the legal profession, and in particular, urging that the old Bar Council be restored and that lawyers be given a meaningful opportunity to participate in the drafting of the new law.

Despite the strong opposition of the lawyers and despite the recommendations of the Centre, the parliament adopted the new legislation during the week of 28 March and it has been signed by the President. While the law was under discussion in the parliament, the Bar Association decided to call a strike for Saturday, 2 April. The majority of Egyptian lawyers participated in the strike.

There continues to be strong opposition to the new law and it is likely that the members of the Bar will engage in further protest activities.

The mission report is reproduced in Appendix A.

G U A T E M A L A

Abduction of Yolanda Urizar Martínez de Aguilar

Yolanda Urizar Martínez de Aguilar was abducted on 25 March 1983 by a group of armed men riding in a jeep; the jeep was later seen in the regional headquarters of Policia Militar Ambulante in Santa Ana, Berlín. Enquiries have not revealed her whereabouts.

Ms Urizar de Aguilar recently returned to Guatemala to work for one of the plantation trade unions. She was also part of Escuela Orientacion Sindical (a school established to educate workers about their rights) which founded Consultoria Juridica Obrero Campesina (COJUCO) (a legal aid office for workers and peasants). She was the director of the Central American Institute for Political Studies and was also on the legal advisory team of Confederacion Nacional de Trabajadores (National Confederation of Workers).

It appears that Ms Urizar de Aguilar was abducted because of her role as legal adviser to various trade unions and workers' organisations. During the past few years many lawyers working with trade unions or with the underprivileged sectors of society have been killed or have "disappeared".

Ms Urizar de Aguilar was previously arrested on 20 April 1979 while distributing Year of the Child leaflets at La Aurora Airport in Guatemala City. The leaflets included a protest on behalf of a trade union leader and his two-year old son who were being forced into exile. Ms Urizar de Aguilar was accused of distributing "subversive literature", but was released two days after her arrest. The other persons arrested with her "disappeared" two months after their release.

Other members of Ms Urizar de Aguilar's family have been harassed and tortured by the police. On 15 October 1979 her 16-year old daughter, Yolanda de la Luz Aguilar Urizar was arrested with a friend in the Torre de Tribunales (Justice Department) in Guatemala City for distributing radio-press bulletins which contained protests against the death of trade union leader Miguel Angel Archilla. The arrest was ordered by plain clothes policemen on the ground that the leaflets constituted an attack upon the government and police. Ms de la Luz Aguilar and her companion were detained for seven hours at the Judicial Police headquarters in Guatemala City. According to Ms de la Luz Aguilar she and her companion were tortured and she was raped several times. Both were taken to the Centre for Observation and Rehabilitation of Juvenile Offenders where they were detained until mid-November 1979. Ms de la Luz Aguilar was beaten several times during her detention.

The continued victimisation of lawyers in Guatemala is a grave threat to the independence of the legal profession, the Rule of Law and the general human rights situation. The CIJL has published several articles on the killings and abductions of lawyers in Guatemala. As noted in Bulletin No. 6 of the Centre: "the government has proved singularly ineffective in preventing the assassination of threatened individuals or in bringing to justice the culpable parties".

The CIJL cabled the government of Guatemala on 7 April 1983 expressing its concern over the abduction of Ms Urizar de Aguilar and requested an urgent enquiry and publication of her place of detention. The CIJL also furnished information concerning these events to the United Nations.

Judicial organisations, bar associations and individuals have been invited to write to the government of Guatemala expressing their concern about the abduction of

- Yolanda Urizar Martínez de Aguilar and, in particular,
- urging the government to conduct a full investigation into the abduction and disappearance of Ms Urizar de Aguilar and to make every effort to locate her,
  - requesting the government to announce publicly her place of detention,
  - urging the government to take all steps necessary to ensure her personal safety, and
  - expressing their concern about the continuing wave of violence and its effects on the independence of judges and lawyers and the Rule of Law.

## E L S A L V A D O R

### Abduction of Saúl Villalta

Saúl Villalta, a lawyer, was abducted from a private house in the El Satelite neighbourhood of San Salvador, El Salvador, on 20 August 1982. Witnesses have stated that the abduction was carried out by members of the Policia de Hacienda. Mr. Villalta's relatives have enquired of the police, the security authorities, the Ministry of the Interior and the courts, but all deny any knowledge of his whereabouts.

Several other persons were abducted with Mr. Villalta: Mrs María Elena Martínez de Recinos, a member of the Committee of Mothers of Political Prisoners and Disappeared Persons, Mrs Recinos' 13 year-old daughter, Mrs America Fernanda Perdomo, a member of the Human Rights Commission of El Salvador and an unidentified domestic worker. Mrs Martínez de Recinos is the wife of a detained trade union



leader, and Mr. Villalta had gone to the house to discuss her husband's situation and the possibility of securing his release.

It appears that Mr. Villalta was abducted because of his role as a legal advisor to various peasant and trade union associations, as well as to the Human Rights Commission and the Committee of Mothers.

While he was a student, Mr. Villalta and several other students founded a legal assistance organisation, Socorro Jurídico, which provided legal counseling and aid to workers. The organisation was taken over and operated by the Archdiocese of San Salvador for several years, but is now functioning as an independent body.

After completing his legal training, Mr. Villalta became a legal advisor to several trade unions, and helped them to establish an inter-union organisation to coordinate their activities. A workers' school was established to educate workers about their legal rights. Even when codified such rights are often ignored by employers.

In 1977 after receiving numerous threats against his life and against the lives of members of his family, Mr. Villalta went into voluntary exile in Costa Rica from where he continued to give assistance to the Committee of Mothers. He returned to El Salvador in 1979.

After the forced dissolution of one of the major trade unions and the imprisonment of one of its leaders, Mr. Villalta shunned publicity, leading a semi-clandestine life. However, he did continue to give advice and assistance to other trade unions and the Committee of Mothers. Mr. Villalta is also a member of the Democratic Revolutionary Front (FDR), the alliance of the opposition political parties.

On 16 November 1982 the Centre wrote to the government of El Salvador urging it to make every effort to locate Mr. Villalta and those abducted with him, stressing the importance of doing so in light of the statements made by witnesses that the Policia de Hacienda were involved in the abduction. The Centre also requested the government to announce publicly Mr. Villalta's place of detention and requested the government to take those steps necessary to ensure his personal safety as well as the safety of those abducted with him. In addition, the Centre noted its awareness of Mr. Villalta's membership in the FDR and stated that membership in a political organisation could not justify an abduction.

Following this letter of intervention, the Centre invited judges' organisations, bar associations and individuals to write to the government of El Salvador, expressing their concern about the arrest and detention of Saul Villalta, and in particular

- urging the government to make every effort to locate Mr. Villata and those abducted with him,
- requesting the government to announce publicly their place of detention, and
- urging the government to take all steps necessary to ensure their personal safety, and
- expressing concern about the threat to the Rule of Law and the independence of the legal profession posed by the illegal abduction of lawyers.

Although many bar associations and international organisations have intervened on behalf of Mr. Villata, the government of El Salvador has remained silent and has not announced his place of detention. The government has done nothing to halt the illegal abduction of lawyers, particularly those who represent trade unions and opposition

political groups. Its failure to act seriously undermines the Rule of Law and the independence of the legal profession in El Salvador.

## S Y R I A

### Legislation annuls independence of the legal profession, and continued detention of lawyers

The declaration of a state of siege or emergency is often accompanied by fundamental changes in the laws concerning the administration of justice, including the laws governing the legal profession.

A state of emergency has existed in Syria since 1963. In 1981, after the government dissolved the national council of the bar association as well as the local councils because of their protests against the continuance of the state of emergency, the Syrian parliament passed legislation governing the practice of law in Syria, including the operation of the bar association. The legislation makes it impossible for an independent legal profession to exist in Syria.

No meeting can be held and no activities can be undertaken without the permission of the regional command of the ruling party. The Minister of Justice has the right to oversee and inspect the activities of the Council of the Order of Lawyers and any of its sections. The Council of the Order and the Councils of the local sections of the Bar may be dissolved by a decree from the Council of Ministers and such decrees are not subject to judicial review.

Appeals from disbarment proceedings are to committees which are appointed by the Minister of Justice, even in cases where it is the Minister of Justice who has taken the appeal.

There are numerous restrictions on the activities of individual lawyers. A lawyer may not belong to any international organisation without the permission of the Order, nor may a lawyer handle a matter, of any nature, referred to him or her from a "foreign society or body or an international or foreign institution" without receiving the permission of the Minister of Justice. If a lawyer does accept such work he or she may be disbarred.

Such legislation violates fundamental principles of the Rule of Law. Its only purpose is to destroy the independence of the legal profession. In recognition of this, the Union of Arab Lawyers has refused to accept the present Order of the Council as the legitimate representative of the Syrian Bar Association.

Bulletin No. 6 of the Centre reported the arrest and detention of several members of the bar association following the general strike on 31 March 1980. Approximately 30 lawyers remain in detention. There have been reports of new arrests, but the details are not, at present, available.

## P A K I S T A N

### Continuing Harassment and Intimidation of Lawyers

The continuing harassment and intimidation of lawyers and lawyers' organisations in Pakistan is of grave concern. The bar associations, which conducted campaigns against human rights violations under the former regime including infringements of the independence of the judiciary, recently held several public meetings concerning the effects of various martial law decrees on the Rule of Law in Pakistan. In addition the lawyers have called for a return to civilian rule and the holding of elections.

As a result of their participation in these activities, four leading members of the Lahore and Karachi Bar Associations were tried before military courts and sentenced to imprisonment. Following widespread protests they were released. No reasons have been given for their release.

The Centre has on previous occasions described the effects of martial law on the Rule of Law in Pakistan, and highlighted the problems being faced by the judiciary. Bulletins 6 and 7 contain descriptions of various decrees issued by the military government which have affected the jurisdiction of the civil courts and the rights of the defence.

These decrees have been repeatedly attacked by the Pakistani Bar. In particular the lawyers have severely criticised the establishment of military tribunals whose decisions are immune from review by civilian courts and whose procedures do not afford basic procedural guarantees to the defence. Defendants in military tribunals are not entitled to legal representation and military judges are not required to be members of the bar. The lawyers have

also criticised the martial law provisions which deprive the High Courts of jurisdiction over cases concerning martial law orders or regulations, over any matter under consideration by a military court or over any "thing done or any action taken or intended to be done or taken" pursuant to a martial law order or regulation. It is the martial law authorities who decide whether a given case will be heard in a military tribunal or in an ordinary court. In addition the High Courts are barred from issuing process against any person acting under the authority of martial law administrators.

### Recent Events

Over two thousand lawyers attended a convention in Lahore on 8 October 1982 to mark the beginning of a new campaign to return Pakistan to constitutional government. The lawyers issued a declaration calling for the end of martial law and the holding of elections. The lawyers decried the erosion of the constitution and of the Rule of Law. Included in the declaration was a demand that the government withdraw all restrictions on the powers of the judiciary and the press, and that the government withdraw a recent presidential decree prohibiting bar associations from engaging in political activity. The lawyers also called for release of all political detainees and abolition of the military courts. The participants decided to call a three-hour strike on 16 October to mark the third anniversary of the ban on political parties and political activity.

As a result of the convention in Lahore, several lawyers were arrested, including Syed Iftikhar Gillani, former President of the Peshawar High Court Association and Mian Sher Alam, a member of the Lahore High Court Bar Association.

On 22 October 1982 the Karachi Bar Association held a meeting to which they invited Ghulam Mustafa Jatoi, the Sind provincial president of the banned Pakistan People's Party. The government had told the organisation not to invite Jatoi to the meeting. On 24 October the government arrested the Bar Association President, Mr. Abdul Hafeez Lakho. In response to his arrest, the Karachi Bar Association, on 25 October, called for a boycott of the courts. About 1,500 lawyers boycotted the courts and attended protest meetings. The acting secretary of the Karachi Bar Association, Mr. Abdul Malik Khan was detained during a protest meeting.

Messrs Lakho and Malik were brought before a military tribunal on 26 October and were charged with violating martial law regulations banning political activity by inviting Mr. Jatoi to speak before the Bar association. Both lawyers argued that they were not subject to military jurisdiction and that they could not be tried by a military court. In November, the lawyers were sentenced to one year's rigorous imprisonment for contravening the ban on political activity.

On 6 December Pakistani lawyers engaged in a two-hour strike and boycotted court proceedings, calling for an end to martial law.

Subsequently on 18 December 500 lawyers held a convention in Karachi during which they demanded an end to martial law and a return to constitutional government. The group called for the abolition of military courts, the restoration of judicial powers and the release of persons jailed for political offences.

On 23 December Messrs Lakho, Alam, Gillani and Malik were released from prison, their sentences having been remitted.

## Role of the Legal Profession

The arrest of the lawyers represents a major threat to the Rule of Law and the independence of the legal profession in Pakistan. The arrested lawyers were engaged in activities expected of them as lawyers. As stated in the Noto Draft Principles on the Independence of the Legal Profession (CIJL Bulletin No. 10):

*"Lawyers have a responsibility to study existing and proposed legislation, to examine the working of the system of administration of justice and to evaluate proposals for reform. They should also propose and recommend well considered law reforms in the public interest and should undertake programmes to inform the public about such matters."*

In addition, the functions of a bar association include the promotion and upholding of justice, without fear or favour, the preservation of the independence of the profession and, the promotion of the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, in accordance with proper procedures.

The Pakistani lawyers were arrested for expressing their concern that the military government was becoming permanent, and that martial law decrees were eroding rights guaranteed by the Pakistan constitution and were having a profoundly negative effect on the Rule of Law in Pakistan.

Both the Supreme Court of India Bar Association and the Bar Association of India have passed resolutions expressing their concern about the denial and deprivation of human rights and the systematic curtailment of the independence of judges and lawyers by executive action and martial law decrees in Pakistan.

In a joint letter, the CIJL and the International Commission of Jurists also expressed their concern about this



situation to the Pakistan government, and the CIJL invited.

Lawyers, lawyers' associations and judicial organisations to write to the government of Pakistan expressing their concern about the arrest and intimidation of lawyers and the effect such actions have on the Rule of Law and the independence of the legal profession.

## I N D O N E S I A

### Harassment of lawyers

On 2 November 1982 five Indonesian lawyers withdrew from a lawsuit because of repeated threats and acts of violence directed against them. In their statement to the court the lawyers explained that they were withdrawing from the case because "the climate and conditions of the trial (did) not allow them to freely practice their profession ...". The President of the Indonesian Bar Association issued a statement denouncing what he described as a campaign of terror against the lawyers.

The lawsuit was brought by A.M. Fatwa, an opposition member of Parliament, to recover damages for acts of physical violence which he alleges were committed by three officers of the armed forces. The named defendants were the Government of Indonesia, the Chief of Security and the three officers.

The lawyers' resignations were precipitated by several incidents of stone throwing at their homes and receipt of

threatening letters and telephone calls. A woman attorney was told that her husband's career in the army would be in jeopardy if she continued to represent Mr. Fatwa. These incidents started after Mr. Fatwa had received a telephone call from an army commander telling him it would be in the interests of both parties if he dropped the lawsuit. Mr. Fatwa also has been the victim of an act of violence since the commencement of his case.

Several lawyers, including the Deputy-Chairman of PERADIN, the Indonesian Bar Association, approached the government asking that the harassment be stopped. No assurances were forthcoming.

PERADIN issued a statement on 15 November decrying the continuing harassment of judges and lawyers, noting that such acts damage "the professional freedom of advocates and of judges" and asking the government to take those steps necessary to ensure access to justice without discrimination.

The CIJL wrote to the government on 2 December 1982 expressing its concern about the situation and urging the government to conduct a full investigation and to bring to justice those responsible for the acts of violence against the lawyers. The CIJL stated: "Only affirmative steps on the part of the government can put a halt to these practices, and such steps would be a positive indication of the government's intention to maintain a freely functioning and impartial system of justice".

Unpunished acts of violence against lawyers which result from their handling of politically sensitive cases are a serious threat to the Rule of Law and the independence of the legal profession.

## T U R K E Y

### Continued harassment of lawyers and release pending trial of President of Istanbul Bar Association

The harassment of lawyers can take many forms and generally occurs when governments wish to dissuade lawyers from representing persons accused of political crimes or those who have expressed opposition to government policies. Recently, the government of Turkey sent a memorandum to 82 lawyers from the Istanbul Bar Association requesting them to provide lists of all clients they represented without charge during the years 1980 and 1981. The government intends to calculate the value of the services and collect taxes as if the lawyers had actually received compensation.

This action by the government is not only a form of harassment, but also undermines the ability of lawyers to fulfil their social responsibilities. As stated in the draft principles on the independence of the legal profession lawyers have a responsibility to make their services available to all sectors of society and should provide free legal services for the poor and disadvantaged.

The Rule of Law is considerably weakened when a government tries to prevent certain groups or persons from receiving free legal services.

Bulletin No. 9 reported on the arrest of Mr. Orham Apaydin, the President of the Istanbul Bar Association. Mr. Apaydin's trial began on 24 June 1982. On 24 December 1982, after widespread protests and interventions on his behalf, he was released from prison for the duration of his trial.

C Z E C H O S L O V A K I A

Case of Jan Cernogursky

Bulletin No. 9 reported on the disbarment of Dr. Cernogursky because of his defence of Mrs D. Sinoglova, a political dissident. After reviewing the facts surrounding Dr. Cernogursky's disbarment the CIJL concluded that it "must be seen as an attempt to deprive unpopular political defendants of the conscientious, independent representation to which every criminal defendant is entitled and/or retaliation against lawyers who provide such a defence".

Recently, the CIJL learned that Dr. Cernogursky's appeal against his disbarment was unsuccessful. In addition, Dr. Cernogursky was denied a passport on the ground that his journey would be inconsistent with the internal order of the country. There is a serious question as to whether the denial of a passport in these circumstances contravenes Art. 12 section 2 of the International Covenant on Civil and Political Rights which states "Everyone shall be free to leave any country, including his own".

## A R G E N T I N A

### Detained lawyer is released

Carlos Miguel Kunkel, detained since 1975, was released late in 1982. Dr. Kunkel had remained in prison "at the disposal of the executive" despite his acquittal of all criminal charges in 1978.

Dr. Kunkel enjoys only "conditional liberty". His freedom of movement is restricted and he must report to the local police headquarters once a week. In addition, he has been denied the right to work as a lawyer. In November 1982 Dr. Kunkel asked for permission to work as a lawyer, but the government has not yet responded to his request.

It is an unacceptable interference in the independence of the legal profession for a government to prevent a lawyer carrying on his profession, when no offence of any kind has been established against him.

## S O U T H A F R I C A

### Banning order is modified

Bulletin No. 10 contained a report on the use of banning orders in South Africa. In December 1982 the CIJL received word that the banning order issued against Nicholas Haysom had been modified. The modifications enable Mr. Haysom to practice his profession and to continue as a research professor. Restrictions on his freedom of movement and his freedom of association are still in force.

## ACTIVITIES OF LAWYERS' ORGANISATIONS

### MEETING OF LAWASIA HUMAN RIGHTS STANDING COMMITTEE

The LAWASIA Human Rights Standing Committee organised a regional meeting of non-governmental human rights organisations in New Delhi from 9 to 11 October 1982. Thirty-four human rights organisations from 12 countries in the ESCAP region participated. Ustina Dolgopol, the Secretary of the CIJL attended the conference on behalf of both the ICJ and the CIJL.

At the conclusion of the meeting, the participants unanimously resolved to establish a coalition of human rights organisations. A primary task of the coalition will be to work for the creation and adoption of an Asian Charter of Human Rights and the establishment of an Asian Human Rights Commission.

The LAWASIA Human Rights Standing Committee is to undertake the role of coordinator for the coalition. As its first activity, the coalition will hold two conferences during 1983. The topics to be covered are: "Adequacy of laws affecting women in the ESCAP region and how far they are implemented" and "Preventive detention-law and practice in the ESCAP region".

The human rights situation in Pakistan and Iran were discussed during the meeting. Representatives of the Human Rights Society in Pakistan were to have attended the meeting in new Delhi, but were not permitted to do so by their governments. A resolution was adopted expressing concern about the denial of exit visas and condemning the repression of lawyers in Pakistan. The participants also condemned the continuing violations of human rights in Iran and called on the government to cease the violations. The

resolutions were transmitted to the respective governments by letter. Both resolutions are reproduced at the end of this article.

The Committee has also formulated minimum standards for the independence of the judiciary in the LAWASIA region. The Standards were agreed upon at a seminar in Tokyo in July 1982. The report of the seminar including the standards, is reproduced in Appendix B.

### Pakistan

"RESOLVED that this meeting of 34 human rights organisations in the ESCAP region, representing 12 countries, called at the invitation of the LAWASIA Human Rights Standing Committee, expresses grave concern at the fact that the Human Rights Society of Pakistan, which wished to participate in these proceedings, could not do so since they were not permitted by their Government to leave their country to attend this meeting. This meeting views this situation as an infraction of human rights and it is RESOLVED to communicate this decision to the President of Pakistan and to the Presidents of the Bar Associations in Pakistan.

RESOLVED that the constant repression of lawyers and interference with their freedom of expression of views in Pakistan is a great threat to the rule of law and this meeting of representatives of human rights organisations in the ESCAP region, representing 12 countries, called at the invitation of the LAWASIA Human Rights Standing Committee, strongly condemns the same and RESOLVES to inform the President of Pakistan of this resolution as well as the Presidents of the Bar Associations in Pakistan."

### Iran

"This meeting of the 34 human rights organisations representing 12 countries called at the invitation of the LAWASIA Human Rights Standing Committee, being made aware of the current situation in Iran, CONDEMNNS the continuing violations of basic human rights in that country, including executions without trial; torture; repression; arrest without cause and imprisonment without trial; interference in proper defence of accused by lawyers; and persecution of lawyers, AND CALLS ON THE GOVERNMENT OF IRAN to cease these violations forthwith; release the President and other members of the Council of the Iranian Bar Association currently held without trial; stop harassment of religious

*minorities and their execution; release all political prisoners; and cease their unjust war against ethnic minorities; AND APPEALS to the Human Rights Commission of the United Nations to condemn the continuing violations of the United Nations Human Rights instruments occurring in Iran, AND FURTHER APPEALS to Governments in the LAWASIA/ESCAP region to take all steps to prevent deportation of students and other Iranians seeking political refuge."*

NINETEENTH BIENNIAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

The International Bar Association held its 19th Biennial Conference in New Delhi from 17 to 23 October 1982. The two main topics of the conference were: "The Eighties - The Challenge to the Legal Profession and the Judiciary" and "Legal Problems of Investment by International Companies in Developing Countries".

The challenges to the judiciary and the legal profession were considered during two plenary sessions, one devoted to the judiciary and one to the legal profession. Several committees devoted their time to discussions of the issues raised during the plenary sessions.

The IBA's Project on Minimum Standards of Judicial Independence successfully completed its task; the standards were adopted and are to be known as the Delhi Minimum Standards of Judicial Independence. The Standards are reproduced in Appendix C.

The project had been undertaken by the Administration of Justice Committee of the General Practice Section of the IBA. The General Rapporteur of the Project was Dr. Shimon Shetreet of Israel. Dr. Shetreet was not able to be present at the conference. He had been advised by the government of India not to attend. The government had



indicated to the Bar Association of India on 12 October 1982 that if any Israeli citizen took part in the programme it could not assure their security or the security of others participating in the conference.

Dr. L.M. Singhvi, UN Special Rapporteur on the Independence of Judges, Lawyers, Jurors and Assessors, in his valedictory remarks congratulated the IBA on its adoption of the standards and noted the contribution these standards would make to the reaching of a worldwide consensus.

The Project plans to undertake the preparation of a report on compliance with the standards in various countries.

A R T I C L E

THE CHALLENGE TO THE PROFESSION BY THE JUDICIARY\*

by

The Hon. Mr. Justice P.N. Bhagwati

I am deeply grateful to the organisers of this conference for giving me an opportunity to say a few words at this session of the conference which is devoted to the subject of "The Challenge to the Profession". The subject which has been assigned to me is "The Challenge to the Profession by the Judiciary".

...

In every kind of civilisation the pursuit of justice is instinctive and it is a basic and primordial instinct in every human being. Every society strives or aspires to attain it through its legal system.

The degree of perfection attained by a legal system may be measured by the extent to which it succeeds in giving the instinct for justice freedom to express itself and to find its fulfilment. Not every legal system succeeds in this goal. Sometimes a legal system fails to achieve its purpose because of defects in its substantive

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\* This is a shortened version of an address given by Mr. Justice P.N. Bhagwati to the 19th Biennial Conference of the International Bar Association in New Delhi, in October 1982. In his address Justice Bhagwati makes some observations about the role of lawyers and judges in today's society and calls for more social activism on the part of lawyers. Judicial activism in changing societies was discussed by R. Hayfron-Benjamin in his article published in Bulletin No. 9. ICJ Review No. 29 contains an article on social action litigation in the Indian Supreme Court.

rules and some times because of procedural infirmities.

Substantive rules are the product of the political process and since the political machine sometimes, even in a democratic structure, does not reflect truly and completely the hopes and aspirations of all sections of people, substantive rules may not always be adequate to meet the needs of the society. Moreover, our political institutions are by their very nature quite often too slow to respond to the need for change. The result is that the law's rate of development does not match society's rate of change. Law tends to lag behind and in the process, it fails to achieve justice.

Lawyers, judges and legislators have therefore always to be alert to see that the law does not remain static: it must undoubtedly be stable but at the same time it must be dynamic and accommodating to change. Law is not like an antique to be taken down, dusted, admired and put back on the shelf but it is rather like a vigorous tree which has its roots in history but takes on new grafts, puts out new sprouts and occasionally drops dead wood. It is a dynamic instrument fashioned by society for the purpose of achieving harmonious adjustment of human relations by eliminating social tensions and conflicts and it must therefore change with the changing socio-economic conditions. It must shake off the inhibiting legacy of its colonial past and assume a dynamic role in the process of social transformation. It is only then that it will really and truly help to realise justice.

When I talk of justice, I mean not commutative justice but distributive justice, justice in depth, justice which penetrates and destroys inequalities of race, sex and wealth, justice which is not confined to a fortunate few, but takes within its sweep the entire people of the country, justice which ensures equitable distribution of the

social material and political resources of the community.

Procedural infirmities may also result in thwarting justice and it is therefore necessary that the procedure should also be adequate. The machinery of justice and the institutional mechanisms for dispute resolution must be efficient and effective. Law must not only speak justice but must also deliver justice. This is primarily the task of lawyers and judges and this task cannot be adequately and satisfactorily discharged unless both lawyers and judges are imbued with a passion for justice. Since it is the function of judges to administer justice, passion for justice comes naturally to them but if law is to perform its task of delivering justice, it is equally important - indeed imperative - that lawyers must also be actuated by a passion for justice. Indeed in an adversary system of administration of justice, no judge can satisfactorily discharge his function of dispensing justice unless he is assisted by lawyers who are moved by a strong and consuming passion for justice.

Lawyers play a vital role in the functioning of the judicial process. The importance of this role of lawyers was emphasised by Lord Upjohn when he said in Rondel's case: "I doubt whether anyone who has not had judicial experience appreciates the great extent to which the courts rely on the integrity and fairness of counsel in the presentation of the case". The Royal Commission on Legal Services also explained the extent of the lawyers' contribution in judicial decision making in these words:

*"In our jurisdiction, judges have no professional staff to assist them and legal argument is presented orally. Since the judge in most cases delivers judgment either immediately after the evidence and argument are concluded or very shortly thereafter, he relies on the advocates who appear before him to bring out the facts of the case to test the evidence and argue the law fully, referring to all relevant authorities, whether they advance their clients' cases or not."*

It is therefore essential that in the discharge of their functions, the lawyers must recognise and observe a duty to justice. The duty to justice on the part of lawyers is an imperative if the judicial process is to achieve a just result or at least one in which there has been a fair and proper application of the law to the true facts.

...

There is another very important aspect of the challenge to the profession from the judiciary which I think it necessary to bring to your attention. It is axiomatic that no democracy based on the rule of law can survive unless there is a truly independent and fearless judiciary. The concept of the independence of the judiciary is a noble concept which constitutes the foundation on which rests the edifice of every democratic policy. This is much more so in a country like India or the United States where the judiciary is entrusted with the task of keeping every organ of the State within the limits of the law and thereby making the rule of law meaningful and effective and the power of judicial review has been conferred upon the judiciary with a view to enabling the judiciary to carry out this important and delicate task.

The power of judicial review is one of the most potent weapons in the armory of the law and by exercising this power, the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers. The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and also transgression of its constitutional limitations by the legislature.

The concept of liberty is an indispensable norm and a perennial human aspiration for freedom, dignity and equality: it is the source and sustenance of the vision and vitality of every nation wedded to freedom, equality and justice it is an essential condition of democracy and development, it is a shield and a sword of social defence and it is a challenge and opportunity to the people to help themselves ameliorate their conditions, to emancipate themselves from deadweights, to facilitate and accelerate social transformation and to achieve social, economic and political justice. It is this dynamic concept of liberty which the judiciary is expected in a democratic set up to safeguard and protect through the exercise of the power of judicial review, and therefore, it is absolutely essential that the judiciary must be free from executive pressure or influence.

But, at the same time it is necessary to remember that the concept of independence of the judiciary is not limited to independence from many other pressures and prejudices. It has many dimensions, namely, fearlessness of other power centres, economic or political and freedom from prejudices and other influences, coming from whatever source.

Now apart from the ordinarily recognised sources of danger to independence of the judiciary, there is one source of danger which is often not perceived as such and it is for that reason much more dangerous than the other sources. This source of danger lies in unjust and improper criticism of judges for the judgments which they deliver. There is a pernicious tendency on the part of some to attack judges if the decision does not go the way they want and is not in accord with the view held by them. Of course, I may straightaway concede that there is nothing wrong in critically evaluating the judgment given by a judge, because as observed by Lord Atkin, justice is not a cloistered virtue and she must be allowed to suffer the

criticism and respectful, though outspoken, comments of ordinary men. But improper or intemperate criticism of judges stemming from dissatisfaction with the decisions given by them constitutes a serious inroad into the independence of the judiciary and whatever be the form or shape which such criticism takes, it has the inevitable effect of eroding the independence of the judiciary.

It is in fact recognised in the preliminary report prepared by the Special Rapporteur appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities that "adverse publicity, embarrassing accusations in public and populist pressures to deflect the judiciary from its appointed role" are factors which affect the impartiality and independence of judges.

Each attack on a judge for a decision given by him is an attack on the independence of the judiciary, because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision-making process. It is essential in a country governed by the rule of law that every decision must be made under the rule of law and not under the pressure of one group or another, no matter how sincerely motivated. If a judge is to be in fear of personal criticism by political or pressure groups or other individuals while deciding a case, it would most certainly undermine the independence of the judiciary.

...

It is also necessary to point out that the law which is being administered today in most parts of the world and particularly in developing countries such as India is no longer the law of the old order. It is not the traditional lawyers' law and it is not the law which merely provides a framework for private ordering. It is the new law, the law

of social or public welfare, the law of the 20th century welfare state whose function is that of comprehensive social engineering, that is, maximisation of total human welfare by the maximum satisfaction of the largest numbers of wants with minimum friction and least waste. Its guiding principle is no longer maintenance of peace and order but justice, not formal but substantive, and that too for all segments of society.

The growing use of law as a device of organised social action directed towards achieving socio-economic change is one of the main characteristics of modern society and that is why the modern age has been described by Prof. Roscoe Pound as "the age of socialisation of law". It is recognised that not only order but justice is also an equally important end of law, both order and justice are in fact complementary. One cannot exist without the other, and hence, in modern society, law is increasingly preoccupied with the problems of distributive justice. It has become a flexible instrument in the hands of the society for bringing about socio-economic change and removing the existing imbalance in the socio-economic structure. This is the law which is being administered by the courts and the efficacy of this law in achieving the end of distributive justice and socio-economic change depends to a large extent on the judiciary which interprets and administers it.

It is no doubt true that the judiciary has to interpret the law according to the words used by the legislature. But, as pointed out by Justice Holmes: "A word is not a crystal, transparent and unchanged; it is the skein of a living thought". It is for the judiciary to give meaning to what the legislature has said and it is this process of interpretation which constitutes the most creative and thrilling function of the judiciary.



Plato posed the problem two thousand years ago: Is it more advantageous to be subject to the best men or the best laws ? He answered it by saying that laws are by definition general rules and generality falters before the complexities of life. Laws' generality and rigidity are at best a makeshift far inferior to the discretion of the philosopher king whose pure wisdom would render real justice, by giving each man his due. Aristotle was, however, in favour of the rule of law. He said: "he who bids the law rule bids God and reason rule: but he who bids man rule adds an element of the beast, for desire is a wild beast and passion perverts the minds of rulers even though they be the best of men".

Yet Aristotle knew with Plato that law cannot anticipate the endless combinations and permutations of circumstance and situation. There is bound to be a gap between the generalities of law and the specifics of life. This gap in our system of administration of justice is filled by the judiciary and in entrusting this task to the judiciary, we have synthesized the wisdom of Plato and the wisdom of Aristotle. It is here that the judge takes part in the process of law making - what Justice Holmes called "interstitial legislation". Law making is an inherent and inevitable part of the judicial process. Even where a judge is concerned with interpretation of a statute, there is ample scope for him to develop and mould the law.

The process of judging is a phase of a never ending movement and something more is expected of a judge than imitative reproduction, the lifeless repetition of a mechanical routine. It is for this reason that when a law comes before a judge, he has to invest it with meaning and content and in this process of interpretation, the judge constantly reminds himself that his interpretation must carry out the great purpose and end of law, namely distributive justice, which is a constitutional, fundamental

and an economic imperative in most of the countries and particularly in countries of the third world, because otherwise people will lose respect for the law. It is elementary that law derives its legitimacy from justice and in the last analysis, its sanction from the community. The people make law valid and obey it if it is just and the end product of the law must therefore be distributive justice which reaches out to everyone in the community.

There is also a significant change taking place in the nature of the litigation coming before the courts. It is no longer the causes of the rich and the well to do which alone come to the courts. With the ushering in of the legal aid programme in almost all parts of the world, the problems of the poor are now being brought before the courts. The doors of the courts have been thrown wide open for the poor and deprived sections of the community and access to justice which is a basic human right has been made available to them through various strategies of the legal aid programme. The problems of the have-nots and the handicapped, of the lowly and the lost, are now coming before the courts in increasing numbers and the courts are called upon to resolve these problems.

The theatre of the law is changing and the judicial process is acquiring a new dimension. Public interest litigation is assuming great importance and it is helping to bring the problems of the weaker sections of humanity before the courts so that basic human rights may be ensured to them and they may realise their social and economic entitlements.

It is being increasingly realised that the problems of the poor are qualitatively different from the problems which have been handled by the lawyers and judges so far. The traditional methods and tools employed by the courts under an adversary system of administration of justice are

found to be wholly inappropriate to tackle these problems. The courts are being called upon to forge new methods, fashion new tools and evolve new strategies for the purpose of finding a solution to these new kinds of problems which are coming from them.

Taking into account the peculiar socio-economic conditions prevailing in the country, the Supreme Court of India has enlarged the doctrine of standing and ruled that where a legal injury is caused to a person or class of persons who by reason of their poverty, disability or other socially or economically disadvantaged position cannot approach the courts for judicial redress, any member of the public acting bonafide can bring a petition before the courts seeking judicial redress for them. The chains forged by the traditional doctrine of standing have been broken and access to justice has been made easily available for the purpose of making basic human rights meaningful for the large masses of people.

Since it would not be possible for the petitioner who brings an action for the benefit of the deprived sections of the community to produce relevant material before the court nor would the poor and weaker sections for whose benefit the petition is brought be able to place before the court relevant material needed to establish their rights, the Supreme Court of India has evolved the strategy of appointing commissions for the purpose of gathering the necessary facts and data which would enable it to enforce the rights of the poor and the down-trodden. But even these strategies may not be enough and it may be necessary to innovate new strategies for the purpose of reaching socio-economic justice to the vulnerable sections of the community and ensuring them their social and economic entitlements.

Now obviously the judiciary cannot succeed in this task of administering and interpreting law in a manner which would produce socio-economic justice and satisfy the hopes and aspirations of the large masses of people who are priced out of justice, unless it has the assistance of a legal profession which is committed to the dynamic concept of the rule of law, is conscious of its social responsibilities and is keenly aware of the need to mould the law creatively and imaginatively in the service of the weaker sections of humanity. The lawyers have to shake off their old traditional approach where they looked upon themselves merely as professional men paid to argue for their clients and must acquire a new ethos, a new sense of values and a new social awareness. The lawyers have so far offered their services in developing and building institutions which advance the economic interests of particular groups or organisations, now lawyers must offer their services for the benefit of the poor. Lawyers have to mobilise social and economic power for the deprived sections of the community through legal institutions and the judicial process. They have to innovate new strategies for the purpose of bringing the problems of the poor before the courts and finding solutions to them.

The development of the legal profession in most countries took place essentially in the matrix of an individualistic society in which the lawyers' clients were the landlord, the trader, the businessman, the employer and the company promoter and the question therefore arises, whether a profession whose ideology and organisation crystallised during an era of outstandingly successful service to the needs of an individualistic society can adapt itself with equal success to the needs of a social welfare state? Can it help in the achievement of the total welfare of the masses which may on occasion conflict with exclusive commitment to the interest of its clients? Will it find

encouragement and energy to do so on its own strength and resources or must it suffer impatient surgery at the hands of those who know more about the pain than the cure.

These are the questions which confront the contemporary branch of the legal profession vis-a-vis the judicial process. Personally I have no doubt that this challenge can and will be met. It would be too much to say that the wind of change is roaring down the ancient corridors but there is no doubt that there is a distinct current of fresh air. There are discerning lawyers all over the free world who are alive to the need to adapt themselves to the needs of the changing society. There is growing in the legal profession an intelligent realisation and real conviction that we cannot produce a 20th century service from an unaltered 19th century mould.

The climate of professional opinion is changing and the lawyers have begun to realise that in the context of a modern society where poverty is regarded as an anachronism and a determined and concerted effort is being made to ensure that the ideal of prosperity for all no longer remains a dream or an illusion but becomes a living reality, the lawyers have to face a new challenge, project a new profile in courage and competence, master a new know-how in public good and impart a new direction and dimension to justice. They have to break down the old legal order which has held us prisoners, weave new legal norms and social values and build a new jurisprudence. This is the response which an activist judiciary expects from the legal profession. If such response is not forthcoming, the judicial process will become sterile and fail to achieve its true purpose of dispensing justice to everyone, irrespective of his power, position or wealth.

I will close with the famous words of Benjamin Cardozo, the great American judge, who said: "The inn that shelters for the night is not the journey's end. The law like the traveller must be ready for tomorrow".

APPENDIX A

REPORT OF MISSION TO EGYPT  
26 February to 9 March 1983

by

Ustinia Dolgopol, Secretary,  
Centre for the Independence of Judges and Lawyers

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The Secretary of the Centre for the Independence of Judges and Lawyers was invited by the Union of Arab Lawyers and several members of the Egyptian Bar Association to undertake a mission to Egypt. The purpose of the mission was to investigate the facts surrounding and following the dissolution of the elected Bar Council in July 1981, and if possible, to make attempts to resolve the resulting situation. For this purpose, the observer needed to obtain information about the text of a new law, presently being drafted by the People's Assembly, which is intended to govern the future organisation and operation of the Bar Association.

Before departing, the observer made it clear that she wished to speak with all parties involved in the dispute.

Three meetings were held with representatives from the People's Assembly. In addition, meetings were held with H.E., Dr. Boutros Boutros-Ghali, the Minister of State for Foreign Affairs and H.E., Ahmad Mandouh Atia, the Minister of Justice. Several meetings were held with the leaders of the dissolved Bar Council as well as other interested lawyers. The observer also spoke with foreign journalists and other persons working in Egypt who were aware of the controversy.

The observer would like to express her gratitude and appreciation to all those with whom she met. All were extremely helpful and extended every possible courtesy.

## History of the Conflict

In 1981 the People's Assembly issued Law No. 125 which dissolved the existing Bar Council (Council) and called for the appointment of a new Council by the Minister of Justice. Law 125 also suspended the provisions governing the meeting of the General Assembly of the Bar Association and the provisions governing elections. The appointed council was to draft new legislation controlling the functioning of the Bar Association.

Although there were several points of contention between the Bar Council and the government and parliament, the primary factor leading to the government's decision to dissolve the Council appears to have been the outspoken criticism by members of the Council of the Camp David Agreement, both within Egypt and abroad. Some of the leaders of the Bar Council believed the Agreement to be unconstitutional and against the interests of the country. In addition to their vocal criticism, several leaders of the Bar Council participated in demonstrations organised by those opposed to it.

President Sadat angered by the conduct of the lawyers requested the parliament to commence an investigation, then subsequently requested it to dissolve the Council. Many of his advisors and several members of parliament advised against this course of action, stating that it would create a bad precedent and might be unconstitutional. Despite these warnings President Sadat pressed the parliament and it enacted Law 125.

A new Council was appointed by the Minister of Justice and it undertook the task of drafting the new legislation. Dr. Gamal el Oteifi was asked to head this Council. When the text of a new law was completed, the appointed Council resigned and another Council was appointed to take its



place. That Council continues to sit, although it is not active.

The text submitted by Dr. Oteifi was subsequently withdrawn by the leaders of the People's Assembly, and the legislative committee undertook the drafting of a brand new text. No explanation was offered as to why this occurred. The legislative committee has been working on the text of the new law for several months and apparently many revisions have occurred. The text of the new law was to be put before the People's Assembly on 12 March 1983. This is the first time the full assembly will have an opportunity to review the law.

Representatives of the People's Assembly stated that there had been widespread participation from individual lawyers and from local chapters of the Bar Association in the drafting of the new law. However, when pressed as to the number of hearings held on the bill and the number of communications received, they admitted that only two hearings were held, the second of which lasted half an hour. During the first hearing, 14 people spoke. Thirteen of the 14 were opposed to the People's Assembly drafting the law and each demanded the return of the dissolved Council.

One of the 13 was Ahmed Assan Heikal, the present Bâ-tonnier (Chairman) of the appointed Bar Council. He submitted his own draft for consideration, but it was ignored by the committee.

At the second hearing, only one person spoke. A dispute arose between him and the committee and the meeting was adjourned. The lawyers claim that the dispute was staged so that the meeting could be cancelled. The representatives from Parliament deny this allegation.

The members of the legislative committee state that the committee has considered all the communications received from lawyers. However, only 25 letters were received, most of which were opposed to parliament drafting a new law.

Soon after the enactment of Law 125 the leaders of the dissolved Bar Council commenced a lawsuit challenging its constitutionality. It is alleged that Law 125 violates section 66 of the Egyptian constitution which prohibits laws in the nature of penalties. Plaintiffs seek a declaration that Law 125 is unconstitutional and also seek monetary damages for the violation of their constitutional rights. The lawsuit was commenced in the administrative court, and after several hearings that court decided that there was a sufficiently serious constitutional question to refer the case to the constitutional court. When the case was transferred to the Constitutional Court, the Commissionnaire d'Etat submitted a brief stating that it was the opinion of the Conseil d'Etat that Law 125 was unconstitutional. A hearing was held before the Constitutional Court on March 5 during which the government lawyers challenged the standing of some of the plaintiffs and also requested an adjournment in order to submit a response to the brief filed by the Commissionnaire d'Etat. The case was adjourned until 2 April.

The lawyers representing the plaintiffs strenuously opposed both the challenge to the plaintiffs' standing and the request for an adjournment. The lawyers believe that the government is trying to delay the lawsuit to enable the assembly to enact the new law before the court renders its decision. If the court were to decide that Law 125 is unconstitutional then the government would have to allow the old Bar Council to return to power. A declaration that Law 125 was unconstitutional would not necessarily prevent the People's Assembly from passing legislation concerning

the Bar Association, since it has the power to do so under the Egyptian constitution. However, it is not clear that the parliament would press ahead with the law if the court issued such a ruling, since that course of action would put it in direct conflict with the leaders of the Bar, who insist that any law governing lawyers should be drafted and approved in the first instance by lawyers.

Some question has arisen as to whether or not the lawsuit will continue if the new law is adopted by the People's Assembly since one of the clauses in the new law repeals Law 125. A former chief justice of the high court expressed the opinion that under Egyptian jurisprudence the case must continue since the plaintiffs have requested monetary damages.

Before moving on to a description of the present state of the controversy, it must be said that the Egyptian Bar has a history of defending and protecting human rights. Over the years there have been repeated instances of mass arrests, and the Bar, on each occasion, formed a defence committee to ensure that all those arrested had the service of a lawyer. In addition, members of the Bar have been in the forefront of movements pressing for economic and social reforms as well as political and civil reforms.

#### Present State of the Controversy

Many of the people the observer spoke with, both within and without the government, agreed that Law 125 was a mistake and that the parliament should not have dissolved the Bar Council. The dispute at present centres on the best method of rectifying the mistake and ensuring that the Bar regains its independent status. This issue sharply divides the members of the dissolved Bar Council and the parliament and the government.

The members of the dissolved Bar Council have refused to participate in the drafting of the new law because the drafting process is being controlled by the People's Assembly. They believe that participating in the drafting process would be tantamount to conceding the government's right to dissolve the Council and interfere in the activities of the Bar Association. They also believe that the government's actions against them are a bad precedent for its relationship with other syndicates. It is the firm belief of these lawyers that the principle of noninterference must be upheld and that the only way to ensure the future independence of the Bar is to restore the old Council and let it oversee the drafting of the new law.

For their part, the representatives from People's Assembly insist that under the constitution they have the power to draft laws governing syndicates and therefore their handling of the drafting process does not pose a problem. This argument ignores the language of Law 125 which states that a bar council is to submit a draft of a new law.

The representatives of the People's Assembly also refuse to concede that they should take cognizance of the court case and the opinion of the Commissionnaire d'Etat. They decline to wait for the court's decision before moving ahead with the new law, despite the fact that many believe the court will find Law 125 to be unconstitutional.

They also state that they are not breaking with tradition in drafting the new law. They note that each of the previous laws was passed by the People's Assembly. This statement is true, but is somewhat misleading. The 1968 law was passed after two and a half years of discussion within the Bar Association and after extensive negotiations between the People's Assembly and the Bar Association. The representatives of the People's Assembly refused to admit

that there is a difference between the assembly passing a law submitted to it by the Bar Association and passing its own law.

The representatives also argue that the law is in need of revision, since it was adopted in 1968 and few changes have been made. According to some members the assembly's acts are warranted because the Bar Council, prior to its dissolution, ignored repeated requests to formulate new rules regarding pensions and the rights of widows and children. However, no one seriously suggested that the need to enact reforms in a few provisions justified the dissolution of the Council and the total revamping of the law.

Both the government representatives and the representatives from the People's Assembly explained that in their view the leaders of the Bar Council had become too involved in politics. There was an insinuation that some members may have broken the law, in particular, the provisions of the National Security Law. They stated that something had to be done to stop this type of conduct. However, during the discussions there was a tacit admission that the proper course of action would have been to commence criminal proceedings against those who were suspected of breaking the law. There appeared to be agreement that parliament should not dissolve an association simply because it disagrees with statements being made by some of its members. Furthermore, the law governing the Bar Association did not prevent its members or leaders becoming involved in politics. In addition, the Egyptian constitution guarantees freedom of opinion and the right of the individual to express his opinion.

When considering the government's argument that the lawyers had become too involved in politics, one must bear in mind that at the time the Council was dissolved, over a thousand people, including many lawyers and several Bar

Association leaders, were under arrest and detained in political prisons. Most of those arrested were detained for several months, without charge or trial. No one, not lawyers, not even prosecutors has access to persons confined in political prisons unless granted permission by the security police.

As noted above, the consensus of opinion is that the dissolution of the Bar Council was a mistake. Also almost everyone predicts that the same council will be elected when the new elections are held. It appears that political considerations are the primary reason for the refusal of the People's Assembly to reinstate the old Council. This is the Assembly that dissolved the Council and it will not take any action which can be interpreted as an admission that it made a mistake.

During the discussions a compromise was offered by the observer since it was quite clear that the Assembly would not agree to bring back the old Council. The compromise, which was acceptable to the lawyers but not to the government or parliament, was for immediate elections to take place under the provisions of the old law and the newly elected Council to be given the draft of the new law to work on. It would be given six or eight months to return a finished text to the People's Assembly, and following passage, new elections would take place.

#### The New Law

A thorough analysis of the proposed law is not possible at this time since the text exists only in arabic. The representatives from the Assembly promised to supply a translation prior to the departure of the observer, but failed to do so. They had stated their willingness to consider any comments the Centre might wish to make on the text. However, some comments can be made in light of the

extensive discussions held with the Assembly representatives.

The Centre had been concerned about provisions in the proposed law which would have made it impossible for the members of the dissolved Council to hold positions in the new Council and which would have prevented those with less than eight years of practice from participating in the elections. The representatives from the People's Assembly stated that these provisions have been removed from the text.

A problem does exist with the proposed provisions governing elections. Under the old system the 20 members of the Council were elected by national ballot, with each of the eight appellate districts being entitled to at least one representative but no more than two representatives, with the exception of Cairo. Cairo was allowed up to five representatives. The district representatives held 12 of the seats on the Bar Council. Four seats were reserved for lawyers from the public sector, including government-run companies. The remaining four seats were filled by those with the highest number of votes who did not become members of the Council under the other selection criteria.

Under the proposed law each appellate district would be entitled to one representative. Six positions would be reserved for lawyers with 15 years or more of practice who have been registered before the appeal courts, with three of those positions reserved for public sector attorneys. The remaining six positions would be reserved for those with less than 15 years of practice but who have been registered before the appeal court, again with three positions reserved for government sector lawyers. Not only have the number of representatives from the government sector been increased, but the new law discriminates against lawyers in Cairo. About 60% or more of the lawyers

in Egypt practice in Cairo, yet it is given the same representation as each of the other districts. Several members of the legislative committee expressed their dissatisfaction with this provision, stating they believed it to be unfair.

It is not clear why the fifteen year criteria was selected. The stated purpose was to ensure representation by younger members of the bar. However, it must be noted that most of the members of the dissolved Bar Council have more than 15 years of experience. A question arises as to whether this provision was inserted in order to ensure that not all of the members of the dissolved Council were re-elected.

To be commended is the inclusion of the following article:

The Bar is an independent profession which shares responsibility with the judiciary in promoting justice and in promoting the sovereignty of law, and in providing the citizens with defence of their rights and liberties. It is practiced by lawyers alone and in complete independence and without interference with any other power, except their conscience and the Rule of Law.

Of concern is the part of the oath which requires lawyers to swear that they will not in their practice say what would be against public manners or tradition. This clause is too broad and could be subject to interpretations that would severely limit a lawyer's ability to defend his clients. This part of the oath was also criticized by several members of the legislative committee.



## Conclusion

For the most part, those who have had contact with this problem have reached the same conclusion: the dissolution of the Bar Council was an attack on the independence of the legal profession and should not have occurred. Although the government representatives state that they adhere to the principle that the legal profession should be independent, and also state that no such action will occur in the future, they are unwilling to do anything that could be seen as a public statement of error. The government's intransigence in this regard undermines the principle of independence set forth in the text of the proposed law.

The government and parliamentary representatives remained firm in their stand despite the fact that the dissolution is seen by many as a bad precedent both internally and externally, internally for the other syndicates and externally for the other countries in the Arab world to whom Egypt has always provided an example of democracy.

The representatives refused to acknowledge that the new law was tainted by the fact that it grew out of the dissolution of the Bar Council and that many people viewed its enactment as a mere "cover". The feeling is that having dissolved the council the Assembly had to do something to rectify the situation without admitting error.

When questioned about what assurances they could give that such an act would not occur again, the government and parliamentary representatives referred to the case presently before the constitutional court. They argued that if the court declared Law 125 unconstitutional, the government would be stopped from repeating the act in the future. These same representatives were unwilling to delay passage of the new legislation until a decision had been rendered by the court.

The government's dissolution of the Bar Council infringed the independence of the bar association and some step must be taken by the government to display its acknowledgement of this fact. The expected outcome of a court case cannot be considered a sufficient deterrent against similar acts in the future. Also, lawyers must have the right to participate freely and openly in the drafting of laws affecting the organisation of the bar association. This has not occurred. The answer that the lawyers can propose amendments or revise the law once it has been enacted is not sufficient. The object should be to arrive at a text all can agree on.

Egypt ratified the Covenant on Civil and Political Rights in January 1982. Although the dissolution of the Bar Council occurred before the ratification, it would be a recognition of the government's adherence to the principles contained in the Covenant if it compromised with the Bar Association. The Covenant recognises the right of everyone to freedom of opinion and freedom of association. Also, it has been stated that the provisions of the Covenant guaranteeing the right to a lawyer in criminal cases can be construed as calling for an independent legal profession.

The Rule of Law and the preservation of the independence of the legal profession would best be served by allowing the members of the dissolved Bar Council to return to office, but at the least a compromise should be reached between the government, the parliament and the bar association.

## INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION —Principles and Conclusion

*A Report of a Seminar held in Tokyo on 17th—18th July 1982*

On 17th-18th July, 1982, the LAWASIA Human Rights Standing Committee met in Tokyo. Japan for the purpose of discussing the application of the principle of the Independence of the Judiciary in the context of the history and culture of Asian countries. The meeting of the Standing Committee was held in private.

The Committee was honoured by the presence at its meeting of Chief Justice Chandrachud of India, Chief Justice Fernando of the Philippines, Chief Justice Samarakoon of Sri Lanka, and President Suchiva of the Supreme Court of Thailand. It was also honoured by the distinguished presence of the Former President of the Supreme Court of Japan, former Judge Ekizo Fujibayashi, former Supreme Court Judge, former Judge Sakamoto and former Judge Takeda, and the former Chief Justice of the Nagoya High Court, former Judge Yorihiro Natio. The meeting was also attended by eminent Japanese lawyers and professors, including the former Dean of the Law Faculty of Tokyo University, Professor Mikazuki.

Having had the benefit of the experience and wisdom of these eminent jurists and the advantages of their insight into the functioning of different judicial systems and drawing upon the collective experience of members of LAWASIA in the region, the LAWASIA Human Rights Standing Committee at its subsequent meeting in Tokyo formulated the following principles and conclusions.

1. The judiciary is an institution which has, and is seen to be of the highest value in the societies in the countries of the LAW-ASIA region;
2. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its high function;
3. 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.
4. The objectives and functions of the judiciary in these countries include the following:
  - (a) to ensure that all peoples 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 within its own society;
  - (c) to administer the law impartially between citizen and citizen and between citizen and state.
5. To enable the judiciary to achieve its objectives and perform its functions, it is essential that those appointed as judges be

chosen with due regard to their independence, competence and integrity.

6. It is fundamental to the preservation of the independence of the judiciary that it be freed from threats and pressures from any quarter.

7. It is also essential that the judges be provided with the facilities necessary to enable them to perform their functions.

8. It is the duty of the institutions of government to ensure that the judiciary occupies, and is seen to occupy, the position in its society which will enable it to maintain its proper dignity and standing in that society and to achieve its objectives and perform its functions.

9. It is equally the duty of each member of the judiciary to conduct himself/herself in all things in such a way as is consistent with the dignity and standing of his/her office and as will promote the achievement of the objectives and the performance of the functions of the judiciary to which he/she belongs.

10. *Appointment of Judges :*

- (a) There is no single mode of appointment of judges which is essential to their proper appointment. However, the mode adopted should be such as will best promote the appointment of proper persons to the office of a judge, will provide a safeguard against appointments being influenced by inappropriate factors, and will be seen to be directed to the appointment of judges of independence, capacity and integrity.
- (b) The structure of the legal profession, and the source from which judges are taken within the legal profession, differ in different societies within the LAWASIA region. In some societies, the judiciary is a career service, in others, judges are chosen from the practising profession. Therefore, it is accepted that in different societies, different procedures and safeguards may be seen as of assistance in ensuring the proper appointment of judges.
- (c) The Committee has observed that, 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.
- (d) The Committee recommends that the appointment of a Judicial Services Commission, or the adoption of a procedure of consultation with the organised associations of lawyers should be adopted as a means of safeguarding the proper appointment of judges.

Where a Judicial Services Commission is adopted for these purposes, it should be representative of the higher judiciary, and of all concerned in the administration of justice, to an extent that will ensure that its independence and integrity are safeguarded, and are seen to be safeguarded.

11. *Tenure :*

- (a) The independence of the judiciary must be secured by security of tenure.
- (b) The Committee recognises that, in some countries, the tenure of judges is subject to confirmation from time to time by an electorate or otherwise.
- (c) However, the Committee recommends that all judges should be appointed for a period related to the attainment of a particular age and that that period should be applicable to all judges exercising the same jurisdiction.
- (d) Judges should be subject to removal from office only for proved incapacity, serious criminal default, or serious misconduct, such as, in each case, makes the judge unfit to be a judge.
  - (i) The Committee recognises that, by reasons of differences in history and culture, the procedures appropriate for the removal of judges may differ in different societies. It recognises, in particular, that removal by parliamentary procedures have traditionally been adopted in some countries. However, the Committee believes that in some areas of the LAWASIA region, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and the use of it other than for the most serious of reasons is apt to lead to its misuse, and to encourage its use where it should not be used. The Committee believes that there is, in some areas of the LAWASIA region, a clear consensus within the legal profession that such procedures should be under the control of the senior judges of the particular society.
  - (ii) Where 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 his/her removal, for the purpose of determining whether the formal proceedings for his/her removal should be commenced. Formal proceedings for that purpose should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them. Such formal proceedings should not take place in public except with the agreement of the Chairman of the body conducting those procedures and of the judge in question.
  - (iii) The abolition of the court of which a judge is a member should not be accepted as a reason or an occasion for the removal of a judge.

12. *Relationship with the Executive :*

- (a) The Committee is aware of instances of threats and pressures made or applied to judges — for example :
  - (i) judges have been transferred from one court to another,

- or suspended from office for wrong reasons ;
- (ii) the remuneration or facilities of a judge have been affected because of decisions given by the judge ;
  - (iii) the value of judicial salaries has not been maintained.
- (b) Powers which may affect judges in their office, their remuneration or their facilities, must not be used so as to threaten or bring pressure upon a particular judge or judges.
- (c) Inducements or benefits should not be offered to or accepted by judges which affect or are apt to affect the performance of their judicial functions.
- (i) The Committee has been made aware of instances of inducements or benefits offered to judges. Examples have been given where, during or after the tenure of office of the judge, appointments or emoluments have been offered in circumstances in which the judge may have been or may reasonably be thought to have been influenced by them.
  - (ii) The judiciary and the other institutions of government should be conscious of the fact that whether what is done in fact induces a judge to act otherwise than he/she should, it is essential that what is done be not such as to be seen to be an inducement or a benefit to a judge for such a purpose.
- (d) It is at all times the duty of a judge to decide matters coming before him/her on his/her own view of the facts and in accordance with the law. It is the duty of the other institutions of government to ensure that he/she is in a position so to do.

**13. Remuneration and Facilities :**

- (a) The Committee is aware of instances, in the LAWASIA region, where the facilities which are now provided to judges and to the court system are below what is the minimum acceptable level at which judges and courts can carry out their functions properly.
- (b) The Committee recognises that there may be economic circumstances in which it is impossible for facilities to be provided to judges and to the court system at what would otherwise be an appropriate level.
- (c) However, a proper system of courts and the proper performance of the judicial functions are each essential to the maintenance of proper values, the rule of law, and the attainment of human rights within a society. The Committee therefore recommends that the provision of such facilities be seen as having a priority of the highest order in the ordering of each society.

It is the conclusion of the Committee that these represent the minimum standards necessary to be observed in order to maintain the independence of the judiciary and the functioning of an effective judiciary in the LAWASIA region.

## **MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE**

**Adopted at the IBA's Nineteenth Biennial Conference held  
in New Delhi, October 1982**

### **DELHI APPROVED STANDARDS**

#### **A. JUDGES AND THE EXECUTIVE**

1. (a) Individual judges should enjoy personal independence and substantive independence.  
(b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.  
(c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.
2. The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.
3. (a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.  
(b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4. (a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
- (b) The power of removal of a judge should preferably be vested in a judicial tribunal.
- (c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission
5. The Executive shall not have control over judicial functions.
6. Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.
7. The State shall have a duty to provide for the executive of judgements of the Court. The Judiciary shall exercise supervision over the execution process.
8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.
10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.
11. (a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
- (b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.
- (c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.
12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
13. Court services should be adequately financed by the relevant government.
14. Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of Executive control.
15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
- (b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.
16. The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole.
17. The power of pardon shall be exercised cautiously so as to avoid its use as interference with judicial decisions



18. (a) The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court judgement.
- (b) The Executive shall not have the power to close down or suspend the operation of the court system at any level.

**B. JUDGES AND THE LEGISLATURE**

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.
20. (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.
- (b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.
21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

**C. TERMS AND NATURE OF JUDICIAL APPOINTMENTS**

22. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.
23. (a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.
- (b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.
24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.
25. Part-time judges should be appointed only with proper safeguards.
26. Selection of judges shall be based on merit.
27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.
28. The procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held *in camera* or in public, may be published.
29. (a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.
- (b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.
30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.
31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.

32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

**E. THE PRESS, THE JUDICIARY AND THE COURTS**

33. it should be recognized that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.
34. *The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.*

**F. STANDARDS OF CONDUCT**

35. Judges may not during their term of office serve in executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.
36. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.
37. Judges shall not hold positions in political parties.
38. A judge, other than a temporary judge, may not practice law during his term of office.
39. A judge should refrain from business activities, except his personal investments, or ownership of property.
40. *A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.*
41. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.
42. Judges may take collective action to protect their judicial independence and to uphold their position.

**G. SECURING IMPARTIALITY AND INDEPENDENCE**

43. A judge shall enjoy immunity from legal actions and the obligation to testify concerning matters arising in the exercise of his official functions.
44. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.
45. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

**H. THE INTERNAL INDEPENDENCE OF THE JUDICIARY**

46. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

The above standards are subject to periodic review by the appropriate committee or committees of the International Bar Association and amendment from time to time by the International Bar Association in plenary sessions as circumstances may warrant or require

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*Report of a Seminar in Penang, December 1981.*

*Published jointly by the ICJ and the Consumers' Association of Penang (CAP)  
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*Available in english, Swiss Francs 10, plus postage.*

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## **Development, Human Rights and the Rule of Law**

*Report of a Conference held in The Hague, 27 April-1 May 1981, convened by the ICJ.*

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