



Nos. 19 & 20

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS

April – October 1987

Editor: Reed Brody

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

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

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

The work of the Centre is supported by contributions from lawyers' organisations and private foundations. 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 provide the financial support essential to the survival of the Centre.

Affiliation

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

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

EDITORIAL

We apologise to our readers for the delay in publishing our April 1987 issue of the CIJL Bulletin. This was due to the departure of Ustinia Dolgopol who has left us and emigrated to Australia. It took us some time to find a replacement. We decided, therefore, to issue a double number for our October issue.

We sadly miss Tina, who for five years ably guided the CIJL. We have persuaded her to prepare an evaluation of the work of the CIJL for this double number.

The past year has been a very active one for the CIJL. In addition to our previous activities, we have undertaken the organisation of regional and sub-regional seminars on the independence of judges and lawyers. In the past 12 months seminars have been held in anglophone East Africa, anglophone West Africa and South Asia, and preparations are under way for further seminars in Southeast Asia, South America, francophone West Africa and the Caribbean.

Message from Ustinia Dolgopol, former Director of the Centre for the Independence of Judges and Lawyers

It has been nearly five years since I undertook the task of Director of the CIJL. A great deal of work had been done by my predecessors to build the organisation and create a place for it among the other international human rights organisations. They had brought it to a crucial turning point; it had developed from being a new organisation without a recognisable name or network of supporters to an organisation with ever-expanding contacts giving it a certain influence with governments and increasing authority at the United Nations.

Five years later, with the assistance of the ICJ staff, the CIJL has developed a large group of supporters, its publications are distributed throughout the world, its seminars are helping to spur action at the regional level, it has been one of the major forces behind the adoption of universal standards on the independence of the judiciary and it has

turned the attention of the international community to the problems being faced by the legal profession. The specific achievements of the CIJL from its inception in 1978 are described in the article "The Centre for the Independence of Judges and Lawyers, its Work and its Aspirations" published within.

These achievements are not those of the CIJL alone. They represent the work of people concerned about their societies and the way their societies secure for their fellow countrymen and women fundamental rights (economic, social and cultural as well as civil and political) and allow for peaceful and progressive change. All of us working in this field are well aware that the structure of the law, the operation of the courts and the willingness of lawyers to make their services available to all affect our lives profoundly. We are also conscious that much depends on the good faith of the executive and of parliament.

Our accomplishments thus far must not blind us to the need to redouble our efforts and to continue making our protests when threats are made to the independence of the judiciary or the legal profession and to find means of strengthening the judiciary and the legal profession in all countries.

I urge each of you reading this Bulletin to think of ways in which you can assist the work of the CIJL both in your own country and abroad and to make whatever financial contribution you can to the CIJL, as its work should not be jeopardised by the lack of material resources. As the departing Director of the CIJL I extend to each of you my wishes for success in your efforts. To all the staff and the Secretary-General of the ICJ, I would like to acknowledge my gratitude for the assistance you rendered in making the work of the CIJL possible. For the CIJL and its new staff, I wish for you the experience of witnessing a world-wide movement, a people's movement, in support of your cause.

CASE REPORTS

ALGERIA

In June the State Security Court in Medea tried and convicted 12 "Ben-Bellists" of political crimes after the president of the court refused, at the opening of the trial, to allow the defendants to be represented by the lawyers they had chosen — Abennour Ali-Yahia and Ait Larbi Mokrane. By letter of 12 June the CIJL expressed its concern to the Algerian authorities for this apparent violation of the right of a defendant to be represented by counsel of his choice and asked for an explanation, but no response has been received. Mr. Ali-Yahia is President of the Algerian League of Human Rights and had himself spent eleven months in prison in 1985 and 1986 for political offences.

BRAZIL

Lawyer of Agricultural Workers Assassinated

The CIJL has previously reported on the issue of intimidation and violence by large landowners (fazeindeiros) against lawyers working with agricultural workers in Brazil's Northeast (CIJL Bulletin Nos. 8, 15). In Bulletin No. 15 we printed the report of the Human Rights Committee of the Federal Council of the Order of Advocates of Brazil which found that between 1977 and 1984 at least 30 lawyers were the victims of assassinations or assassination attempts.

On 11 June 1987 this repression apparently took another victim when the lawyer Paulo Fontelles was killed by unknown gunmen in Ananindeua, 10 kilometers from Belem.

Fontelles, who had been imprisoned and tortured under Brazil's military regime in the early 1970s, had dedicated himself since that time to the defence of rural workers and small landholders. He was lawyer for the Pastoral Land Commission and then for the Union of

Rural Workers. He was also a member of the state parliament of Para from 1982 to 1986.

Fontelles was assassinated in a gas station at which he had stopped. According to the station attendant, a car without license plates pulled up behind Fontelles and one man stepped out and shot three bullets into the lawyer. The gunman also reportedly announced that the local member of the state parliament would be "next on the list."

Many local political leaders have attributed the crime to the Democratic Rural Union (UDR), an organisation of fazendeiros with an armed militia. They point out that at the time of his murder, Fontelles was defending 30 peasants from Santana do Araguaia, Para, who were under preventive detention and accused of collaboration in the murder of fazendeiro Tarley de Andrade, son of the national treasurer of the UDR. They also point out that the assassination occurred on the eve of a congressional vote on agrarian reform. The UDR has denied any participation in the crime.

The same leaders fear that the crime may never be solved. They note that since 1964 almost 1200 crimes relating to land conflicts have gone unpunished. There has been at least one positive sign, however. A federal court, in an unprecedented move, has refused to release the fazendeiro Francisco de Assis Amaro, accused of the 12 February 1987 killing of 3 indians in the Xacriaba reserve in Mato Grosso, and accused him of the crime of genocide.

HONDURAS

Security Police Kills Supreme Court Justice

On 4 July, Supreme Court Justice Mario Antonio Reyes Sarmiento was shot and killed by the Honduran security police (FUSEP) after being stopped at a roadblock on a fashionable Tegucigalpa boulevard. Asked for his documents, the judge declared that he was a member of the Supreme Court. After a long delay, the judge began to drive off when he was shot by officers.

Although there is no evidence to suggest that Justice Reyes was shot because of his position, the case has become highly politicised. The FUSEP quickly blamed the judge for provoking the attack by firing first. Investigating Judge Amilcar Chavarria, however, later declared that the police's story was not credible. Laboratory tests, he said, showed that the judge had not used his revolver and that he was shot at close range. Shortly after making this declaration, Judge Chavarria was abruptly removed from his post by the Supreme Court for "drunkenness". Although the legislature and the Bar Association have called for a civilian court trial of the officer accused of the shooting, as the victim was a civilian, FUSEP has taken custody of the officer and there appears little likelihood of a civilian trial.

INDONESIA

Human Rights Lawyer Suspended

Adnan Buyung Nasution, one of the senior counsel of the Bar of Indonesia and a leading human rights activist, now in Holland completing his doctoral thesis, has been suspended from practising as a lawyer for a year. The decision was taken by the Justice Minister, Lieutenant-General (retired) Ismail Saleh, on 11 May, fifteen months after the first moves were made in Jakarta to have Buyung disbarred for alleged contempt of court in the political trial of H.R. Dharsono (CIJL Bulletin No 17).

In April of this year, Buyung received a letter from the Indonesian ambassador in Holland informing him that the Minister of Justice was intending to take unspecified administrative action against him, and giving him two weeks to defend himself.

In his reply, Mr. Buyung Nasution accused the minister of violating four legal principles:

- The notification of minister's intention to take administrative action failed to specify either the accusation or the administrative action being considered. Nor did it explain why Buyung would have only two weeks to defend himself.
- Laws in force at the time of Buyung's alleged offence did not allow the minister to take action against a lawyer for his conduct in a court of

law. Subsequently, Law No. 2 of 1986 on the Courts of Law gave the justice minister powers to act against lawyers but only while respecting the principle of the independence of the judiciary (which therefore excludes executive interference in the conduct of trials). In any event this law was enacted after the alleged offence.

- No one may be punished more than once for the same offence. The Court of Honour of the lawyers' association, Ikadin, had already taken up the case and issued stern warnings to Buyung for his action during the Dharsono trial. The Supreme Court accepted this penalty. Buyung regarded the penalty as a "realistic compromise" in the current political climate between protecting the rule of law and upholding the independence of the judiciary on the one hand, and pressure from those in power for him to be punished on the other.

- Action by the minister would undermine the independence of the legal profession in the conduct of advocacy and would be seen as a response not to Buyung's behaviour but to the independence he displayed in the conduct of Dharsono's defence.

The CIJL and the ICJ also urged the minister to reconsider his decision to impose sanctions against Buyung and requested Bar Associations to express their concern as well. Despite the strong response by lawyers' organisations, the minister imposed the suspension order, preventing Buyung from providing any legal advice for one year.

Buyung plans to file a lawsuit against the government in response to the decision. Nevertheless, the suspension, together with clients' fear of the adverse consequences of being represented by him or being associated with his office, have forced him to close down his thriving modern law firm.

Sweeping Powers Against Lawyers Decreed

In the wake of Buyung Nasution's disbarment, the Minister of Justice and the Chairman of the Supreme Court, Lieutenant-General (retired) Ali Said issued a joint decision in July giving themselves sweeping new powers to control and dismiss lawyers.

The new powers cover a range of loosely defined offences. Among other things, lawyers are prohibited "from acting, behaving, assuming attitudes, using words or issuing statements that display disrespect for

the legal system, the laws of the land, the general powers, the courts and their officials." They are also required to refrain from improper behaviour towards their opponents and from acting in conflict with the responsibilities, respect and reputation of their profession.

The judiciary will be able to impose disciplinary measures against lawyers, ranging from warnings to disbarment for life. District court judges and high court chairmen are empowered to impose punishments up to disbarment for six months, while disbarment for longer periods can be made by the Justice Minister in consultation with the Supreme Court Chairman.

The new measures were denounced as illegal by Ikadin, the sole officially recognised bar association. Ironically, Ikadin was set up two years ago under pressure from Supreme Court Chairman General Said. The Justice Minister recently ordered all other lawyers' organisations to disband, explaining that with Ikadin alone acting for the legal profession, "it will be easier for both the government and Ikadin to guide and control the lawyers".

KENYA

Human Rights Lawyer Detained Without Charges

The CIJL is concerned about the continued detention without charge or trial of a Kenyan lawyer, Gibson Kamau Kuria. He was taken into custody on 26 February 1987, although no warrant was issued for his arrest. He was kept incommunicado for two days and six days passed before a preventive detention order was issued. The order does not set out the reasons for his arrest or continued detention.

Mr. Kamau Kuria's detention came shortly after he had informed the government of his intention to bring suit on behalf of detainees for poor prison conditions and torture. Mr. Kamau Kuria had had an audience with the Attorney-General during which he informed the latter of his intent to bring suit.

While Mr. Kamau Kuria was not himself involved in political activities, he was the most prominent lawyer willing to take cases

with a political background in the face of possible government harassment, loss of business or even detention. In 1982, another prominent attorney, John Khaminwa, was detained under Public Security Regulations and held for two years without charge or trial. It was widely assumed that Khaminwa's detention resulted from his legal representation of political prisoners and because he had brought a lawsuit challenging the government's right to practise indefinite detention without charge or trial.

Mr. Kamau Kuria, who is also a lecturer at the Faculty of Law at the University of Nairobi, was known for his representation of political detainees in suits against the government as well as for his defense of students charged with sedition after an unsuccessful 1982 coup attempt. Shortly before his arrest, he had issued notices of intent to sue the government on behalf of three persons detained under Public Security Regulations on the grounds that their detention was unlawful and that they had been tortured in detention. He issued a similar notice to sue on behalf of the family of Stephen Wanjema who had died in government custody, allegedly of torture.

When Mr. Kamau Kuria was detained at his law firm, police searched his office and then his home before taking him to an undisclosed destination. Attempts by his colleagues to ascertain his whereabouts from the Criminal Investigation Department, at police stations and with the Special Branch responsible for internal security proved fruitless. When a habeas corpus petition filed on his behalf was heard in court 14 days after his arrest, the Assistant Deputy Public Prosecutor revealed that Mr. Kamau Kuria had been detained under Public Security Regulations on 6 March 1987 (eight days after his incarceration). Mr. Kamau Kuria was not produced at the court hearing despite a law requiring that arrested persons be produced in court within 24 hours. The judge ruled that his detention was lawful because an administrative detention order had been issued.

No charge was brought against Mr. Kamau Kuria nor has the government yet given any public explanation of his detention. The use of an administrative detention order would appear to indicate that the authorities do not intend to bring him to court.

According to one report in the government-controlled press, Mr. Kamau Kuria was an active member of Mwakenya, a left wing opposition organisation which is officially banned. His close associates strongly deny this charge. The day before his arrest, Mr. Kamau Kuria told the Financial Times of London:

"If I am picked up it is important that people know the reason why. I have determined that people's rights must be enforced, so I am going to press the government. I have decided I am not going to compromise on principle, even if it means being detained. The fear is that if I am detained I am going to be accused of involvement in the Mwakenya organisation. I have never had anything to do with subversive activities".

The CIJL urged - and still urges - lawyers and lawyers' organisations to write or telex the Kenyan authorities and request that Mr. Kamau Kuria be charged and brought to trial or released. The New York-based Lawyers' Committee for International Human Rights made a similar appeal.

SOUTH AFRICA

Lawyers Arrested Under Emergency Regulations

A state of emergency has been in force in South Africa since June 1986. Under the terms of the Emergency Regulations in effect from June 1986 to June 1987, those detained pursuant to its terms were forbidden access to any person, except with the permission of the Minister of Law and Order. Another regulation prohibited attempts to make contact with detainees, except with such permission. When the state of emergency was renewed in June 1987 even these limited possibilities of contact were removed.

In at least two instances lawyers were arrested for having conversations with clients who had been arrested under the Emergency Regulations when their clients appeared in court to respond to charges previously lodged against them.

One such case occurred outside Cape Town in June 1986. A lawyer, Trevor de Bruin, and three colleagues were representing people arrested following large scale protests against apartheid. During the course of the trial, all of the defendants were re-detained under the provisions of the emergency decree. However, despite the provisions prohibiting their contact with others, they were nevertheless brought to court for the trial proceedings on the earlier charges. On 19 June, after all the defendants had been re-detained and not allowed to appear in court, the lawyers approached the magistrate to discuss with him how the case was to proceed in the absence of the accused. The magistrate suggested that the lawyers contact the Attorney-General by phone and seek his advice. One lawyer, Mr. Albertus, went to place the call and while waiting for a telephone he was arrested by the police. The Chief Magistrate then directed the court switchboard to put through the call to the Attorney-General's office; as the call came through to Trevor de Bruin in an annex of the Chief Magistrate's office, a team of policemen in camouflage uniform rushed into the office and arrested him. The police told the Chief Magistrate not to speak with de Bruin because he was being detained pursuant to the terms of the Emergency Regulations and refused to allow de Bruin to speak to the Attorney-General.

The police were aware that the two men were lawyers, as one of the policemen involved in the arrest was a witness in the case being handled by the lawyers and was about to be cross-examined by de Bruin.

When Albertus and de Bruin arrived at the police station, they learned that they were being accused of having spoken to detained persons, i.e. their clients. They also learned that the police had misunderstood the Emergency Regulations and had incorrectly taken to court on 17 June the defendants detained under the decree. The police suggested that the lawyers had somehow arranged for their clients to be in court on that day.

The lawyers were questioned about a visit to a township that had taken place the day before. The lawyers explained that the visit was an inspection in loco which had been undertaken with the magistrates as well as the police. De Bruin was also questioned about some film that had been given to him by one of his clients.

After they were questioned, the lawyers were taken to another township where they were placed in a police station cell. It appears that while they were in custody the police searched their case files, since documents in the lawyers' files were found to have been switched.

On the 5th day of their detention in a cold cell with foam mattresses, they were released from custody under the terms of the Emergency Regulations but were immediately re-arrested and charged with having violated certain sections of the Regulations. They were driven back to the town where they had been detained initially, charged and then released on bail. The charges were later withdrawn.

The lawyers are suing the Minister of Law and Order as well as the police lieutenant responsible for their arrest and detention.

It appears that a similar incident occurred with respect to a Johannesburg lawyer, Prakash Diar during December 1986. He is also suing the Minister of Law and Order as well as the responsible police officer.

Lawyer Banished for Second Time

Transkei lawyer Dumisa Ntsebeza was banished to remote areas of the Transkei in March of this year. The precise reasons for his banishment are not known. He was previously banished in October 1986 while he was investigating the death of his adopted brother, Batandwa Ndonga, who had been shot while in the custody of security police (see CIJL Bulletin No. 17). He has frequently acted for those accused of political crimes.

SPAIN

Judiciary and Executive Clash Over Investigations

Over the past year, a number of incidents have provoked clashes between the Spanish judiciary and the government.

In investigating the allegation that members of the Civil Guard (Guardia Civil) beat and tortured a civilian in 1981, Judge Elizabeth

Huerta Sanchez of Bilbao ordered 90 Civil Guards to appear in court for identification. On 27 August 1986, the General Management of the Civil Guard, acting, it was later learned, under orders from the Interior Ministry, refused to allow the officers to appear.

The General Council of Judicial Power (CGPJ) - comprised of the President of the Supreme Court and twenty members, twelve of whom have judicial backgrounds, and which "governs" the judicial branch - reacted to the Ministry's obstruction by "insisting in the constitutional obligation of each and every citizen and public authority to comply with judicial resolutions and mandates". Nevertheless, the government has maintained its refusal to allow the officers to appear.

The Bilbao case and others gave rise in June and July 1987 to declarations by Interior Minister Jose Barrionuevo complaining of the lack of assistance which judges were giving to the fight against terrorism and calling upon them to take a more active role. He also criticised some judges in the Basque region whose behaviour in handling investigations both of alleged mistreatment by law enforcement officers and of accused terrorists, "has scandalised the other judges and the majority of citizens".

Responding to the minister's declarations, the CGPJ protested:

"1. The participation of the Judicial Power in activities of the State is restricted exclusively to the functions attributed to it by the Constitution and the laws. No other activity by the Judicial Power can be demanded or even permitted. In the fight against terrorism ... the mission of the judicial branch consists, as with all crimes, in judging and in seeing that its judgments are executed, using only those criteria set forth by law.

2. To call on the Judicial Power to take action foreign to its mandate, to forget the importance of judicial protection of fundamental rights and to accuse, by means other than those provided for by the judicial procedures, judges who are serving in the Basque region of serious charges, not only supposes a perturbation of judicial independence, indispensable to the rule of law, but also contributes to creating a state of mistrust within public opinion to the detriment of the credibility of the mission of the judicial branch, without prejudice to the right of

criticism, logical and necessary, of judicial resolutions in the exercise of free expression."

Lawyer Detained

In May 1987 in Grenada, the lawyer Dario Fernandez - well known for having represented the civil parties in the "Almeria case" in 1981 which marked the first time that Civil Guards were convicted of homicide - was representing a fellow lawyer accused of diversion of funds. While examining his client, Fernandez asked if the client had ever made a complaint against the presiding judge and if the complaint had been accepted. The judge for some reason barred the question as irrelevant. The lawyer then asked the witness if he believed that the court was competent to hear the case. Again, the judge ruled the question irrelevant and Fernandez asked for a suspension of the case, stating that he was being restricted in his right to defend his client. The judge then sentenced Fernandez to jail for contempt of court, where he spent 72 hours before being released. The action was severely criticized by the Grenada Bar Association which rejected "any attempt to limit the freedom of defense". Antonio Pedrol Rius, President of the Spanish General Lawyers Council added that "if a lawyer has to act thinking that a policeman is waiting for him at the door in order, upon a judge's order, to put him in jail, then the social function of a lawyer is finished, as is the right of citizens to be defended."

SYRIA

CIJL Bulletins 6 and 15 contained reports on the arrest and continued detention without trial of 13 Syrian lawyers in 1980. The CIJL has learned that 10 of the 13 were released during November 1986. The ten are:

Dibo Abbud
George Atiyeh
Abdal Karim Jurud
Muhammad Hamdi al Khorasami
Haitham Malih
Sa'id Nino
Assad'Ulabi

'Adnan 'Arabi
Michel Arbash
Bahjat al-Missouti

Three lawyers remain in detention; they are: Thuraya 'Abd al Karim, Salim 'Aquil and 'Abd al Majid Manjouneh. No reasons have been given for their continued detention.

The 13 lawyers were detained following a general strike called in January 1980 to protest the continuation since 1963 of a state of emergency, the existence of emergency courts, arbitrary detention and the use of torture and other forms of cruel and degrading treatment.

YUGOSLAVIA

The CIJL has been following the case of Yugoslav lawyer Vladimir Seks since 1984. Full details of his case are contained in Bulletins 13, 15 and 18. Because of his conviction on charges of having falsely and maliciously represented social and political conditions, Mr. Seks was disbarred from practise in his home state of Croatia.

After his release from prison, Mr. Seks found it difficult to obtain employment. There were suggestions that some police officers and local government officials were exerting pressure on prospective employers not to hire him. Furthermore, his passport, withdrawn when he entered prison, was not immediately returned when he was released, thus preventing him from taking up employment opportunities abroad.

The CIJL wrote to the government on 20 January about this situation. It also wrote to the Belgrade Bar Association which had before it Mr. Seks' application for admission. The CIJL requested that his application be given sympathetic consideration. (The standards for admission to practise differ from one region to another in Yugoslavia, therefore the automatic disbarment that came with the conviction in Mr. Seks' home region would not have prevented him from being admitted to practise in Belgrade.) The CIJL issued an appeal letter to Bar Associations asking that they intervene on behalf of Mr. Seks with the government and with the Belgrade Bar Association.

Since then the CIJL has learned that Mr. Seks was permitted to take up employment in a law firm in the city of Osijek and has been given back his passport. However, Mr. Seks' license to practise has not been restored; he is continuing his efforts to have it restored.

ARTICLES

The Independence of the Judiciary in Botswana, Lesotho and Swaziland*

by P.K.A. Amoah**

Introduction

It has been a hundred years since Dicey raised the basic constitutional problem that appears to have bedevilled statesmen, lawyers and judges, and to which Professor Dicey's exposition of the Rule of Law¹ was directed. That problem may be expressed in the form of the question: What form of justice best ensures a proper harmonisation between public order and personal freedom? To put it another way, in what way does the administration of justice achieve a productive balance between the opposing notions of individual liberty and the public interest? The Diceyan solution, embraced in his conception of the Rule of Law, was intended to achieve efficient governmental administration while giving due regard to the observance of the law.

In modern times national and international attempts to focus upon this basic problem have emphasized the procedural and human rights

* Editor's note: This article is the second part of a paper presented to the Lusaka Seminar on the Independence of Judges and Lawyers, organised by the CIJL and the African Bar Association

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¹ In his Introduction to the Study of the Law of the Constitution (1885); A.V. Dicey argued *inter alia* in support of the absolute supremacy of regular law as opposed to the influence of arbitrary power, and the subjection of all persons to the ordinary law of the land administered by the ordinary courts. Although his exposition has been subjected to much criticism, the basic tenets of his thesis have survived and have been linked with the modern conception of human rights.

aspects of the Rule of Law to such a degree that the promotion of the Rule of Law is now subsumed under the promotion and protection of human rights and fundamental freedoms. Such efforts by the International Commission of Jurists (ICJ), the United Nations and regional organisations as in conducting seminars, studies and concluding multilateral treaties have given great impetus to the international campaign for the observance of human rights. In its thirty-four years of existence the ICJ has held several congresses, seminars and conferences to address issues pertaining to the Rule of Law and human rights.

One of the earliest congresses was held in Delhi in 1959, and was attended by judges, lawyers and law teachers representing over fifty states. They issued a declaration affirming their recognition of the Rule of Law as a "dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his 'legitimate' aspirations and dignity may be realized".²

The Delhi Congress was followed in 1961 by the ICJ-sponsored African Conference on the Rule of Law. The resolutions of that conference, in a language that presaged the adoption of the African Charter on Human and People's Rights, invited African Governments "to study the possibility of adopting an African Convention of Human Rights in such a manner that the conclusions of this conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states".³ In the years following the Lagos Conference, African

² Declaration of New Delhi, 1959. International Commission of Jurists Report of Committee IV Clause I.

³ African Conference on the Rule of Law, Lagos, Nigeria January 3-7, 1961. A Report of the Proceedings of the Conference. Geneva: International Commission of Jurists, (1961). Declaration 4 of the "Law of Lagos" Conference attended by 194 judges, practising lawyers, and law teachers from 23 African nations as well as 9 countries of other continents. The Third Committee dealing with the responsibility of the Judiciary and the bar for the Protection of the rights of the Individual in society affirmed (page 119) (*footnote continued*):

governments' impatience with the pace of economic development, as well as increasing authoritarianism, which sowed the seeds of their own destruction, led to the constitutional breakdowns of the 60's and 70's.⁴ A re-appraisal of the Rule of Law and human rights thus has to be undertaken.

The ICJ seminar on Human Rights in a One-Party State, held in Dar-es-Salaam in September 1976, addressed the subject of this paper - independence of the judiciary and legal profession - and the conclusions of that seminar indicated that such independence was a prerequisite to the proper administration of justice, the respect for the Rule of Law and the protection of human rights, and a number of principles were set out which the seminar suggested would facilitate their observance. Among these principles were the following:

The independence of the judiciary in the exercise of its judicial functions and its security of tenure is essential to any society which has a respect for the Rule of Law. Members of the judiciary at all

(footnote continued): In a free society practising the Rule of Law, it is essential that the absolute independence of the judiciary be guaranteed. Members of the legal profession in any country have over and above their ordinary duties as citizens, a special duty to seek ways and means of securing in their own country the maximum degree of independence for the judiciary.

⁴ The Constitutional breakdowns of the mid-60's prompted a pessimistic constitutional analyst to make the following observation: The question therefore arises whether we are not wasting our time speaking of constitutionalism and constitutional engineering in the African context. The simple, direct answer - and I have heard it pronounced on more than one recent occasion - would be:

'Yes, you are, and have been wasting you time. There is no African constitutionalism. Most efforts at constitutional engineering in Africa since independence have failed. You can employ yourselves more usefully by studying the role of the military or of economic decay'

H. SPIRO. Constitutionalism and Constitutional Engineering (Paper presented to the Ninth Annual Meeting of the African Studies Association, 1966).

levels should be free to dispense impartial justice, without fear, in conformity with the Rule of Law.

The independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed. They should enjoy complete immunity for actions taken within the law in defence of their clients.⁵

In the light of these ideals expressed over a decade ago, the present paper will provide an overview of the impact of the principles on the independence of the judiciary and legal profession in Botswana, Lesotho and Swaziland. This does not purport to be a comprehensive analysis of the subject. It is a modest attempt to describe as well as provide an objective assessment of the progress made in the three countries since independence in this crucial area. To achieve these objectives the paper is divided into two parts. Certain tentative conclusions will be drawn from a consideration of the problems confronting the three states in the regard to the effective realisation of the goals of achieving the Rule of Law and the observance of human rights through the judicial process of harmonising the opposing notions of public order and personal freedom. For the purposes of this paper, the judiciary is understood to refer to the judges of the superior courts (the High Court and the Court of Appeal), and the legal profession refers to lawyers in private legal practice.

Botswana

The point has been made that the independence of the judiciary and the legal profession is sustained by the general human rights situation in a country. Improvements in standards of human rights protection lead inevitably to respect for the independence of the judiciary and the legal profession as well as the values they represent. Nowhere is this as dramatically illustrated as the case of Botswana.

⁵ Human Rights in a One-Party State, International Seminar on Human Rights, their Protection and the Rule of Law in a One-Party State: Convened by the International Commission of Jurists (London: Search Press, 1978).

The Republic of Botswana may appropriately be described as a shining example of human rights protection in Africa. There is no evidence suggesting either subtle or overt attempts to undermine the independence of the judiciary or the legal profession. The general situation has been described in these laudatory terms:

Botswana is a regional symbol of liberal democracy, an African state with a multi-party system that has held open elections for successive popularly elected governments. The openness of the Botswana political process stands in sharp contrast to Swaziland and Lesotho as well as that of Zambia, much less South Africa. It provides a refutation of the paternalistic assumptions underlying the ideology of white supremacy.⁶

Lesotho

As the Botswana experience demonstrates, the independence of the judiciary and the legal profession is enhanced (or at least not interfered with) where generally improved human rights conditions exist. Is the converse true? That is to say, is it conceivable to have a co-existence of authoritarian rule and judicial independence? Or is the judiciary "neutral" rather than independent in such a situation.

The experiences of the judiciary and the legal profession in Lesotho (and to a certain extent in Swaziland) raise interesting issues in regard to the direct and indirect impact of executive action upon their independence. It is possible that even where there has not been direct interference on the part of the executive, the general atmosphere of insecurity and fear could cause the judiciary and the legal profession to "watch their step" in relation to the executive and to avoid confrontation with the more powerful forces of state.

⁶ E.P. Morgan, "Botswana: Development, Demography, and Vulnerability, " in Gwendolin Carter and Patrick O'Meara (eds), *Southern Africa: The Continuing Crisis* (2nd edition), (Bloomington: Indiana University Press, 1982) p. 237.

It is, of course, debatable whether a logical distinction can be drawn between indirect and direct forms of interference with the independence of the judiciary. The form that interference takes may not matter at all. Lesotho presents an ambivalent picture to the casual observer. For example, at the same time as the government adopted security legislation curtailing certain basic freedoms it passed human rights legislation guaranteeing a variety of basic freedoms.

In order to understand the situation more fully, a review of court decisions interpreting the various pieces of legislation is necessary. The review will be divided into two periods, 1966 to 1970 and 1970 to 1986.

1966 - 1970

The period immediately following independence in Lesotho was one of relative calm in the Kingdom. This is not to suggest that the system of human rights protection in Lesotho was perfect. Rights were violated on occasion, and charges of abuse of power were expressed; but as Maqutu points out: "Government could be sued for damages where the police violated an individual's human rights".⁷

1970 -1986

The second period which commenced with the 1970 constitutional crisis was characterised by features militating against the independence of the judiciary. The Prime Minister seized political power, and declared a state of emergency which suspended the operation of the 1966 independence constitution. Several people were detained for periods up to eighteen months without charge or trial.

In an unprecedented move, the Chief Justice suspended the sitting of the High Court on the basis that "as the court was bound to the suspended constitution" it had somewhat lost its power to provide remedial justice. To abandon the process of the administration of justice at a time when legal redress was needed most was not only a tacit endorsement of the Prime Minister's seizure of power, it was also a complete

⁷ W.C.M. Maqutu, *The Lesotho Legal System* in K. Redden (ed.) *Cyclopaedia of Modern Legal Systems* (Buffalo : Hein Co. 1985) p. 15.

abdication of the judicial function. Curiously enough it was the Prime Minister who had suspended the constitution, who, by legislation, brought the court back into operation.

Since 1970, there has been a series of Internal Security Acts (a euphemism for Preventive Detention Acts). Each of the acts has contained provisions which deny access to detainees and which take away the power of the courts. The general human rights implications of the state of emergency in Lesotho, including the draconian legislation it fostered, have been carefully documented by commentators.⁸ The judiciary and the legal profession have, in recent years, tried to limit the encroachments into their independence and into the protections afforded human rights. Two recent cases are illustrative of their efforts.⁹

*The Law Society of Lesotho v The Prime Minister
and the Solicitor-General*

In this matter the Lesotho Law Society launched an application against Prime Minister Leabua Jonathan in order to have revoked the appointment of a staff member of the Director of Public Prosecutions as an Acting Judge of the High Court. The Law Society contended that as the appointee was a civil servant whose appointment would be temporary, the principle of judicial independence would be violated if he were allowed to take up his appointment. It was also argued that the appointment contravened the Human Rights Act of 1983, in particular section 2(1) guaranteeing "the right to a fair and public hearing by independent impartial and competent national courts in the determination of rights, obligations and criminal offences", and section 16(6) which imposed an obligation on the state to "guarantee the independence of the courts and to allow the establishment of national institutions entrusted with the promotion and protection of human rights freedoms guaranteed by the Act".

⁸ See, for example, B.M. Khaketla, *Lesotho 1970: An African Coup under the Microscope* (London: C. Hurst, 1971); and M. Stein, *Legal Aspects of the Lesotho Constitutional Crisis*, *East African Law Journal* Vol 6, 1970. p. 210.

⁹ In a development reflecting one of life's ironies, the applicant in the second case was the respondent in the first.

The application was dismissed by an Acting Judge of the High Court with costs, the learned judge having satisfied himself that there was no merit in the application.

On appeal, the Court of Appeal found that the appointee had not in fact resigned his office as a civil servant. The court stressed the importance of the independence of the judiciary in regard to the enforcement of human rights. The Court of Appeal observed that the common law of Lesotho upheld the principle of the independence of the judiciary and that in order to have a fair trial it was essential that judges be absolutely independent from government. In the event, the court held that the appointment of the civil servant as an Acting Judge of the High Court contravened the Human Rights Act of Lesotho.

Chief Leabua Jonathan v Commissioner of Police and Another

The decision of Mr. Justice B.K. Molai in this case raises issues of constitutional importance with respect to the independence of the judiciary in a civilian-cum-military administration. It was a noteworthy departure from a trend that was being established in earlier decisions which tended to negate the protections afforded by the Human Rights Act. For example, in one earlier case an Acting Judge of the High Court had stated that the rights embodied in the Act could be impliedly repealed by subsequent inconsistent legislation.¹⁰ In another case, decided by the former Chief Justice, the court lightly dismissed a claim alleging a violation of rights, concluding: "I am not persuaded that there was such violation. The Human Rights Act of Lesotho is at par with other laws not superior to them".

True, it may be at par with other legislation or liable to amendment; but in the absence of such amendment, it is difficult to see how the honourable court faced with the choice of applying one of two inconsistent statutory provisions - one violating human rights, the other protective of those rights - would resolve the matter in favour of human rights violation. Chief Leabua Jonathan's application did not directly cite specific provisions of the Human Rights Act but it did raise, inter alia, important human rights issues: the rights to freedom

¹⁰ Bennet Makalo Khaketla v The Honourable Prime Minister Civ/APN/145/85 (Judgement Delivered on July 24, 1985). (unreported).

of movement and association. The case must be viewed against the backdrop of the events following the overthrow of Chief Leabua Jonathan's government on January 20, 1986. A restriction order issued by the Acting Commissioner of Police was served on the former Prime Minister on August 20, 1986. The order alleged that the applicant's recent political activities were prejudicial to public safety and confined him to his residence and limited those who could have access to him to his immediate family. The order concluded: "In the event that you find yourself compelled to move beyond the area you have been restricted to, you are ordered to notify the nearest police station to you".

No statutory authority was cited in the order. On September 4, 1986 the Legislature enacted, with retroactive effect from August 1, 1986, the Internal Security (Amendment) Order No. 21 of 1986 which amended the Principal Act by inserting, after section 24, a section 24A which reads, in part:

"24A (i) The Commissioner may, subject to the approval of the Minister, issue a restriction order to a person who in his opinion is conducting himself in a manner prejudicial to public order, the security of Lesotho, the administration of justice or obedience to the law or lawful authority".

On that same day (September 4, 1986), Chief Leabua Jonathan filed an urgent application for a declaratory order to the effect that the letter of the Acting Commissioner of Police dated August 20, 1986 was invalid and of no force and effect.

In his answering affidavit the respondent stated that as the Acting Commissioner of Police he was subject to the general direction of the Minister responsible for law and order. That he had command and superintendence over the entire police force whose duty was to preserve peace and take remedial action for the prevention and detention of crime. Further, that he had in his possession credible information that the applicant was engaged in activities which caused internal dissension and indulged in subversive activities ... He was however unable to give any details of such information as it was extremely sensitive and disclosure thereof would prejudice national and public security. The interest of public safety demanded that for the preserva-

tion thereof he should take immediate action to restrict the movements of the applicant.

The two main issues considered by the learned judge were first, whether there was any statutory provision empowering the Commissioner of Police to issue restriction orders against persons allegedly involved in subversive activities; and second, whether the absence of an express reference to "Acting Commissioner of Police" in the Internal Security (General) Act of 1984 precluded the respondent from exercising the statutory powers vested in the Commissioner.

In regard to the first issue, Justice Molai considered the provisions of section 5 of the Police Order 1971 and those of the Internal Security (General) Act of 1984 and found that no provision had been made for the Commissioner of Police to issue such restriction orders. The first piece of legislation dealt with his powers of governance over the police force while the second dealt with his power to arrest someone without a warrant where a member of the police force suspected the person arrested of being involved in subversive activity.

The court's finding on the second issue was that whereas in the Police Order the definition of "Commissioner" included "Assistant Commissioner" no such definition was provided for by the Internal Security (General) Act of 1984. The judge concluded: "it cannot be said that the Acting Commissioner of Police is the Commissioner of Police for purposes of the Internal Security (General) Act of 1984." Consequently he held that when on August 20, 1986 the first respondent issued the restriction order against the applicant there was no law authorising him to do so, therefore his action was ultra vires.

The court's refusal in this case to adopt reasoning that would have sanctioned the invocation of implied police powers displayed a judicial determination to curtail unwarranted executive encroachment upon the liberty of the subject.

Swaziland

The situation in Swaziland is somewhere in between those of Botswana and Lesotho, though two recent superior courts decisions indicate that

it may be moving towards that of Botswana. Both cases involved attempts by high-ranking members of the executive (in one case a powerful prince, and in the other a cabinet minister and a commissioner of police) to defeat the ends of justice. Their conviction and sentence demonstrate the determination by the judiciary to guard jealously its own independence, as well as that of the legal profession. The two decisions also prove quite convincingly that the Roman-Dutch common law of Swaziland upholds the principle of judicial independence and frowns upon unwarranted interference with the proper administration of justice.

The post-independence developments in Swaziland may be conveniently highlighted in three distinct stages. The first is the period immediately following independence in 1968 until the suspension of the "independence Constitution" in 1973 by King Sobhuza. The second from 1973 until the King's death in 1982; this period marked the beginning of the present "Tinkhundla" form of government which is based on a combination of traditional methods of governance with modern concepts. The third stage, 1982-1986, is the period which follows King Sobhuza's death and continues until the coronation of King Mswati III.

Although there were no direct confrontations between the executive and the judiciary during any of the three periods, actions taken by the executive and legislation passed by Parliament tended to interfere with the jurisdiction of the courts. In addition, there were actions taken by members of the executive which had the effect of impinging upon the independence of the legal profession. Legislation to establish a Law Society is being considered and it is hoped that the Law Society will be given powers which will enable it to resist interference in the independence of the legal profession.

1968-1973

The independence constitution contained safeguards which guaranteed the independence and impartiality of the judiciary. It also provided for judicial redress of violations of guarantees for human rights and fundamental freedoms. However, Parliament's dissatisfaction with court decisions interpreting provisions of the constitution concerning discrimination and citizenship resulted in the passage of a resolution calling on the King to abrogate the constitution. Members of Parliament

asserted that the Westminster-based constitution had introduced political practices and concepts which were alien to Swaziland and incompatible with its traditional system of administration. The King did repeal the constitution by Proclamation on 12 April 1973. However, the provisions of the constitution relating to the judiciary were retained.¹¹

1973-1982

Following the repeal of the independence constitution, the King assumed supreme governmental power. This power was exercised in collaboration with a Council of Ministers which replaced Parliament and legislation was enacted in the form of King's-orders-in Council. This state of affairs continued until 1979 when Parliament was restored by the Establishment of the Parliament of Swaziland Order.¹²

In 1978 a 60 day detention law was introduced. This law deprived the courts of their jurisdiction over the validity of detention orders issued pursuant to its terms.

¹¹ Sections 98(1) and 106(1) of the 1968 Constitution dealing with the Judicial Service Commission were subsequently repealed by decree.

¹² In terms of the Establishment of the Parliament of Swaziland Order (King's - Order - in Council No. 23 of 1978) a two-tier system of "no-party" parliamentary elections is provided. The first stage of the election process takes place at forty election points (Tinkhundla). Two candidates are elected by each "Tinkhundla" in accordance with Swazi traditional methods. The eighty elected candidates constitute the Electoral College. The second stage of the election process is conducted by secret ballot in the Electoral College. The College elects 40 members of the house of Assembly and the king appoints 10 additional members. The House then elects 10 senators and the king appoints 10 more senators. The Attorney-General is an ex-officio member of the 70 member bicameral legislature. No court has jurisdiction to entertain any action questioning the regularity or otherwise of elections conducted in terms of the Order.

1982-1986

Following the death of King Sobhuza in August 1982, Queen Regent Dzeliwe assumed the duties of head of state. In 1983, there was a dispute between various members of the government which apparently concerned the respective power and functions of the modern and traditional sectors of government. As a result of the dispute the Prime Minister was dismissed and Queen Regent Dzeliwe removed from power and replaced by Queen Regent Ntombi. When Queen Regent Dzeliwe attempted to test the constitutional validity of her removal in the High Court, legislation was passed to deprive the High Court of jurisdiction to hear the case. The legislation was made retroactive. The 1978 detention laws were used against Queen Regent Dzeliwe's supporters and against her lawyer.

The coronation of King Mswati II brought to an end the intense power struggle which followed the death of King Sobhuza. Those detained during the period 1982 to 1986 under the 1978 legislation were released and some members of the former government who had misused the laws so as to punish their opponents have been brought to trial and convicted. Judicial independence is once again being respected.

The two cases mentioned at the start of the section on Swaziland which were decided during the 1982-1986 period demonstrate the determination by the judiciary to safeguard its independence against abuse of power and executive interference with the judicial process.

Thato Margaret Nhlabatsi v Hetrick Sipho Nhlabatsi

In the first case, a cabinet minister displayed a total disregard for orders of the court in a private suit against him and attempted to subvert the course of justice by giving false evidence in court.

The minister was a respondent in a divorce action which was settled by the entry of a consent decree requiring him to make payments to his wife for alimony and child support. When the minister stopped making payments, the wife instituted contempt proceedings. After a series of delaying tactics by the defendant minister, he was sentenced to three months imprisonment, to be suspended if he complied with the consent decree by making the required payments. Rather than

complying with the order or appealing against it, the defendant applied to the High Court for an order that the matter be treated as one of urgency and that the consent order and the order of committal for contempt be rescinded.

When the matter came before Hassanali J. of the High Court 3 days later, the defendant stated under oath that he had personally served papers at the offices of plaintiff's attorney and that he had further informed an employee of plaintiff's attorney that the matter would come on before the court later that day.

Although the plaintiff did not appear, the judge proceeded to hear the application in which the defendant claimed that the original order was invalid and that the attorney who had acted for the defendant had exceeded his authority in consenting to the order. The defendant's application was granted. The Court of Appeals then affirmed the judgement rescinding the contempt order.

The wife appealed, asserting that (1) contrary to the statements made in the defendant's affidavit and during his testimony before the trial court, service of defendant's motion papers had never been made and therefore the order rescinding the contempt judgement was obtained by fraud, and (2) that the manner of service as stated by the defendant was void because defendant had stated that he personally served the motion papers which was not permitted by the court's rules of procedure.

In view of the nature of the allegations made in the affidavits before the Court of Appeal, the court referred to several authorities noting that this was an exceptional case warranting an order that evidence be led. After a careful consideration of the evidence, the court, per Maisels P concluded: "This Court had no hesitation in accepting the wife's evidence and rejecting that of the defendant, with regard both to his alleged telephonic conversation and visit to the offices of plaintiff's attorneys".

The appeal was allowed, the court setting aside the order of rescission. The court drew the attention of the Director of Public Prosecutions to the evidence in the case. The Minister was subsequently convicted of

perjury and sentenced to nine months imprisonment. His appeal to the Swaziland Court of Appeal was dismissed.

Regina v Majaji Simelane and Prince Mfanasibili Dlamini

In the second case, the first accused, a former Commissioner of Police, was charged with seven counts of allegedly defeating or obstructing or attempting to defeat or obstruct the course of justice with alternative counts of subornation of perjury, forgery and uttering. The second accused, a former member of the Supreme Council of State (Liqoqo), was jointly charged on counts six and seven. Both accused pleaded not guilty.

The intense power struggle and ensuing political strife that followed the death of King Sobhuza II in August 1982 forms the backdrop for the arrest and trial of these two powerful political figures. During 1984 and the early part of 1985 two cabinet ministers and four high ranking police and army officers were dismissed then subsequently arrested and detained under the provisions of the 1978 detention legislation. Their arrest caused considerable disquiet both nationally and internationally. Concern was expressed about the need to provide procedural safeguards for the human rights of the detainees. Consequently, the authorities announced publicly that the detained persons had committed certain crimes for which they would be brought to trial. In April 1985, the former police and army officers were charged with sedition. That offence allegedly having been committed by reason of a meeting of top police and army officers that took place at the Matsapha Police College on June 8 1984. It was alleged that the meeting aimed at taking the necessary steps to reinstate the dismissed Queen Regent Dzeliwe (who had been removed from office by the Supreme Council of State in mid-1983). The sedition charges were subsequently withdrawn after the prosecution decided that an indictment for high treason against the detainees and other persons (including high ranking members of the royal family) would be more appropriate.

The accused in the Regina v. Simelane and Dlamini case were behind the arrests and detention. In their endeavour to find evidence to support for the high treason charge, the two accused attempted to fabricate evidence which would show that the detainees and other

persons had held secret meetings in various places in Swaziland during which plans were hatched to overthrow the government. As part of the attempt to fabricate evidence the second accused undertook a visit to Johannesburg in order to recruit a South African witness, whom the second accused believed would provide convincing testimony in regard to the alleged treasonable meetings conducted by the detainees.

To obtain corroborative evidence of the witness' testimony both accused threatened a high government official to have the latter dismissed and incarcerated if he failed to comply with the request. On the basis of these threats the two succeeded in getting the official to make a statement that supported the witness' testimony in material respects.

When the above facts were brought to light, the two officials were brought to trial. In a 36-pages judgment Chief Justice Hannah, after a careful consideration of the evidence was left in some doubt as to whether the offences alleged in the first five counts against Simelane had in fact been committed. Accordingly he was acquitted on counts one to five. The judge found, however, that the evidence adduced in respect of counts six and seven, in which both accused had been charged, was different both in its nature and quality and disclosed a calculated, cunning and wicked attempt to defeat the course of justice. Commenting on the evidence, the Chief Justice noted: "I have, I hope carefully, certainly anxiously, considered all the evidence given on count six as it concerns the second accused and I am completely satisfied that the evidence of Ndaba (the South African witness), unscrupulous rogue that he is, is in this instance, credible and reliable. I have no doubt that he was induced by the second accused to make a false statement to the police with a view to incriminating the detainees".

In convicting the accused persons on counts six and seven of attempting to defeat the course of justice, the judge pointedly observed:

"In reaching the foregoing conclusion I have borne fully in mind that the first accused has behind him a long and successful career as a police officer but the sad fact is that he became corrupted once he reached the pinnacle of his career by a man whose desire to retain his power and authority knew no bounds".

Tentative Conclusions

The preceding discussion has attempted to highlight the experience of Botswana, Lesotho and Swaziland in respect of the crucial issue of the independence of the judiciary and the legal profession. This is a crucial issue because such independence is a sine qua non for proper administration of justice and the protection of human rights.

The basic assumption underlying the discussion has been that improvement in the general human rights situation in a country inevitably leads to conditions that sustain judicial impartiality and independence as well as the independence of the legal profession. The cases discussed highlight the difficulties confronting Lesotho and Swaziland in their attempts to grapple with the basic problem of harmonising public order with individual liberty. They also indicate trends in the direction of increasing the degree of judicial independence and the independence of the legal profession. To this end, it is urgent that the African Charter on Human and Peoples' Rights be applied as soon as possible. The Charter provides enlightened interpretative guidance for the courts, as well as guidance for the executive and legislative branches of government. Finally, the issue of preventive detention has to be seriously reviewed. So long as preventive detention legislation remains on the statute books the atmosphere of intimidation it creates undermines the independence of the judiciary and the legal profession.

The Centre for the Independence of Judges and Lawyers, its Work and its Aspirations

by Ustina Dolgopol

The increasing frequency of attacks against judges and lawyers during the 1970's, particularly in Latin America, were the cause of growing concern among lawyers and human rights organisations. As lawyers became more involved in the defence of human rights, and sought to insure that legal representation was available to all, governmental and para-governmental forces began to mount attacks against both individual lawyers and groups of lawyers, often trying to identify the lawyer with his or her client or the client's cause. The more successful the lawyer was in protecting a client's rights, the more severe the attacks. Such campaigns against the legal profession were perhaps most horrifyingly typified by the following "advertisement", distributed by the military government of Argentina in 1974:

"SPECIAL INVITATION

The GUILD of ADVOCATES has the pleasure to invite hereby those members of the TERRORIST and DELINQUENT ORGANIZATIONS who have not already done so, to visit our headquarters, Suipacha 612, 4 "B", where they will be duly instructed as regards the moderate fees which we have imposed as a contribution towards the cheapening of VIOLENCE-ASSASSINATIONS-KIDNAPPINGS-THEFTS and any other sort of downright crimes against the ARGENTINIAN PEOPLE.

For ideological delinquents and for those who DEFEND KILLING AT LARGE the SERVANTS OF THE LAW, there is a special discount.

Mr. DELINQUENT: Trust in our long experience in the assessment and defence of the most conspicuous members of the ERP-FAL-MONTONEROS and MAFFIOSOS.

We await you always with affection.

Dr. EDUARDO LUIS DUHALDE - Dr. SILVIO FRONDIZI - Dr. RODOLFO ORTEGA PENA - Dr. MARIO A HERNANDEZ - Dr. RAUL ARAGON - Dr. GUSTAVO ROCA - Dr. R SINIGAGLIA - Dr. A CAVILLA FERNANDEZ - Dra. SUSANA DELGADO

COMANDO "PUMA"

(Of the persons named, three were subsequently assassinated, one disappeared and at least two fled into exile).

Through its human rights work, the International Commission of Jurists (ICJ) was aware of the increasing frequency of such attacks and was aware that judges in many countries were subjected to executive pressure to carry out their functions in a manner acceptable to the government of the day. This led the Commission to establish a Centre within the ICJ where issues pertaining to the independence of the legal profession and judiciary would be looked at in depth. The Centre, it was hoped, would become the focal point for activities to protect the independence of the legal profession and the judiciary and would act as a clearinghouse for information about threats to that independence, using this information to mobilise international support. It was also foreseen that the CIJL would work with bar associations, encouraging them to act on behalf of persecuted colleagues and would assist in disseminating information about regional and international steps to protect lawyers and judges from undue government interference.

Another part of the CIJL's task was to educate lawyers, judges and governments as well as the general population about the role of lawyers and judges in society, including the social responsibilities of lawyers and the important role played by judges and lawyers in the protection of human rights. Since that time the CIJL has taken on an additional, most important task: the elaboration at the international and regional level of standards for the independence for judges and lawyers.

More specifically, the CIJL carries out its work in the following manner:

CASEWORK

The CIJL intervenes in cases involving harassment, persecution or threats directed against individual judges or lawyers or their associations, as well as more subtle pressures such as the use of transfer to punish a judge for having rendered a decision unfavourable to the government.

When the CIJL receives information about any of these matters, the information is verified and the CIJL then makes a written intervention in the form of a cable or letter to the government concerned and, in more serious cases, solicits the aid of jurists throughout the world to do likewise. These cases must clearly establish that the judge or lawyer has been persecuted by reason of carrying out his professional duties.

This latter point is crucial to the CIJL's work and distinguishes it from other human rights organisations. The decision to limit the CIJL's mandate was taken for two reasons: first, because experience had shown that too little attention was being given to the issue, and its long term consequences for the protection of the rule of law and of human rights were not fully understood; and, second, because the International Commission of Jurists believed it desirable that lawyers' and judges' organisations play a more active role in the international protection of human rights. Many of these organisations were reluctant to become involved in what they characterised as political questions, but the members of the Commission, being lawyers themselves, considered that these organisations might be moved to act in cases concerning colleagues in other parts of the world.

This assessment has proved to be correct. From an initial response of twenty-odd organisations, the CIJL has, in the past 9 years, built up a network of over 90 organisations of judges and lawyers that are willing to respond to CIJL requests for action. This network includes international, regional, national and local bar associations as well as human rights organisations, and many have undertaken to distribute CIJL appeal letters to their own members.

These organisations have come to recognise that it is their professional responsibility to speak out on behalf of colleagues being persecuted at home or abroad and that such interventions are not "political" but are

vital if a system of justice based on the rule of law is to be protected. Such a system cannot exist in a country where the judiciary and legal professions are not independent but are subject to reprisal for acting in the way that they should.

As readers of the Bulletin have seen, the cases taken up by the CIJL vary greatly. They are selected on the basis of the gravity of the case, the general human rights situation in the country and the effect the violations are likely to have on other judges and lawyers. The availability of detailed and precise information is also a factor. Information is received from a variety of sources: individuals, groups, bar associations and other international organisations. There have been situations in which the CIJL was aware that a violation was taking place or had taken place but was unable to obtain precise information and therefore was unable to act. It is therefore essential that more contacts be developed and that more bar associations accept that it is part of their duty to make the international community aware of violations within their own countries.

STANDARD-SETTING

At its inception, the CIJL sought to protect the independence of judges and lawyers in particular cases by referring to what were believed to be accepted international norms. Nevertheless, governments were able to reply that these were norms set out by individual organisations or groups or organisations, but were not guarantees accepted or adhered to by that particular government.

As a result of these experiences, the CIJL and the ICJ began the task of formulating international norms which could be relied upon in particular cases.

The CIJL was instrumental in the drafting of the Basic Principles on the Independence of the Judiciary and in their unanimous adoption by the Seventh United Nations Congress on Crime Prevention and Control in 1985 (see CIJL Bulletin No. 16). The principles were subsequently welcomed by the UN General Assembly which invited governments to respect them and to take them into account in their national legislation and practise. They set forth principles concerning the independence of the judiciary, and the freedom of expression and association of judges as

well as rules regarding the qualification, selection, training, conditions of service, tenure, immunity, discipline, suspension and removal of judges.

Among the many important provisions preventing inroads into the independence of the judiciary are these:

"Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties."

The Basic Principles are the first universal statement on this subject and the CIJL is giving them the widest possible publicity so that they will be used internationally and nationally to promote and protect the independence of the judiciary.

Both the ICJ and the CIJL were also influential in the 1980 decision of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to appoint a Special Rapporteur to undertake a study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

The CIJL, along with the ICJ and the International Association of Penal Law, organised two seminars in 1981 and 1982, hosted by the International Institute of Higher Studies in Criminal Sciences in Siracusa and Noto, Sicily, for the purpose of bringing together leading

experts from around the world to discuss and formulate principles on the independence of first the judiciary and then the legal profession, with a view to assisting the UN Special Rapporteur in his task. The principles adopted at these seminars (see CIJL Bulletins Nos. 8 and 10) were appended to the Special Rapporteur's progress reports and his final report, completed in 1985, and served as basic working documents for his elaboration of standards.

The principles set forth at Noto and Siracusa were also extensively relied upon by the organisers of the World Conference on the Independence of Justice held in Montreal, Canada from 5 to 10 June 1983. The aim of this conference was to prepare a universal declaration concerning the independence of judges, lawyers, jurors and assessors to assist the Special Rapporteur in the completion of his study. The CIJL principles again served as basic working papers for this conference, and its representatives played a leading role in the formulation of the principles concerning judges and lawyers. The declaration adopted by the conference participants (see CIJL Bulletin No. 12) was also appended to the Special Rapporteur's final report (E/CN.4/Sub.2/1985/18).

Thus, when the UN Sub-Commission met this August, it had before it for adoption a draft set of standards largely based on documents and declarations emanating from conferences organised or co-sponsored by the CIJL. These standards are more detailed than the Basic Principles and cover lawyers, jurors and assessors as well as judges. They provide for both the individual and collective independence of judges, and set forth minimum standards to be followed in the selection, training, promotion, transfer, discipline and removal of judges. With regard to lawyers, the draft sets forth standards for open legal education and access to the legal profession, the rights and duties of lawyers, legal services for the poor, the rights of bar associations, and the discipline of lawyers.

We hope that the Draft Declaration proposed by the Special Rapporteur will eventually become the basis for a UN declaration.

CIJL BULLETIN

Since its inception the CIJL has worked to disseminate information about the independence of judges and lawyers through its Bulletin published twice a year in English, French and Spanish and distributed to lawyers and lawyers' organisations in 127 countries. The Bulletin contains reports on individual cases of harassment and persecution of judges and lawyers, and notes on developments concerning the independence of the legal profession and the judiciary as well as longer articles on these subjects and reports on the seminars and other activities of the CIJL. The Bulletin is thus a means of keeping lawyers and judges informed of the plight of their colleagues in other countries and of positive developments, particularly with respect to legal aid schemes and work being undertaken in the protection and promotion of human rights. This is important for the cross-fertilisation of ideas, and to let lawyers and judges know that they are not alone in their struggle to improve the protection of human rights within their own countries.

REGIONAL SEMINARS

In 1986, the CIJL began a series of regional seminars at which judges and lawyers would be provided with the UN Basic Principles and asked to discuss the extent to which the principles were actually adhered to in their regions.

Seminars have now been held in: Costa Rica for Central America and the Dominican Republic; Lusaka, Zambia for the countries of Botswana, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Zambia and Zimbabwe; the Gambia for the countries of Gambia, Ghana, Kenya, Nigeria, Sierra Leone and Uganda; and Nepal for Bangladesh, India, Nepal, Pakistan and Sri Lanka. Additional seminars are planned for South America, francophone Africa and Southeast Asia.

The seminars provide an opportunity for frank debates and also allow the participants - judges, lawyers, attorneys-general and academics - to work out recommendations for the steps that need to be taken in their regions to further strengthen the independence of the judiciary and the legal profession. At the Lusaka seminar, for instance, which was opened by President Kenneth Kaunda, two of the attorneys-general in

attendance commented that the seminar helped them realise that some of their countries' practices were not proper.

Typically, the participants divide into working groups which spend three days discussing and formulating recommendations on such topics as courts and society, the judiciary as an independent branch of government, the organisation and jurisdiction of the courts, the status and rights of judges and the independence of the legal profession. These recommendations are then discussed and adopted in a plenary of all the participants.

The recommendations of the regional seminars draw on the basic principles drawn up by the CIJL and adopted at the different international conferences. Nevertheless, the participants often go into more detail and develop new standards of particular relevance to their own region. Thus, at the Lusaka seminar, participants grappled with the practice of foreign expatriate judges who are employed on contracts in several African countries. The participants concluded that governments must strive to hire national judges. Similarly in Costa Rica the special role of the Ministerio Publico, the public prosecutor, was examined at length.

An important part of these seminars has been the creation of follow-up committees, usually composed of one lawyer and one judge from each country, whose task is to recruit support from the bar and the judiciary within their countries to ensure compliance with the regional recommendations including, where needed, changes in legislation.

MISSIONS

The CIJL also conducts missions and sends observers to trials. Seven such missions have been conducted since 1978, concerning the disbarment of a lawyer in Austria, the dissolution of the Bar Council by the Egyptian government, the harassment of judges and lawyers in the Philippines, the situation of legal services attorneys in Indonesia, the independence of the judiciary in Paraguay, the harassment and persecution of human rights lawyers in the Philippines and the administration of justice in the Sudan.

These missions make governments aware of the serious concern with which outside organisations are watching developments within their countries and they give support to those being persecuted. They also make possible a closer examination of the situation in a particular country and provide better understanding of particular problems and issues. It is then easier to assess the accuracy of information emanating from the country and to pinpoint more clearly those problems which should be highlighted at the international level and about which representations should be made to government.

This aspect of the CIJL's work has not been as extensive as we would like, due in large part to insufficient funding. While this problem besets the CIJL's work in general, it is particularly detrimental to mission work which involves substantial costs.

OTHER U.N. AND INTERNATIONAL WORK

Other UN work has included interventions before the Commission on Human Rights on the need to strengthen legal institutions through greater use of the UN advisory services programme, providing information to various special rapporteurs and UN agencies on the harassment and persecution of lawyers and judges, and providing information to the Human Rights Committee about problems existing in State Parties to the Covenant on Civil and Political Rights with respect to the independence of the judiciary and the legal profession and the administration of justice.

The CIJL also helped to organise the Geneva Meeting on the Independence of Judges and Lawyers (see CIJL Bulletin No. 7) which brought together representatives of major international lawyers' and judges' associations to discuss

- (a) problems concerning the independence of the two professions,
- (b) the criteria to be applied in determining when to intervene,
- (c) whether to do so publicly or privately, and
- (d) methods of promoting and defending the independence of judges and lawyers.

THE MEDIA

The CIJL has developed contacts with the press and with various legal magazines. Frequent radio interviews have been given on the work of the CIJL and articles on the CIJL have appeared in the Boletin of the Andean Commission of Jurists, the Commonwealth Law Bulletin, Human Rights (published by the Section of Individual Rights and Responsibilities of the American Bar Association), the Guardian Gazete of the Law Society of England and Meneesker og Rettigheter, a Norwegian human rights journal. Slowly, the press is coming to realise the importance of the issues addressed by the CIJL to the protection of human rights. There is no doubt that more work is needed in this area, and the CIJL has on occasion sought the assistance of its affiliates and those of the ICJ. More use needs to be made of bar association journals, and for this, the CIJL needs the help of interested lawyers and judges.

WHERE WE ARE AND WHERE WE SHOULD BE GOING

Since the CIJL was formed, there has been a great increase in the attention paid to the issue of the independence of judges and lawyers. International declarations have been adopted, bar associations have taken up the cases of harassed colleagues in other countries, seminars have brought the issue home on a regional and national level.

The efforts being undertaken and those being considered are hopeful signs for the future. Even more thought needs to be given to methods of cooperation between organisations, however. Several of the international bar associations have been considering the need for an international declaration on the rights of the defence. Yet few of them have taken up the suggestion of the UN Crime Prevention Branch to work with the branch in its current elaboration of principles concerning the independence of the profession which will include principles on the rights of the defence.

One of the issues that is seemingly forgotten by some organisations is that while their own statements of principle can have great moral persuasion, only an international declaration or instrument adopted by the member states of the UN can permit us to truly gauge state compliance. Although the passage of such a document is not an end in

itself, but the beginning of a long fight for compliance, the existence of universally agreed standards prevents states from hiding behind the shield of national laws and practices.

Another possibility which has been neglected by many organisations, including the CIJL, is using national sections or affiliates to lobby governments to ratify relevant international standards and then to have these sections or affiliates follow-up by insuring that general principles of international law are incorporated into national laws and practises. International and national efforts of this type would be particularly useful in assisting the work of the Crime and Prevention Branch.

An aspect of the work of the United Nations which has not received sufficient attention is the Advisory Services Programme, which was created to assist states by giving practical help with law reform and national level training courses for government officials, judicial personnel and law enforcement personnel in order to improve the protection of human rights. Again, this is an area where more lobbying needs to be done at the international and national level.

State members of the UN need to be convinced to focus more attention on this programme and those states in need of assistance should be encouraged to come forward. Even small projects can be of significant help. Some small but important suggestions are:

(1) The use of modern equipment in the carrying out of the judicial process. In a number of countries judges continue to be responsible for keeping by hand the record of the proceedings before them. In comparison, in some industrialised countries, court reporters have switched over to word processors and the old tripod stenograph machines are now languishing in basements. A coordinated effort to supply these steno machines to countries in need of them along with appropriate training courses for court staff would be great assistance;

(2) The publication of legislation in government gazettes is one of the ways in which lawyers stay abreast of legal developments. However, in some countries, there is no money to publish the gazette. More countries giving development assistance should be encouraged to sponsor

such gazettes, as the cost is limited, but the benefits to the recipient countries would be enormous;

(3) Similarly, academic publications serve as a forum for the exchange of ideas and are often useful in putting forward ideas for necessary changes in the laws. There are not a sufficient number of these publications in the developing world because of a lack of funds. Yet there is a great need for such journals as these countries attempt to change their laws, and in some cases their legal structures, to better reflect the needs of their societies. The cost of such publications is not great; again, national bar associations in those countries with development aid programmes should encourage their governments to sponsor such projects.

None of the above should be taken to suggest that we ease up on letter writing campaigns. These must continue, and lawyers throughout the world should be encouraged to accept as part of their professional responsibility the reporting of violations within their own countries and elsewhere to regional and international organisations and should also be prepared to act on behalf of persecuted colleagues.

What is needed above all is more coordinated action. This does not mean that all of us must agree to work on the same issues, or that we must seek the assent of other organisations before we take action, but it does mean working with other organisations and keeping them informed of actions taken and being willing to work together in cases where joint action is called for. By working together we can achieve more both internationally and nationally. The strengths of each organisation can be used to achieve common aims. The power of concerted popular action should never be underestimated.

DOCUMENTS

THE MILITARY COURT SYSTEM IN THE ISRAELI- OCCUPIED TERRITORIES

The ICJ affiliates in the Israeli-occupied territories, Al-Haq/Law in the Service of Man (LSM) in the West Bank and the Gaza Centre for Rights and Law in the Gaza strip have published an account of the system of military courts in the occupied territories.

The Israeli military courts have jurisdiction to try all cases which the authorities consider to be security cases (which can include failing to carry identification papers or participating in a demonstration) as well as concurrent jurisdiction with local, non-military criminal courts to try all alleged criminal offenses. It is the military authorities who decide whether or not a particular case or class of cases should be heard by a military or local court.

Beginning with a suspect's arrest, the 39-page document prepared by a solicitor, Paul Hunt, describes the system's operation through the stage of interrogation to charge, trial and sentence, comparing the actual rights available to detainees with the relevant principles of international and humanitarian law.

The report points out the frequently arbitrary nature of arrests by security forces which then result in detention without court order for 18 days, extendable by a military court for up to 6 months. After 6 months in detention, the detainee must be charged, at which point the court may extend the period of detention until the end of all legal proceedings. Bail applications for security detainees are very rarely successful. During the long period of interrogation, the victim's vulnerability is heightened by his lack of access to an attorney (see below) or an independent doctor and numerous cases of torture have been documented. The detainee is judged by a tribunal of one or three army officers which usually has before it a confession signed during

interrogation and almost invariably written in Hebrew. A detainee's failure to give evidence under oath may be used against him. There is no court to which a detainee can appeal against a conviction or sentence of a military court.

Of particular interest to readers of the Bulletin are the chapters on the Right to a Lawyer and on the Independence and Impartiality of the Israeli Military Courts which are excerpted below:

The Right to a Lawyer

Israeli Military Orders do not recognize a detainee's absolute right to consult a lawyer. A detainee may meet a lawyer provided that:

i) the Prison Commander "is convinced that the request was made for the purpose of dealing with the legal affairs of the prisoner and ..."

ii) "... the meeting will not impede the course of the investigation". (M.O 410 (ii) in the Gaza Strip; M.O. 29 (ii) in the West Bank).

In other words, when detainees are under interrogation whether or not they receive legal advice is a matter for the Prison Commander. However, in practice, a lawyer is denied access to an accused until the interrogation is complete; the person who denies or permits access is not the Prison Commander but the interrogator himself.

The Legal Advisor's Department liaises between the detainee's lawyer and the interrogators and informs the lawyer when he or she may meet the client. A lawyer is never permitted to attend the interrogation with the accused, in contrast to the common but not invariable practice of many western countries. If and when an interview between the lawyer and client is permitted, it normally takes place in the interrogator's office within the environs of the detention centre; often a third person is within earshot. ...Many bail applications are made without the lawyer having the opportunity to meet the accused. ...

Under the humanitarian law relevant to the Occupied Territories, the right to counsel is found in Article 72 of the Fourth Geneva Convention: "Accused persons...shall have the right to be assisted by a qualified advocate or counsel of their own choice...".

However, some Israeli jurists argue that Article 72's right to counsel "...is qualified, in that it does not oblige the occupying power to allow communication with a lawyer if the offender is suspected of grave and hostile security offences" (page 30, 'The Rule of Law in the Areas Administered by Israel', published by the Israeli National Section of the International Commission of Jurists, 1981). The authority quoted for this proposition is Article 5 of the Fourth Geneva Convention, the second paragraph of which states: "Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention". The following points deserve special emphasis regarding Article 5's alleged qualification to Article 72's right to counsel. Firstly, forfeiture operates only "...in those cases where absolute military security so requires..."; secondly, with two exceptions, forfeiture occurs only to persons under "...definite suspicion...", in which case mere suspicion is not enough; thirdly, the Commentary to the Fourth Geneva Convention illustrates which rights to communication are forfeited under Article 5 and the right to counsel is not amongst the illustrations.

The Commentary to Article 5 concludes: "It must be emphasized most strongly, therefore, that Article 5 can only be applied in individual cases of an exceptional nature, when the existence of specific charges makes it almost certain that penal proceedings will follow. This Article should never be applied as a result of mere suspicion". It would seem that Article 5's forfeiture of rights of communication is prompted by fears that communication from the detainee to others may include intelligence or other information which could threaten "military security"; however, in practice, Article 5 is used to restrict the communication of information to the detainee concerning his or her rights.

The invariable Israeli practice regarding all security detainees in the Occupied Territories, is to deny them access to a lawyer until the end of interrogation. This practice is applied even in connection with such relatively minor offences as stone-throwing. It is absurd to suggest that in all these cases "absolute military security" requires forfeiture of the detainee's right to counsel. In these circumstances, one is driven to the

inevitable conclusion that the Israeli practice in the Occupied Territories abuses Article 5's narrow qualification to Article 72's right to counsel. Consequently, Israeli practice regarding a detainee's right to counsel is in breach of humanitarian law (Articles 5 and 72).

Finally, under the Israeli Military Orders there is no doubt that an accused has the absolute right to a lawyer on the trial day. Under M.O. 373 in the Gaza Strip and M.O. 400 in the West Bank, the accused is given the choice of either being represented by a lawyer or conducting his or her own defence; however, the court is obliged to appoint a defence lawyer in serious cases when the accused has not [the means to afford one] and, in that event, the Military Government is responsible for the lawyer's fees.

Israeli Military Courts: "Independent and Impartial"?

The quality of justice dispensed in any legal system depends upon the independence and impartiality of the judges. "The total independence of the judiciary from everyone else is central to the entire concept of the Rule of Law, for the whole point about a law is that it must be upheld impartially..." (page 89, The Lawful Rights of Mankind' by Paul Sieghart, Oxford University Press, 1986).

The international law of human rights recognizes the importance of the judiciary's independence and impartiality; both UDHR 10 and ICPR 14(1) stipulate that everyone is entitled to a fair and public hearing by an "independent and impartial tribunal". The UN has adopted "Basic Principles on the Independence of the Judiciary".

Furthermore, it is clear the Israeli authorities are aware that the requirement of judicial independence and impartiality extends to military court judges. On the appointment of ten military court judges to hear cases within Israel's pre-1967 borders, the President of Israel publicly reminded the appointees that even military court judges must be guided only by "the law and their conscience". However, in all legal systems, it is very difficult to guarantee judicial independence and impartiality; it may be equally difficult to prove dependence and partiality.

One important criterion of judicial independence is the procedure of judicial appointment and discharge. However, even technically impeccable procedures do not guarantee independence. In the case of the Israeli military courts in the Occupied Territories, the procedure for judicial appointment and discharge is different for legally qualified judges and for non-legally qualified judges.

According to the Israeli military orders, the appointment procedure for legally qualified judges is as follows: "The Commander of the Region shall, on the recommendation of the Military Advocate General appoint...legally qualified officers of the rank of captain or above to act as legally qualified judges" (M.O.378, as amended, in the West Bank and an unnumbered Military Order of 1970, as amended, in the Gaza Strip). This procedure raises a number of important points concerning legally qualified judges. Firstly, they are all serving officers in the Israeli army; secondly, they are appointed by the Commander of the Region, who is the executive and legislative authority in the Region; thirdly, the Commander of the Region is required to appoint on the recommendation of the Military Advocate General of the Israeli army; fourthly, the Military Advocate General is the advisor on all legal matters to the Israeli army's Chief of General Staff; fifthly, the discharge procedure for all military court judges (legally qualified and non-legally qualified) is the same as the appointment procedure (page 181, 'Military Government in the Territories Administered by Israel 1967 - 80, The Legal Aspects', edited by M. Shamgar, Hebrew University, 1982).

This procedure appears to be designed to establish the appearance of a formal 'separation of powers' between, on the one hand, the legally qualified judiciary and, on the other hand, the executive and legislative authority; ... in the Occupied Territories the Commander of the Region is both the executive and legislative authority. However, in the case of legally qualified judges, there is only a 'separation of powers' to the extent that the Commander of the Region is required to make judicial appointments and dismissals on the recommendation of another person, the Military Advocate General. One must note that, of course, both the Commander of the Region and the Military Advocate General are senior members of the Israeli army, answerable ultimately to the Minister of Defence.

The procedure for the appointment and discharge of non-legally qualified judges differs from the procedure described above. According to Col. Joel Singer of the Military Advocate General's Corps, non-legally qualified judges are "...selected by the President (of the court) out of the ranks of the entire IDF, with the exception of officers serving in the military government and its civilian administration" (letter dated 16th June, 1986 to Raja Shehadeh, director of al-Haq). The President of the court is a legally qualified judge appointed by the procedure outlined in the preceding paragraphs. Whatever professional or other considerations apply regarding the appointment of legally qualified judges, no such considerations are required regarding the appointment of non-legally qualified judges, neither as to rank, educational qualifications, experience nor any other matter. Consequently, the risk of total dependence and partiality is even greater in the case of non-legally qualified judges.

In practice, there may be a significant overlap between dependence and partiality. Professor Pieter van Dijk in 'The Right of the Accused to a Fair Trial under International Law' (published by the Netherlands Institute of Human Rights, 1983) writes "...it is extremely difficult to ascertain by what motives a judge has been prompted. It will therefore only be possible to prove that a judge has been partial when this becomes manifest from his attitude during the proceedings or from the contents of the judgement" (page 38). Defence practitioners repeatedly remark upon the questionable manner of many judges in court; apparently, the judicial attitude and courtroom interventions often leave the impression of resolute bias in favour of the prosecution. For instance, if the detainee is without a lawyer, some judges will participate in the prosecution's cross-examination of the detainee, assisting in the extraction of a confession which the judge places on the court record, without either giving the detainee an opportunity to speak for him or herself, or recording the detainee's allegations of mistreatment, or recording any mitigating factors in favour of the detainee. Also, defence practitioners complain that judges almost invariably accept as credible the prosecution evidence tendered by police and soldiers, rejecting defence evidence given by Arab witnesses such as the detainee. Some defence lawyers feel that whatever the official burden of proof is said to be, in practice they need to prove the innocence of their clients beyond a reasonable doubt if they are to obtain their clients' acquittal. Further, there have been rare occasions

when judicial hostility to the defence has even led to the defence lawyer being denied the right to make representations in court. Defence practitioners add that, of course, a judge will endeavour to ensure the court record does not reflect any procedural improprieties or unwanted allegations.

The independence and impartiality or lack thereof of tribunals cannot be assessed by merely considering the procedures for judicial appointment and discharge, or commenting upon judicial behaviour in court. Other matters, general and specific, must be borne in mind. For instance, the Israeli army dominates the entire governmental apparatus in the Gaza Strip and West Bank, including the military courts. The judges, some of whom have no legal training, are all currently serving army personnel; they hear cases of a political complexion, usually arising out of a conflict between the detainee and the army. Further, the prosecutor, military court staff and most prosecution witnesses, are serving in the Israeli army. The military court system allows for neither a jury nor a court of appeal.

In these circumstances, it seems doubtful whether any military tribunal could maintain complete independence and impartiality. Certainly, all the defence lawyers who were interviewed expressed profound scepticism about the real independence and impartiality of Israeli military courts. Inevitably, the rule of law is jeopardized to the extent that practitioners and detainees seriously doubt the independence and impartiality of the legal process within which they find themselves.

CONCLUSION

Although the Israeli military court system appears to have many of the features of a fair system of justice, in reality the justice it dispenses is seriously flawed.

Most of the defence lawyers who were interviewed, attached special significance to two of the system's defects examined in this paper. Firstly, they emphasized the critical importance and injustice of the prolonged period of interrogation to which a detainee may be subjected without access to independent legal or medical assistance; most detainees give a signed confession during interrogation which it is extremely difficult to retract despite evidence that it was extracted

under duress. Secondly, the lawyers stressed the apparent sustained partiality of many military court judges.

NO JUSTICE IN CHILE

From 1-8 March 1987, Lord Gifford, Q.C., visited Chile on behalf of the United Kingdom Parliamentary Human Rights Group and the International Human Rights Federation to examine the protection of human rights by the judicial institutions. In his report, "No Justice in Chile", he concludes that torture has become routine and that given the long periods of incomunicado detention permitted by Chilean legislation, the courts are unable to prevent its occurrence. Nor have the courts been able to respond to the various assassinations and kidnappings carried out by the security forces.

Of special interest is the report's chapter on "Military Injustice", excerpted below:

I have been deeply shocked to discover how far the penal jurisdiction over serious criminal cases in Chile has been taken over by military courts. The hierarchy of military judges is in three tiers:

- a) The Fiscal Militar, a lawyer in military service who undertakes the functions of the examining judge, including the laying of charges, the preparation of a dossier of evidence, and recommendations on sentence.
- b) The Military Judge (Juez Militar), a military officer (not a lawyer) who receives the report of the Fiscal Militar and passes sentence on the accused.
- c) The Court Martial (Corte Marcial), composed of three military judges and two civilian judges, which hears appeals from the military judges.

After passing through this hierarchy an accused person has a final right of appeal to the Supreme Court.

Before the dictatorship, the jurisdiction of the military courts was limited almost entirely to the judging of offences committed by military personnel and the police. But a series of new laws have been passed and appended to the Code of Military Justice: the State Security Law of 1975, the Arms Control Law of 1978, and the Anti-Terrorism Law of 1984. All offences charged under the Arms Control Law, and most of those charged under the other laws, have to be processed through the military courts. As a result, around 95% of the business of the military courts concerns accused civilians. The Social Aid Foundation of the Christian Churches (FASIC) has published a survey of all political prisoners in Chile as at 15 November 1986. They found a total of 454 prisoners (since then the number has risen to 510). Of the total, only 57 have been sentenced; the remaining 397 were being processed by the military courts. 309 were accused of offences against the Arms Control Law and 95 of offences against the Anti-Terrorism Law. 56 of the total were women.

It is a fundamental human right, expressed in the Universal Declaration of Human Rights and other international agreements, that a person should be tried by an independent and impartial tribunal. The military courts cannot either in principle or practice be considered independent or impartial. The judicial personnel of military courts under a military regime cannot avoid having loyalties divided between the principles of justice on the one hand and the wishes or commands of their superior officers on the other. The President of the Chilean Supreme Court, Rafael Retamal, expressed to me his great anxiety about the excessive power given to military courts, and his wish for civilian trials to be returned to civilian judges because:

"We do not have to obey any orders. Even the most humble judge is free to make his own judgement unless ordered otherwise by a higher court."

In practice the military judges have fulfilled their tasks in ways which are clearly subservient to the dictates of the State. Andres Dominguez, Vice-President of the Chilean Commission on Human

Rights, summed up to me the motives and methods of the Fiscales Militares:

" The job of the Fiscal is to prove the crime and the culpability of the accused; not to take account of all the facts. The guilt of the accused is presumed. It is more important to judge the dangerousness of the accused than the facts of the crime. So, if a man does not accept his guilt, a series of complementary procedures is put in process: solitary confinement, association with the most dangerous criminals, deprivation of visits. A hell is created inside the prison."

It should be observed that such an approach is the complete antithesis of the proper role of the examining judge in the Continental system of Law. The role should be to reach the truth about an alleged crime through a number of procedures - questioning of the accused, identification processes, confrontations with witnesses, etc. - at which the defendant has the absolute right to be legally represented. In Chile the investigative process has become a form of grievous oppression. The Fiscal militar has the power to hold defendants entirely incomunicado, without access to legal advice, for ten days. The Fiscal Militar Fernando Torres, investigating the attempted assassination (of Pinochet) and the arsenals cases (in which the defendants are accused of possessing arsenals of weapons), has succeeded in extending this to forty days by imposing successive periods as each one expires - a practice approved, regrettably, by the Supreme Court. Even the International Committee of the Red Cross is not allowed to visit the defendants during these periods of total isolation. The purpose of such psychological torture, coming after a period of intense physical torture, is clearly to break any possible resistance and to ensure that the defendant will ratify his or her confession.

Bitter complaints have been made about the Fiscal Militar Fernando Torres. He was not a regular Fiscal Militar, but was nominated "ad hoc" to investigate these crimes - a fact which adds weight to the view that he was a political appointee. Before his appointment he was legal adviser to the Secretary of the Presidency. After the Supreme Court had upheld his practice of renewing incomunicado detention for successive periods, his secretary boasted to one of the defence lawyers that he was now "all powerful". He had made frequent statements to the media proclaiming the guilt of those whom he is investigating. He

has recently imposed fresh orders of incomunicado detention upon defendants who are not co-operating with his investigations. He has given instructions to the prison authorities to restrict visits, and to distribute some political prisoners away from each other in dangerous wings where, it is feared, other prisoners may be incited to attack them - as happened with fatal results in Valparaiso jail in 1985.

With this Fiscal Militar, and with others, the "safeguard" of taking confessions before an examining judge is worthless. When defendants are brought in to ratify their confession-statements, they have no lawyer present. Sometimes defendants have not even realised that the person asking for their signature is a "Judge" and not a torturer. Sometimes there are CNI (security police) personnel in the Fiscal Militar's room. Sometimes the Fiscal Militar has threatened directly to send defendants back to the CNI. In Valparaiso it was said to me by the mother of a political prisoner that her son had actually seen the Fiscal Militar in the torture room.

The Code of Military Justice provides that the investigative stage (sumario) of a trial should not last for more than forty days. In reality this stage has become extended over years. Bail is rarely granted, and prisoners have no idea when they will be sentenced. Looking at the survey made by FASIC one sees cases in the 'sumario' stage for up to three years; then more years elapse before the final appeal. The President of the Chilean Commission on Human Rights, Jaime Castillo, described it as a "Legal procedure used as an administrative punishment".

BAR COUNCIL OF MALAYSIA (DISCIPLINARY PROCEEDINGS) REVIEW COMMITTEE

The Draft Principles on the Independence of the Legal Profession adopted in Noto, Sicily, in 1982 (see CIJL Bulletin No. 10) provide that:

"Save in respect of proceedings for failure to show proper respect for a court, the bar association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers. Neither the public prosecutor nor any other representative of the executive shall participate in such proceedings. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the bar association with a view to its initiating disciplinary proceedings." (Para. 40)

"Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the bar association". (Para. 41)

These principles were later integrated, almost without change, in paragraphs 3.30 and 3.31 of the Montreal Universal Declaration on the Independence of Justice (CIJL Bulletin No. 12).

Nevertheless, in many countries, particularly those without a large bar association, disciplinary powers have rested in the hands of the executive or the judiciary, often for want of an alternate mechanism established by the bar.

During the past few years, the subject of discipline of attorneys has been the focus of numerous discussions at international, regional and national meetings of lawyers. Recurring questions include the nature of the proceedings and the role of the public and of government officials. In light of the Noto and Montreal principles and the international debate, the recent draft proposals of the Bar Council of Malaysia may be of interest to others.

The Bar Council of Malaysia set up a Review Committee during November 1985 for the purpose of

- examining the provisions of the Legal Profession Act 1976 relating to discipline of advocates and solicitors;
- considering the adequacy of such provisions; and
- recommending proposals for reform.

The Committee presented its report in December 1986. Members of the Bar has been asked to comment on the report. The Bar will analyse the comments and then make its proposals for amendments to the Legal Profession Act, 1976.

The views of the public were solicited by the Committee. In addition, materials on disciplinary procedures existing in comparative jurisdiction were sought and examined.

Exerpts from the report follow:

INTRODUCTION

The conduct of members of the Bar has been the subject of increased public scrutiny in recent times. The degree of sustained publicity and the intensity of the interest in the Bar in the 1980's are undeniable facts. One area in which publicity has dominated is discipline of lawyers with the Bar Council at the centre of attraction. The Bar Council has rightly or wrongly been perceived as not showing sufficient willingness or interest to arrest indiscipline among members of the Bar.

It was against this background that the Bar Council, of its own volition, resolved in October 1985 to appoint the Bar (Disciplinary Proceedings) Review Committee to examine the provisions of the Legal Profession Act 1976 relating to discipline, to consider their adequacy and to recommend proposals for reform.

"Disciplinary System Under the Legal Profession Act 1976

....

15. In nearly every memorandum submitted to us criticism is directed at the delay in dealing with complaints. We are satisfied that these criticisms are in the main justified. It can be seen from the series of steps referred to above which have to be taken before the matter is

finally disposed of that a significant passage of time would occur even if all the steps are carried out within the prescribed period under the Act. If there are lapses on the way as often happens according to the evidence that we have examined, the entire process becomes unduly and unbearably long for the complainant to endure to endure. Further the complaint may become stale in process

16. Another consequence of this procedure is that the complainant, either because of the long delay or of the procedural steps which have to be taken in order to reach a conclusion to his complaint which by necessity takes time and energy, loses and abandons his complaint. Public interest is not served when a genuine and serious complaint is not proceeded with because the complainant has lost patience with the system.

17. It is regrettable, but appears to us as a fact on the evidence that we have examined, that the root cause of most delays is the abdication of some State Bar Committees of their responsibilities conferred by the Legal Profession Act. Their failure to perform one of the most important functions for which they exist has caused considerable delay in many a complaint....

19. We observe that under the present system no guidelines are laid down in the Legal Profession Act to assist the State Bar Committees, the Inquiry Committees in the discharge of their duties. Every committee is master of its own proceedings. The result is a lack of uniformity between various State Bar Committees in the manner in which their duties are discharged. In our view such divergence of practice is unhealthy and ought to be avoided.

20. The supposed justification for the existence of the four bodies discharging separate disciplinary functions is that these bodies act as filter agents by sifting the serious complaints from the frivolous ones.... We accept the need for a filter system, but do not think that four bodies are needed to achieve this object.

21. Under the present system the Bar Council, the State Bar Committee and the Inquiry Committee cannot mete out any punishment at the conclusion of any proceedings before it. The Disciplinary Committee is

the only body which has the power to punish (except the Court), which power is set out in Section 101....

We are of the view that the lack of power of punishment of the three bodies is a serious disadvantage since it means that all punishments, however trivial, have to be handed down by the Disciplinary Committee, particularly when much time and energy has to be expended before a matter finally reaches the Disciplinary Committee. We are satisfied that a substantial number of offences committed by advocates and solicitors are of a minor nature....

We think that for such offences light punishment in the form of a reprimand or a small fine would be appropriate and that it is not necessary for such complaints to be considered by three or four bodies leading up to the Disciplinary Committee.

MISCONDUCT

22. We have examined various expressions to describe in a nutshell the circumstances, leading to the institution of disciplinary proceedings against an advocate and solicitor. The expression used in the current legislation, is "due cause". We are not convinced of the appropriateness of that term.

23. The term "misconduct" appears to have been used most often in other jurisdictions. This word has many attractions, Perhaps its principal attraction is that it is a work that is recognised and easily understood by lawyers and lay persons. Whether the word is capable of precise definition is doubtful. We are of the view that no term can accurately and comprehensively define the infinite and varied circumstances, which prevail in an advocate and solicitor's practice which could result in disciplinary proceedings being instituted against him.

24. We are not convinced that (the Act) as presently constituted sufficiently sets out all the circumstances under which disciplinary proceedings ought to be instituted Some discussion took place on whether it was necessary, in the first place, to enumerate circumstances which amount to misconduct giving rise to disciplinary proceedings. We are of the view that on balance it is preferable for practitioners to

be able to locate, with ease and in one place, the types of conduct prohibited under the Act. In order to preserve flexibility and not to tie the hands of the Disciplinary Tribunal general provisions are also included in the draft to serve as catch-all provisions.

25. In order to overcome the lack of a precise and acceptable working definition of misconduct, we are of the view that the Legal Profession Act should expressly define the term and we so recommend. . . . To constitute misconduct the act (or omission) must be one of "grave impropriety". (This would be followed by) a catalogue of specific instances which would amount to grave impropriety.

We are concerned that under the present system disciplinary proceedings cannot be brought against an advocate and solicitor for any misconduct which does not affect his professional capacity. . . . In most societies advocates and solicitors are regarded by members of the public, whether justifiably or not, with esteem and honour and it is important that advocates and solicitors should not conduct their affairs, whether in their private capacity, or otherwise which would in any way reflect adversely upon the profession.

. . . .

28. . . . There appears to be a lack of awareness or concern by practitioners of their duty to the Court. We think that a lawyer's paramount duty is to the Court, which is the seat of justice, and in certain circumstances this duty overrides his duty to his client. A breach of the duty to Court should be made subject to disciplinary proceedings.

. . . .

30. Accordingly, we are of the view that the time has come for our practitioners to be subject to disciplinary proceedings if they are in breach of their duties to the client. We have avoided the word "negligent". We appreciate that it is not every careless, reckless or negligent act of a lawyer that should attract disciplinary proceedings. We think that to bring a case . . . there must be prima facie evidence that (i) an advocate or solicitor's failure to perform his tasks

constitutes a breach of his duty to this client and (ii) this amounts to a gross disregard of his client's interests. . . .

31. . . . When considering overcharging We are of the view that a typical situation where disciplinary proceedings ought to be instituted against an advocate and solicitor is when he has tendered a bill to his client which is so grossly excessive that no reasonable advocate and solicitor could have tendered such a bill in similar circumstances.

. . . .

PROPOSED DISCIPLINARY SYSTEM

33. We put forward the view above that the present disciplinary proceedings under the (Act) are unsatisfactory in many ways. We propose in this Chapter to discuss an alternative disciplinary system which we hope will be efficient and fair, and at the same time ensure a speedier disposal of complaints. The principal features of the disciplinary system proposed by us are the establishment of a two stage inquiry and the participation of lay persons at both stages of the inquiry.

34. We have discussed in some detail above the obvious disadvantages of four separate bodies exercising disciplinary powers as at present. We recommend in its place a two stage inquiry, the first to be conducted by a new body called the "Tribunal Committee" and the second to be conducted by another new body called the "Disciplinary Committee".

35. For the conduct of the first stage inquiry, we recommend the establishment of a Tribunal Panel of forty five (45) members consisting of thirty (30) advocates and solicitors of not less than five years' standing and having valid practising certificates and fifteen (15) lay persons. All members would be appointed by the Chief Justice from a list submitted by the Bar Council and would hold office for three years. A permanent Complaints Secretariat headed by a Director would be established to carry on the business of the Tribunal Panel. The Tribunal Panel would be a permanent body akin to a standing committee, and would sit in committees selected from the Panel.

.... (The reports then details the functioning of the Tribunal Panel)

38. Where the Tribunal Committee considers that its powers are insufficient, having regard to the gravity of the charge against the advocate and solicitor concerned or for some other reason, it shall refer the matter to the Chief Justice for his appointment of a Disciplinary Committee. This is the second stage of the inquiry process. We recommend for this purpose the establishment of a Disciplinary Panel of thirty (30) members comprising twenty (20) advocates and solicitors of not less than ten years' standing and possessing valid practising certificates and ten (10) lay persons to be appointed by the Chief Justice from a list submitted by the Bar Council to hold office for three years. Like the Tribunal Panel, the Disciplinary Panel should be a permanent body (and would sit in committees of three members selected from the Panel).

....

40. Under the present system all disciplinary proceedings are to some extent coordinated by the Bar Council. We recommend that in order that disciplinary proceedings are seen to be exercised independently of the Bar Council, a Complaints Secretariat headed by a Director be established and located at premises separate from that maintained by the Bar Council. The Director should preferably be an advocate and solicitor of some standing and his primary function would be to act as the Administrative Head of the Complaints Secretariat. We appreciate that if this recommendation is accepted extra expenditure would be incurred by the Bar. We are satisfied that the issue of finance is not insurmountable; in fact one way in which finance can easily be raised is if every advocate and solicitor is required to pay \$ 50 annually. Such a scheme would raise more than \$ 100,000 every year which may be sufficient to fund the Complaints Secretariat.

....

42. We are satisfied from the evidence submitted to us that a substantial number of complaints are withdrawn or not proceeded with, usually on the ground that the advocate and solicitor concerned has "settled" the matter with the complainant. In our view it is not in the public interest that once a complaint is lodged it should be withdrawn

merely because the complainant, for reasons best known to him, considers the matter resolved. To give one reason why we consider such practice to be undesirable, the matter may require to be investigated further in order that other clients of the advocate and solicitor concerned are not exposed to misconduct to a similar nature. Accordingly we would recommend that the Bar Council should have the right in all cases where the complainant cannot or does not wish to pursue his complaint to substitute itself as a complainant.

43. It is noted that under the present system there are not sanctions which can be applied when any of the four disciplinary bodies fail to complete their duties within the specified or extended period. This often happens in practice and is undesirable. A self-regulatory disciplinary system in a profession can only work if all members of the profession carry out their respective duties promptly and diligently. It is disappointing to note that some members of the legal profession have in the past taken lightly their duties as members of the four disciplinary bodies. If lawyers wish to continue having a self-regulatory system they must play their full part in the system and regard their service to the disciplinary process as akin to "national service".

44. To overcome this problem we put forward two proposals. First, that the Chief Justice be empowered to dissolve a Tribunal or Disciplinary Committee, as the case may be, should the Tribunal or Disciplinary Committee concerned fail to complete its inquiry and investigation within the specified period of three months or any extended period or for any other reason, and appoint another in its place.

Second, that a new Practice and Etiquette Rule be made by the Bar Council making it:

- a) compulsory for all members of the Bar to serve on the Tribunal and Disciplinary Committees if appointed by the Chief Justice;
- b) that priority be given by all practitioners to the carrying out of such tasks, including the right of Counsel to secure any adjournment of hearings before any Court on the ground that he or she is required to serve on the Tribunal or Disciplinary Committee.

45. We accept unhesitatingly that the independence of the Bar is of fundamental importance and inroads against this principle should not be made under any circumstances. We likewise accept without hesitation that the independence of the Bar requires the Bar to be allowed to regulate the legal profession without let or hindrance, to the exclusion of all other parties, save for the Court by way of its appellate jurisdiction. Given the tendency of the State in a number of societies to attempt to curb this independence we think that governmental representation on either the Tribunal or Disciplinary Panel would be inimical to the independence of the Bar. We accordingly reject any suggestion that third parties should take over the function of discipline from members of the legal profession. The Bar should thus remain self-regulatory and self-disciplining.

46. This, however, does not mean that the proposed Tribunal and Disciplinary Panels should comprise solely and exclusively practitioners. Criticism is often made that members of the profession tend to protect their own brethren in matters of discipline. The impression that the present disciplinary system is weighted too much in favour of advocates and solicitors at the expense of complainants and the fact that lay participation is completely absent lends credence to such criticism. The fact that such criticism is widespread and appears to be on the increase brings discredit to the profession and is of concern to us.

47. We note that lay participation is gaining ground in the jurisdictions that we have examined. It emerges from our comparative study that where lay participation does not already form part of disciplinary proceedings it has been strongly recommended. The introduction of lay members in both proposed Panels would, in our opinion, go a long way towards providing assurance to the public, which appears needed in today's climate. Most importantly, it would demonstrate that the legal profession is prepared to be accountable to the public in the real sense of the word. The public would, in turn, be kept informed of how the profession is conducting itself. We do not think that the introduction of lay members would in any way impair the independence of the Bar or diminish the self-regulatory feature of the profession. It is for these reasons that we strongly recommend the participation of lay members in the Tribunal and Disciplinary Panel.

48. In our proposed system, two-thirds of the members of both Panels should be advocates and solicitors, the remaining one-third being lay members. . . . All sittings of the Tribunal and Disciplinary Committees should be chaired by an advocate and solicitor. . . .

49. In the selection of lay members to make up the Tribunal and Disciplinary Panels we recommend that retired judges, law lecturers from the Universities, members of other professions, members of public interest organisations and representatives from the business and financial community and the labour movement be given consideration. The Bar Council may wish, in this regard, to write to these groups to submit their nominees for inclusion in the lay persons' list. The Bar Council may also wish to give some attention, when making selection of panel members, to the differing roles of the two Committees and the differing demands which may be made on the lay members of the two Committees. Thus to give one example, there may be a case for retired Judges to sit on the Disciplinary Committee, but not on the Tribunal Committee.

SUSPENSION OF ADVOCATES AND SOLICITORS AND ACCOUNTANTS' REPORT

(In this section the Review Committee recommends the retention of the provision in the Legal Practitioners Act which allows the Bar Council to make an application to the Chief Justice for the suspension of an advocate and solicitor from practice, in an appropriate case, while disciplinary proceedings are pending. The Committee also touches upon the question of accountant's reports which are obligatory for advocates and solicitors.)

PAKISTAN - THE INDEPENDENCE OF THE JUDICIARY AND THE BAR AFTER MARTIAL LAW

In December 1986, the International Commission of Jurists (ICJ) sent a mission to Pakistan to study the process of return to a democratic form of government after eight years of martial law rule. Among the issues the mission was particularly asked to enquire into were the constitutional position, the electoral process, the position of political prisoners convicted by military courts under martial law, the independence of judges and lawyers, the impact of Islamisation on the rights of women, trade union rights and the situation of minorities and minority religious communities.

The mission report is available from the ICJ. We reprint below the chapter examining the independence of the judiciary and the bar:

Against a background of three separate martial law periods,¹ three Constitutions in less than 25 years² and an existing Constitution which the mission was told has been amended 25 times since its introduction in 1973, an assessment of the independence of the judiciary and the Bar in Pakistan must be viewed in the context of constant political, legal and constitutional change since the inception of Pakistan as an independent State in 1947.

The focus of this part of the report is to assess the impact of the last martial law period, from 5 July 1977 to 30 December 1985, on the independence of the judiciary and the Bar, with particular reference to the constitutional changes made during martial law and the provisions which have continued since the lifting of martial law in December 1985.

No assessment of the independence of a judiciary is complete, however, without reference to the basic international principles accepted for the independence of justice,³ particularly with regard to security of tenure for judges. The Mission therefore, also considered the method of appointment of judges, their security of tenure once appointed with particular reference to the power of transfer vested in the President and

the conditions of their service, including remuneration and the facilities within which they must work.

Judicial independence prior to 1977: Transfer of Judges under Prime Minister Bhutto

It is appropriate to observe that prior to the imposition of martial law in 1977, amendments made to the 1973 Constitution under the Government of Mr. Bhutto had made inroads into the independence of the judiciary. For example, the Constitution Fifth Amendment Act of 1976 passed in September 1976 amended Article 200 of the Constitution which had contained the guarantee that a Judge could not be transferred from the High Court to another without his consent. The effect of this amendment was that a judge of the High Court could be transferred to another High Court against his wishes "for a period not exceeding one year at a time". Mr. Bhutto did not exercise this power, but it remained the sword of Damocles over the heads of the judges, and after the imposition of martial law, the Martial Law Administrator General Zia-ul-Haq exercised it several times. As discussed later a further amendment of Article 200 was made under martial law enabling a judge of the High Court to be transferred against his wishes to another High Court for two years.

Article 179 of the 1973 Constitution dealt with the tenure of the Chief Justice of the Supreme Court. On being appointed Chief Justice of the Supreme Court, the Chief Justice was entitled to continue as Chief Justice until he reached the age of retirement which is 65 years. But Article 5 of the Constitution (Fifth Amendment) Act 1976, reduced the term of the Chief Justice to five years. At the end of five years, he had the option to continue as a judge of the court over which he had presided or to retire on full pension. The Chief Justice at that time was Mr. Yacoob Ali and he was due to retire within two years. Within three months of the Constitution (Fifth Amendment) Act 1976, Mr. Bhutto again amended Article 179, with the effect that once a judge of the Supreme Court was appointed its Chief Justice, he could continue in this office for a period of five years regardless of whether he had passed the retirement age. Both these amendments to Article 179 damaged the image of the judiciary, and were later repealed by the Martial Law Administrator.

The Constitution (Fifth Amendment) Act of September 1976 also curtailed the tenure of the Chief Justices of the High Courts. Until then, once a judge was appointed as Chief Justice of the High Court he was entitled to continue in his office until he reached the retirement age of 62 years or until elevated to the Supreme Court. This guarantee was curtailed with retrospective effect by Article 9 of the Constitution (Fifth Amendment) Act, with the result that a Chief Justice could hold office as such only "for a term of four years". At the end of four years, he had the option of retiring on full pension or of serving as a judge of the court of which he had been a Chief Justice.

This amendment gave the Government extensive opportunities to interfere in the judiciary. The fact that the Chief Justice had to retire in four years increased the opportunities which the President had of appointing Chief Justices. At the same time, the fact that a Chief Justice had to retire in four years could not but rouse the ambitions of the other judges of the Court and increase their willingness to please the Government. Consequently, this amendment was generally resented by the Bench and the Bar.

The Chief Justice of the Lahore High Court retired in 1976 in view of this amendment. Instead of appointing the next senior judge, in accordance with the usual practice, Mr. Bhutto appointed as Chief Justice a judge who was junior to several other judges of the Court.

This decision shocked the legal profession and the public at large, and this had as traumatic an effect on the judiciary as the later removal of judges under martial law (see below) in March 1981.

Legislative enactments during martial law

Effect of "The Laws (Continuance in Force) Order 1977"

Following the proclamation of martial law on 5 July 1977 which put the 1973 Constitution "in abeyance", Chief Martial Law Administrator Zia-ul-Haq issued "The Laws (Continuance in Force) Order 1977"⁴ (CMLA 1977 Order). This order stated that:

"notwithstanding the abeyance of the provisions of the ... Constitution of Pakistan subject to this Order and any order made

by the President and any [regulation] made by the Chief Martial Law Administrator",

Pakistan shall be governed as nearly as may be, in accordance with the Constitution. However, by Clause 3 of the Order, fundamental rights under the Constitution were suspended. Also by Clause 3, all judges of the Supreme Court and High Courts were to continue in service on the same terms and conditions and all Courts in existence were enjoined to continue to function and exercise their respective powers and jurisdictions⁵. However limits were placed on the jurisdiction of the Supreme Court and the High Courts. The jurisdiction under Article 199 of the Constitution was curtailed in that no Judgment, Writ, Order or Process could be issued by the Supreme Court or the High Court against any Martial Law Authority⁶. Further, Clause 4 of the Order stated that "no Court, Tribunal or other authority shall call or permit to be called in question" the Proclamation of Martial Law or any Martial Law Order or Regulation⁷.

Despite these restrictions, in Begum Nusrat Bhutto's case referred to in the chapter on the Constitutional situation, the Supreme Court struck down clause 4 of the CMLA 1977 Order and affirmed that "the Superior courts (namely the Supreme Court and the High Court) continued to have the powers of judicial review, to judge the validity of any act or action of the Martial Law Authorities if challenged in light of the principles underlying the law of necessity ...", and that the Supreme Courts could exercise their full jurisdiction under Article 199 of the Constitution. In the view of Justice Dorab Patel, a retired Supreme Court judge, and one of the judges who heard the *Nusrat Bhutto* case "the judgement was the law of Pakistan until March 25, 1981. In this period of more than 3 years, hundreds of Writ Petitions were filed against Martial Law Orders, some of which were admitted, while many others were dismissed on the ground that there was no case for interference with the impugned orders."⁸

The *Nusrat Bhutto* judgement has been severely criticised for giving the CMLA permission to "perform all such acts and promulgate legislative measures, which fell within the scope of the law of necessity, including the power to amend the Constitution"⁹.

Unfortunately, the Constitution was amended many times (see for details Chapters I and II) by the CMLA in the following years and the promise to hold elections was not fulfilled. In October 1979, the CMLA postponed elections indefinitely and amended the Constitution by inserting Article 212A.

Article 212A

This Article provided for the establishment of one or more Military Courts or Tribunals for the trial of offences punishable under any Martial Law Regulation or Order and purported to oust the jurisdiction of the Superior Courts by removing the power of judicial review over acts done or orders made by the martial law authorities. The validity of Article 212A was challenged in all the High Courts throughout Pakistan and although there was a divergence of judicial opinion as to its validity,¹⁰ the stay orders and directions granted by the Supreme Court were complied with by the Martial Law Authorities,¹¹ despite the curb on the Superior Courts' powers. Possibly because of the exercise of the Superior Courts jurisdiction, the President made the Constitution Amendment Order, 1980.

Constitution (Amendment) Order 1980

a) Jurisdiction of the High Court and Supreme Court Amended

On 27 May 1980, the Constitution (Amendment) Order 1980 came into effect. Clause 3A of that Order amended the jurisdiction of the High Court, contained in Article 199 of the Constitution, by preventing the exercise of judicial review of any Martial Law Action or Order, precluding the High Court from making any order affecting the jurisdiction and any judgement or sentence of a Military Court or Tribunal, and disallowing any proceeding to be taken against any martial law authority. All orders made by the High Courts and the Supreme Court affecting the validity of any Martial Law Action or Order were declared null and void¹² and any such proceedings pending decision in any Court were declared to have abated.

In addition, the Order declared that all the Orders made by the CMLA and the President, including Martial Law Regulations and Martial Law Orders, "notwithstanding any judgement of any Court" were validly made¹³. Clearly the gradual inroads on the jurisdiction of the

Superior Courts, in particular, were in evidence in this Order, but it was not until the introduction of a further amendment, the PCO 1981, that the independence of the judiciary was severely curtailed. Before considering the PCO 1981, one other aspect of the 1980 Constitution Amendment Order has an important bearing on the jurisdiction of the Courts, that is the introduction of the Federal Shariat Court.

b) *The Federal Shariat Court*

As part of the process to implement Islamisation of laws in Pakistan, President Zia-ul-Haq made an Order¹⁴ in 1978 which provided for the establishment of a Shariat Bench in each of the High Courts in the four provinces of Pakistan and a Shariat Appellate Bench in the Supreme court of Pakistan. These benches were authorised to rule on the *Shari'a*, the Law of Islam, namely, to examine and decide whether any law was repugnant to the injunctions of Islam as laid down in the Quran and Sunnah, (referred to as "the Shariat jurisdiction"), and any citizen of Pakistan or the Federal or Provincial Government could seek the Courts' ruling by way of petition. The President, by way of the Constitution (Amendment) Order 1979, with effect from 7 February 1979, gave constitutional standing to the Shariat benches, by adding to the 1973 Constitution Chapter 3A, "Shariat Benches of Superior Courts", which confers Shariat jurisdiction on the High Courts and the Supreme Court.

One year later, the Constitution (Amendment) Order 1980 again amended the 1973 Constitution, inserting a new Chapter 3A in the Constitution called "Federal Shariat Court". By this amendment, the Shariat Benches of the High Courts were abolished, and the Federal Shariat Court was established, which was initially to consist of five Muslim members who had to be qualified to be (or were already) High Court judges, including a Chairman who had to be or was qualified to be a judge of the Supreme Court. Provision was made for judges of the High Court to be appointed to the Federal Shariat Court for not more than one year without their consent but if a judge of the High Court did not accept appointment as a member of the Court he was deemed to have retired from office.

The initial jurisdiction of this Court was as a Civil Court with Shariat jurisdiction, namely to examine and determine whether any law was repugnant to the injunctions of Islam, and if it were held by the Court

that a law was repugnant it would cease to have effect on the day of the Court's decision and the President would have to take steps to amend the law to bring it into conformity with the injunctions of Islam. Provision was made for an appeal from the Federal Shariat Court but such an appeal would be to the specially constituted Shariat Appellate Bench, consisting of three Muslim judges of the Supreme Court.

Since the introduction of the Federal Shariat Court, Chapter 3A of the Constitution has undergone constant amendment¹⁵ with provisions being introduced which greatly affect the appointment of judges and religious members to the Courts, their security of tenure and the jurisdiction of the Court. Although these aspects are commented on in greater detail in the latter section of this chapter, it is pertinent to observe that a separate and distinct court structure was established to operate in a parallel way to the existing judicial system, with judges (initially) from the existing High Courts and the Supreme Court to preside over the Federal Shariat Court, in matters which had previously been dealt with in the existing judicial system. The reason for the creation of a separate Shariat Court structure may well have been born of a genuine desire to implement the Islamisation of laws in Pakistan, but the practical effect of its establishment, jurisdiction and structure has been to weaken the jurisdiction of the Superior Courts, create insecurity amongst superior judiciary and make unnecessary inroads in a judicial system which could have dealt with the Shariat jurisdiction in its existing structure.

The Provisional Constitutional Order 1981

The most significant constitutional amendment made during the martial law period, which seriously impaired the independence of the judiciary and had a lasting impact on its functioning was the Provisional Constitutional Order 1981 (PCO 1981).

It has been observed that the PCO 1981 was made before an appeal could be heard in the Supreme Court from a decision by the Full Bench of the Quetta High Court which "unanimously declared that both the insertion of Article 212A and addition of Clauses (3A), (3B) and (3C) in Article 199 failed to come up to the test of necessity laid down in Begum

Nusrat Bhutto's case and were *ultra vires* of the power of CMLA even though he acted as President while promulgating these amendments".¹⁶

Although leave to appeal to the Supreme Court had been granted, one legal commentator¹⁷ notes that "the regime was not prepared to take any chances before the Supreme Court" and the PCO 1981 was promulgated on 24 March 1981.

The most invidious of its provisions was Article 17, which required the judges of the Supreme Court and the High Courts to take an oath to act faithfully in accordance with the PCO 1981 and to abide by it. The article provided that if a judge failed to take the oath *or* if the President did not call upon a judge to take such an oath, he would cease to be a judge. Several judges including the then Chief Justice of Pakistan and two Supreme Court judges, refused to take the oath, and several High Court judges were simply not invited to do so. As a result, the President effectively dismissed approximately 16 High Court and Supreme Court judges.

This was a severe blow to the security of tenure of judges, which is a cardinal principle for the independence of the judiciary. Under article 128 of the 1962 Constitution and Article 209 of the 1973 Constitution the Government could dismiss a judge only by referring the matter to the Supreme Judicial Council consisting of the five most senior judges of the country, and receiving its recommendation for dismissal. This could be given only on the ground that the judge 'is incapable of performing the duties of his office or has been guilty of misconduct'.

Since 1962 the Government had referred only three cases to the Supreme Judicial Council. According to Justice Patel, the procedure under Article 209 'is a very fair way of ensuring the independence of the judiciary and of protecting the judiciary against the misconduct of judges'. We note that under the present government it is once again in force.

The other provisions of the PCO 1981 were equally undesirable. Article 15 retrospectively validated everything done by the military regime since 1977, "notwithstanding any judgement of any Court"; it prohibited any challenge in any court to anything done or any action taken by a

military authority or to any sentence passed by a Military Court, which effectively precluded all judicial reviews, it nullified any orders or injunctions made by the courts in respect of decisions of the Military Courts and declared that all constitutional proceedings pending hearing by the courts had abated.

Of significance to the tenure of judges were the provisions which empowered the President to a) appoint *ad hoc* judges from the High Court to the Supreme Court for such period as may be necessary¹⁸; b) request one of the judges of the Supreme Court, irrespective of his seniority, to act as Chief Justice of a High Court¹⁹; and c) transfer a High Court judge from one High Court to another without the judge's consent and without consultation with the Chief Justice of Pakistan or the Chief Justices of both High Courts, for a period of not more than two years.²⁰ This latter power of transfer altered the previous 1976 constitutional requirement that consultation with the Chief Justice was not required if the transfer was only for a year. Other provisions established benches of the High Court in different places in each Province,²¹ removed the constitutional bar to a judge holding public office until two years after he ceased to be a judge by allowing a judge to take a diplomatic assignment or an advisory post to the Government while in office,²² and curbed the power of the High Court to grant interim bail or interim relief with regard to a detention order on a Habeas Corpus Petition.²³

Finally, the President in his capacity as President and Martial Law Administrator reserved for himself the power both retrospectively and for the future to amend the Constitution.

It is clear that the constitutional and legislative changes during the martial law period, culminating in the PCO 1981, had a cumulative and repressive effect on the independent functioning of the judiciary. The seriousness of these changes and their effects on the judiciary was highlighted in a recent address of welcome to the Prime Minister at the 5th Pakistan Jurists Conference by the Vice-Chairman of the Pakistan Bar Council, when he stated:

"After the promulgation of martial law in Pakistan in July 1977, the judiciary, under the law of necessity conferred legality on the martial law regime in *Begum Nusrat Bhutto's* case. Thereafter a treatment was meted out to the judiciary in which no society can

take pride. The addition of Article 212A to the 1973 Constitution, the promulgation of the Provisional Constitution Order in the year 1981, and the enforcement of various Presidential Orders, Martial Law Regulations and Martial Law Orders relating to the jurisdiction of the Superior Courts seriously undermined the powers and dignity of the judiciary. On the enforcement of the Provisional Constitution Order 1981, a large number of judges of the Superior Courts did not take oath or were retired leaving an adverse impression in the mind of the public. Subsequently, instead of making permanent appointments to the Superior judicial offices, the Chief Justice and judges were kept on the acting list for a long time to weaken the rank and file of the judiciary. Transfers of some of the judges or shifting of their headquarters adversely affected the independence of the judiciary."²⁴

With the introduction of the PCO 1981, the power of the executive to influence the judiciary was more than apparent. Rewarding a judicial officer regardless of seniority, was made possible by an appointment to the office of Chief Justice or to an advisory or diplomatic post, and conversely the Presidential powers to transfer a High Court Judge, without his consent, either from one district to another for a period of two years, or to the Federal Shariat Court could be used as a means of punishment.

As one commentator notes:

"It was not surprising that in the PCO years, which ended with its repeal on December 30, 1985, the progressive development of constitutional law through judicial review almost came to a halt."²⁵

As will be evident from the legislative development from 1981 to the present day, and as a resolution of the All Pakistan Lawyers Convention states:

"The introduction of [PCO 1981] has done incalculable harm to the independence of the judiciary and of rights of the citizens of Pakistan."²⁶

The period prior to the lifting of martial law – The Judiciary and the Bar

In the period from 1981 to 30 December 1985, further enactments were made which affected both the legal profession and the judiciary alike. On 10 March 1985, the President promulgated the "Revival of the Constitution of 1973 Order 1985", although fundamental rights and the Writ Jurisdiction of the High Courts were not brought into force. More importantly, the PCO 1981 continued as part of the revived constitution until 30 December when it was repealed and martial law was lifted. The following enactments survived the martial law period and are still in force today.

In July 1982, amendments were made to the Legal Practitioners and Bar Councils Act of 1973, firstly prohibiting Bar Councils and Bar Associations from engaging in political activity, and secondly allowing the right of an advocate to practise at the bar without being a member of a bar association.²⁷ As the Vice-Chairman of the Pakistan Bar Council noted:

"By the first provisions the activities of the advocates were intended to be controlled and by the latter provision a gross indiscipline was introduced into the legal profession."²⁸

In March 1985, a further amendment was made to the Legal Practitioners and Bar Councils Act 1973, removing the power to enrol and discipline members of the legal profession from the bar councils to the judiciary.²⁹ These amendments were seen by the legal profession as highly discriminatory and seriously affecting the freedom of the legal profession.

In addition, many changes were made affecting the appointments and tenure of the superior judiciary. The principal ones included an amendment to Article 179 of the Constitution with the abolition of the seniority ranking for appointment to the office of the Chief Justice of the Supreme Court,³⁰ and Article 196 which abolished the appointment of the most senior judge of the High Court to the office of the Chief Justice of the High Court,³¹ thus allowing a junior judge to be appointed over more senior judges. A further enactment amending Article 200 provided that any High Court judge who did not accept a transfer to

another High Court would be deemed to have retired from his office,³² and in relation to an appointment of a judge to the Federal Shariat Court, a new provision (inserting Article 203C(4B) to the Constitution) allowed the President "at any time" to modify the term of appointment of that judge, or assign him to any other office or require him to perform such other functions as the President "may deem fit; and pass such order as he may consider appropriate".³³

The effect of such an enactment is amply demonstrated by the experience of Mr Justice Aftab Hussain, who was Chief Justice of the Federal Shariat Court. In 1984 he was out of the country on a tour of Saudi Arabia. In his absence, another judge was appointed to his position and on his return to the country he was asked to take up a position as Advisor to the Ministry of Religious Affairs. He declined to accept the new office and was therefore deemed to have resigned.³⁴

The jurisdiction of the Federal Shariat Court was also the subject of change. In 1982, the jurisdiction was extended to allow the Court of its *own* motion to examine laws to determine their compatibility with the injunctions of Islam. The Federal Shariat Court was also given the power to review any finding, sentence or order passed by a criminal court in respect of any law relating to the enforcement of Hudood (which are the penalties ordained by the Quran or Sunnah and are contained in statutes described as the Enforcement of Hudood Ordinances)³⁵ including the power to "enhance the sentence".³⁶

Even in its civil Shariat jurisdiction, if the Federal Shariat Court considers that a law is repugnant to the injunctions of Islam, an enactment passed in 1984 required the Court to notify the appropriate Government authority and afford it "adequate opportunity to have its point of view placed before the Court".³⁷ Under Article 203G, no Court including the Supreme Court and a High Court can exercise any jurisdiction over matters within the jurisdiction of the Federal Shariat Court and Article 203GG provides that a decision of the Federal Shariat Court shall be binding on all High Courts and subordinate courts.

Finally, the structure of the Federal Shariat Court was also amended in this period. Originally constituted to consist of eight Muslim judges who were or were qualified to be High Court judges, the Federal

Shariat Court, by an amendment in May 1981, was to consist of a Chief Justice (who was, or has been, or is qualified to be a judge of the Supreme Court or who was or has been a permanent judge of the High Court), not more than four judges who were or were qualified to be judges of the High Court and not more than three shall be *ulema* who are well versed in Islamic law.³⁸ *Ulema* are religious leaders, who give decisions on questions of religious importance, and thereby regulate the life of the Muslim community. The *ulema* now sit as judges of the Federal Shariat Court along with High Court judges, or persons so qualified. Similarly the Shariat Appellate Bench of the Supreme Court consisted originally of three Muslim judges of the Supreme Court, but by an amendment in 1982,³⁹ it was to consist of three Muslim Supreme Court judges and not more than two *ulema* "to be appointed by the President to attend sittings of the Bench as *ad hoc* members thereof from amongst the judges of the Federal Shariat Court or from out of a panel of *ulema* to be drawn up by the President in consultation with the Chief Justice".⁴⁰

The legislative changes in this period illustrate the continuing meddling of the Executive with the jurisdiction and judicial officers of the superior judiciary. One further enactment that came into force on the day that martial law was lifted has compromised the superior judiciary in its present functioning. That enactment is clause 19 of the Constitution (Eighth Amendment) Act 1985.

The lifting of martial law and the Constitution (Eighth Amendment) Act 1985

After eight and a half years of military rule, President Zia-ul-Haq issued a Proclamation which ended martial law, repealed the Laws (Continuance in Force) Order 1981 and the PCO 1981, but which stated that the Constitution (Eighth Amendment) Act 1985 had been passed by Parliament (Majlis-e-Shoora). Clause 19 of the Eighth Amendment substitutes Article 270A in the Constitution and this Article validates and affirms all orders made, proceedings taken and acts done by any martial law authority during the martial law period, and provides that no law passed may be called into question in any court whatsoever, "notwithstanding anything contained in the Constitution".⁴¹ Further, it precludes any court from reviewing any acts done by the martial law

authorities or entertaining any legal proceedings against any authority and declares that *all* orders made and action done or taken by the martial law authorities "shall be deemed to have been made, taken or done in good faith".⁴²

Although the Writ Jurisdiction was restored to the High Court on the lifting of martial law,⁴³ Article 270A effectively curbed any judicial review of martial law actions or laws in respect of which many hundred petitions challenging Martial Law Orders as well as actions taken, are still pending hearing. The crucial issue which has yet to be determined, is whether the superior courts have the jurisdiction to review *mala fide* actions, abuses of power or *ultra vires* actions on the part of any martial law authority, and order appropriate remedies. Thus petitions seeking the return of confiscated property, the re-opening of sealed newspaper presses and the review of the continued detention of martial law prisoners, whose cases had not been heard, were still awaiting hearing at the time of this Mission's visit to Pakistan. The allegations of serious and gross delays in the hearing of cases was widespread but more particularly there seemed to be a marked reluctance on the part of the judiciary to set down for hearing those petitions involving sensitive political issues.

One such case involved the closing down and sealing of an Ahmiddyian newspaper *Al Fazal* in December 1984. A petition was filed in the Lahore High Court on 29 December 1984 challenging the authority of the Punjab Provincial Government to take such action.

From the date of filing to mid-1986 more than 21 adjournments were granted by the Court, principally at the request of the Attorney General, until the matter was set down for hearing in October 1986. On the day fixed for hearing the petition was placed towards the end of the fixture list and simply "was not reached". At the time of our visit in mid-December 1986, the matter had not been given another hearing date and neither the judge nor the court had marked the matter for a priority hearing. We were told by the Acting Chief Justice of the Lahore High Court that the petitioner's counsel should seek an urgent fixture by seeing him and making such request personally, although he also acknowledged that he had the power to set an urgent fixture of his own motion.

The reluctance of the judiciary to determine such matters and grapple with the vexed question of the extent of their powers of judicial review can perhaps be explained by the further requirement made of them, after martial law was lifted, and the PCO 1981 was repealed, to take a fresh oath of office. The judicial oath that was administered was the oath contained in the Third Schedule of the 1973 Constitution. Although it purported to be the oath under the "revived Constitution" it was administered after the Eighth Amendment was passed and Article 270A was incorporated in the Constitution. Since the PCO 1981 had been repealed and its terms incorporated into the Constitution and the 1973 Constitution had allegedly been revived, why was it necessary for judges who had already taken the oath under the 1973 Constitution to take the same oath again?

Since the oath required judges to discharge their duties and perform their functions honestly and "faithfully in accordance with the Constitution" and to swear that they will "preserve, protect and defend the Constitution", was it not a grim but timely reminder that the Constitution they must now uphold is a Constitution substantially amended and different to the 1973 Constitution to which they originally pledged allegiance, and that it now contained a provision validating all martial law action and legislation?

The requirement for the judiciary to swear to uphold the Constitution in its amended form must also be seen in the context of the martial law changes and the executive powers which have endured the transition to civilian rule, and which continue to affect the functioning of the judiciary.

Post martial law – the surviving enactments

The historical tracing of the successive martial law enactments and constitutional amendments evinces a gradual but steady weakening of the judiciary by the martial law administration, so that with the lifting of martial law it is pertinent to examine those enactments which continue to exist and to assess how they affect the present independence of the judiciary.

Despite the repeal of the PCO 1981 and Article 212A, constitutional enactments were passed prior to the lifting of martial law, which ensured the continuation of many of the changes made during martial law.

The most notable of these were the amendments made to Articles 196, 200 and 203C of the Constitution. Article 196 allows the appointment of High Court judges to the position of Chief Justice regardless of their seniority. Article 200 allows the President to transfer High Court judges to other High Courts for two years and if any judge does not accept transfer he is deemed to have retired. Article 203C permits the President to appoint a High Court judge to the Federal Shariat Court and if any judge does not accept such an appointment he is also deemed to have retired.

As discussed earlier, these amendments were made in the period prior to the lifting of martial law with all the above amendments being made in March 1985. The changes to Articles 196 and 200 were not new, however. They simply echoed the provisions of Articles 8 and 10 of the PCO 1981 but were inserted in the Constitution in 1985 prior to the repeal of the PCO 1981, to ensure their continuation. Thus the executive still retains the ability to punish or reward members of the judiciary. The prospect of promotion for a junior High Court judge to the position of Chief Justice would seem to offer an incentive for a judge to seek the favour of the executive while simultaneously creating an unnecessary competitive element among the members of the judiciary. Conversely, the prospect of being transferred from a High Court bench in one district to a completely different district for two years, or face retirement, creates for any judge an atmosphere of apprehension and uncertainty. Even more undesirable, are the provisions of Article 203C, which allow the President to appoint a High Court judge to the Federal Shariat Court and if the judge does not accept appointment he shall be deemed to have retired. If he does accept appointment, the President can at any time modify the term of his appointment or assign him to any other office or require him to perform any other function the President deems fit.

All these powers of transfer and appointment which are still retained by the President from martial law times, mitigate against any notion of

security of tenure of judicial officers and continue to threaten and damage the independent functioning of the judiciary.

The repeal of Article 212A of the Constitution, which established the Military Courts, proscribed their jurisdiction and precluded any other form of judicial review, is another example of a positive advance made when martial law was lifted.

However, when balanced against the provisions of the Eighth Amendment, the overall result is somewhat nugatory. The Eighth Amendment validates all actions taken and sentences passed by the Military Courts, and as already discussed, precludes any other Court from reviewing any of their decisions, sentences or orders. Again, the repeal of one martial law enactment is replaced by another which ensures continuing immunity for everything done during the martial law period, particularly by the Military Courts. The jurisdiction of the superior courts was again affected on the return to civil rule. Not only is their jurisdiction curtailed by the Eighth Amendment but a further constitutional amendment has impaired their ability to review any future amendments to the Constitution. With effect from 2 March 1985, Article 239 allows parliament by a two-thirds majority to amend the Constitution, but such an amendment is not to be "called in question in any Court on any ground whatsoever".⁴⁴

Without the jurisdiction to examine the validity of an amendment to the Constitution, the courts are deprived of an essential part of their function, to give redress to a citizen who is aggrieved by any enactment passed and to prevent violation to the Constitution. The prohibition to review constitutional amendments breaches Article 8 of the Universal Declaration of Human Rights which provides:

"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".⁴⁵

Restricting the jurisdiction of the courts by the Eighth Amendment and Article 239 erodes the public perception of and confidence in the judiciary. This is further exacerbated by the actions of the executive in certain cases, in providing the relief sought in proceedings before the court, after the hearing has started and before the decision is given.

One such example occurred during the Mission's visit. A petition challenging the continued detention of Jan Saqi was set down for hearing on 7 December 1986 in the Sind High Court. Jan Saqi, a prominent leader of the Sind Hari Committee, was convicted before a military court and sentenced to ten years rigorous imprisonment. His sentence expired on 5 July 1986 but the authorities continued to detain him. The hearing of his petition commenced on 7 December and on 9 December before the hearing was completed, the Central Prison of Karachi authorities ordered his release.⁴⁶ Clearly, such executive action obviates any need for a judicial determination, but has the effect of rendering the court's function redundant. It also prevents any court from setting a precedent which may in turn encourage other petitioners to have their detention reviewed and offends against an internationally accepted standard for the independence of justice that: "the executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision".⁴⁷

Other impediments to judicial independence

In addition to the above mentioned impediments to the proper functioning of the judiciary are a number of other factors which affect its independence and the adequate administration of justice. These factors do not necessarily arise from any specific martial law enactments, but continue a pattern of practice which existed during the martial law period:

Vacancies in the Judiciary

Inordinate delays in the hearing and disposal of cases was a constant and universal complaint made to the Mission by the Bar Associations, Bar Councils and practising advocates throughout Pakistan. The principal cause is attributable to the inadequate number of judicial officers available to clear the large backlog of cases pending hearing and to ensure an efficient flow of cases in the future. We were told that in the High Courts in each district there are vacancies in the judiciary which has largely been operating for many years without a full complement of judges. The Bar Councils have also observed that the number of judicial officers has not been increased commensurate with the increase in the number of cases and have stated that "the

inadequacy of the number of judges is a major cause for justice delayed".⁴⁸

The Appointment of Ad Hoc and Acting Judges

As stated in the Universal Declaration on the Independence of Justice, "the appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence". Although the constitutional provisions allowing for the appointment of acting additional and *ad hoc* judges were passed prior to the martial law period,⁴⁹ we were informed that the practice during martial law was to consistently appoint *ad hoc* additional or acting judges in the High Courts and the Supreme Court without confirming the appointments as permanent. By Article 182 a High Court judge can be appointed as an *ad hoc* judge of the Supreme Court "for such period as may be necessary" and similarly by Article 197 a person qualified for appointment as a judge of the High Court can be appointed an additional judge "for such period as the President may determine". As with the powers of transfer, the ability of the President to cancel an appointment of a temporary judge when he chooses creates uncertainty and insecurity and can be meted out as a punishment to an independent and courageous judge. In addition to encouraging the appointee to favour the executive, such a power can and does destroy judicial independence.

Retirement Age of the Superior Judiciary

In 1976 amendments were made to the Constitution stipulating that the retirement age for judges of the Supreme Court be sixty-five years and for judges of the High Court, sixty-two years.⁵⁰ Those judges who face compulsory retirement from the High Court, but who wish to continue a judicial office, may well wish for an appointment to the Supreme Court. Again, the opportunity for the executive to "reward" certain judges presents itself and to promote true judicial independence it is recommended that the retiring age for all superior judges should be sixty-five.

Facilities and Funding

The premises in which the judiciary must function, particularly the subordinate judiciary, are generally inadequate, overcrowded and lack adequate equipment for recording evidence, storing files and typing

judgements. It has been urged upon the Government to impress on Provincial Governments the need to make adequate financial allocations in their budgets to alleviate the situation and clearly greater funding is necessary to improve the conditions both for the judiciary and the public alike.

The Mission also received widespread allegations of corruption, particularly in the subordinate ranks of the judiciary. A contributing factor to the acceptance of bribes in particular was the inadequate remuneration received by the subordinate judiciary. The Pakistan Bar Council has urged the Government⁵¹ to improve the conditions for the judiciary, including an increase in remuneration and we endorse that recommendation.

Separation of the Judiciary from the Executive

Article 175 (3) of the Constitution provides that the judiciary shall be separated progressively from the executive within fourteen⁵² years.

Under the Code of Criminal Procedure 1898 (referred to as the Criminal Code) four classes of criminal courts are established: Courts of Session, Magistrates of the First Class, Second Class and Third Class.⁵³ In every district the Provincial Government has the power to establish the session courts,⁵⁴ to appoint all session judges,⁵⁶ district magistrates⁵⁵ and magistrates of each class,⁵⁶ including any "Special Magistrates";⁵⁷ to direct any "two or more magistrates to sit together as a Bench" and invest the Bench with such powers conferrable on magistrates of the first, second or third class;⁵⁸ to confer additional powers on magistrates;⁵⁹ and to withdraw all or any of the powers conferred by the Criminal Code on any person.⁶⁰

The civil "district courts" and the Courts of Small Cases established by the Code of Civil Procedure 1908 are however, subject to the control of the High Courts,⁶¹ although the application of the Civil Code to Revenue Courts is within the power of the Provincial Governments, which may declare which portions of the Code may apply.⁶²

It has long been the request of several Bar Councils and the public⁶³ that article 175 (3) of the Constitution should be honoured and the judiciary should be completely separated from the executive. We were told by the Minister of Justice that the Government was committed to

the separation of the inferior judiciary from the executive by August 1987 and we urge the Government to secure the complete independence of the inferior courts and judiciary as expeditiously as possible.

The effect of the Shariat Courts

As described earlier⁶⁴ the Federal Shariat Court was established during the martial law period as a separate and distinct court outside the existing court system. It retains the same powers and functions as were conferred on it during martial law. Thus, apart from the present restriction on any question regarding fiscal law, tax law, court procedures, or banking and insurance practice, it retains jurisdiction to examine any laws and declare them repugnant to the injunctions of Islam, and to review any sentence or order passed by any criminal court in respect of Hudood laws. (Islamic criminal laws). The findings of the Federal Shariat court still bind all High Courts and subordinate courts and the only right of appeal from the Federal Shariat Court is to the Shariat Bench of the Supreme Court. The members of the Federal Shariat Court and the Shariat Bench of the Supreme Court include *ulema* who do not have formal legal qualifications and whose only qualification must be that they are well-versed in Islamic law. In addition, a panel of jurisconsults or *qalim*, who in the opinion of the Federal Shariat Court are "well-versed in Shariat", are to be maintained by the court to represent any party to the proceedings before the court, although a party may also be represented by an advocate of the High Court, with five years experience, who is a Muslim.

Thus, a court structure has been created during martial law times, with far reaching jurisdiction, by a President who has retained the power to appoint or modify the term of all its members who must be Muslim; who has introduced legally-unqualified religious leaders to sit as judges; has placed restrictions on legal practitioners who may appear before the court; has permitted legally unqualified persons to represent parties; and who has imbued the decisions of the court with a status greater than that of the High Courts and all subordinate courts, which in turn are bound by those decisions. It is not surprising that the legal profession perceived the establishment of the Shariat Court as a threat because "jurisdiction has been taken away from the Shariat

Benches of the Supreme Court and placed into another separate court outside the Civil Court system and beyond the reach and influence of the legal profession. In addition such a development enhances the power of the Executive by giving it the choice of another forum of law in which to prosecute complaints and consequently vests it with the added power to bargain as to penalties".⁶⁵

In addition to reserving for itself "adequate opportunity to have its point of view placed before the Court" when the Shariat Court specifies that a law is repugnant to Islam,⁶⁶ the Government or executive exercises its control over the court by modifying the appointment of judges or amending the court's jurisdiction, as demonstrated in the following two cases:

In *Hazoor Bakhsh v. Federation of Pakistan*⁶⁷, a full bench of the Federal Shariat Court ruled that the imposition of a sentence of death by stoning ("rajm") was against the injunctions of Islam and the infliction of 100 strikes alone constitute Hadd (the punishment proscribed in the Quran). The Government lodged an appeal with the Shariat Bench of the Supreme Court. Before the appeal was heard, an amendment was passed to the Constitution allowing the Federal Shariat Court to review its own decision.⁶⁸ The bench of the Federal Shariat Court was reconstituted; the chairman of the Federal Shariat Court a former judge was removed, a new Chief Justice was appointed and two *ulema* sat on the bench. On review the sentence of death by stoning was upheld.⁶⁹ However, the mission understands that no sentence of death by stoning has been carried out.

In *Mujeeb-ur-Rehman v. Federation of Pakistan*⁷⁰, Ordinance XX (which prohibits Ahmadis from calling themselves Muslims) was challenged before the Federal Shariat Court as being repugnant to the Quran and Sunnah. The case was heard by five judges and a "short order" announcing the determination by the five Judges was made in August 1984,⁷¹ with reasons to be given at a later date. The Chief Justice who presided at the hearing was Mr Aftab Hussain. By the amendment to Article 203C(4B) with effect from 2 March 1985, the President was empowered to assign a judge to any other office or perform such other functions as the President deems fit. As described earlier, Mr Aftab Hussain was asked to accept appointment as Advisor to the Ministry of Religious Affairs. He declined, and was deemed to

have retired. The full judgement of *Rehman's* case was later delivered and reported,⁷² by four judges only. There is no reference to the fact that five judges heard the case and made a preliminary determination.

The problem with the establishment of separate religious-based courts, which have jurisdiction over civil laws and enactments and are able to be controlled by the executive, is that they can be easily manipulated to approve and endorse Government policy, while discriminating against sections of the populace who do not belong to the majority religious sect. The introduction therefore of *ulema*, the religious leaders of the majority sect in Pakistan, who are perceived by the community to be very powerful and influential as judges in both the Federal Shariat Court and the Supreme Court Shariat bench, is a dangerous innovation, particularly as they are not required to have any formal legal qualifications and the judgements of both the Shariat courts are not justiciable by any of the civil courts.

For the restoration of confidence in the judiciary and for the preservation of fundamental human rights, it is desirable that the jurisdiction of the Shariat courts, if still required, is returned to the civil court structure.

With the return to civilian rule, and the re-establishment of Parliament, the need for Shariat Courts, with the power to strike down legislation, may no longer be necessary. If legislation is passed by the elected representatives of the people, then as in any democracy, the laws should be justiciable, particularly with reference to the provisions of the Constitution. As the title suggests, the Constitution of the Islamic Republic of Pakistan contains in its preamble and in the "Objectives Resolution" which is a substantive part of the Constitution,⁷³ that "Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah". If the full jurisdiction of the courts were restored, and constitutional amendments were justiciable, then the need for Shariat courts would seem to be superfluous. However, if the prerequisite for legal training in Pakistan were to include more courses on Islamic law, lawyers and judges would be well equipped respectively to present argument and adjudicate on laws repugnant to the tenets of Islam. If the need to seek specialist religious opinion arose in a difficult matter, the *ulema* could

be called before any court as independent expert to give evidence. Since the civil judges were able to decide "Shariat" cases, prior to the establishment of the Federal Shariat Court, and are still appointed to the present Shariat court structure as judges, there seems little reason to doubt their capability to interpret and apply Shari'a to the laws of Pakistan.

The need for judicial independence

It is axiomatic to the rule of law that a judiciary must be able to function independently. In formulating international standards for the independence of justice, fundamental principles have been enunciated. The most pertinent are that the judiciary must be independent of the executive; the judiciary must have jurisdiction, directly or by way of review over all issues of a judicial nature; the executive must not have control over judicial functions and nor should any power be exercised as to interfere with the judicial process; assignments or transfers of judges within the courts to which they are appointed is an internal administrative function to be carried out by the judiciary; the appointment of temporary judges is inconsistent with judicial independence, and it should "be a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence ..."74

For the sake of an independent judiciary in Pakistan, it is time that these principles were followed. We would urge the Government of Pakistan to restore full jurisdiction to the Courts by the repeal of Article 270 and 239; to leave the powers of transfer of judges to the judiciary, including the transfer of any judge to a Shariat Court; to review the need for separate Shariat Courts and to ensure that legally qualified persons only are appointed as judges of these Courts; to repeal the provisions allowing for the appointment of ad hoc or temporary judges; to separate the subordinate judiciary from the executive; to provide the same retirement age for Supreme and High Court judges, and to allocate adequate resources to the superior and inferior judiciary, including adequate remuneration for the inferior judiciary.

The Bar

The amendments made to the Legal Practitioners and Bar Councils Act 1973, during martial law, as already described, still persist today. Thus the ban on Bar Councils and Bar Associations from engaging in political activity continues. Nevertheless, many of the Bar Associations, Bar Councils and Lawyers Conventions before and after martial law have issued press statements, made public addresses and published resolutions urging the Government *inter alia* to uphold the rule of law, to allow the judiciary and the bar to operate independently, to repeal repressive laws and enactments and to restore fundamental human rights.

Both during and after martial law, many lawyers were arrested and detained for their political activity, for holding meetings with political leaders, for appearing at political gatherings and for delivering speeches at such gatherings. The detention of lawyers during 1986, after martial law, has lasted in some cases for several days, in other cases for one month. At the time of their arrest, no reason has been given and no charges have been laid. Although none of the lawyers interviewed could say that they were arrested because of their professional activity or because of the clients they represented, the type of work which they received from Government corporations or commercial organisations was affected, as the Government would "blacklist" certain lawyers and thus prevent them receiving more lucrative work.

The other amendments made during martial law allow lawyers to practise without belonging to a Bar Association, and all enrolments of and disciplinary actions against lawyers were moved from the Bar Councils jurisdiction to the judiciary. These amendments, which are still in force, weaken the ability of the Bar Councils and Associations to check the quality of lawyers being admitted to the Bar and, more importantly, deprive the profession of the ability to discipline its members and make them accountable for their actions.

A constitutional amendment made just prior to the lifting of martial law, has also caused concern to the legal profession. Article 204 of the Constitution contains the powers for a High Court or Supreme Court to

punish anyone for contempt of court. Prior to March 1985 it contained an explanation which read:

"Fair comment made in good faith and in the public interest on the working of the Court or any of its final decisions after the expiry of the period of limitation for appeal, if any, shall not constitute contempt of the Court."

By an amendment to the article,⁷⁵ the explanation was omitted. The concern of the legal profession is aptly expressed as follows:

"The Pakistan Bar Council is unable to find wisdom behind the omission of the "Explanation". Does this mean that a judgement of a Court in no circumstances can be commented upon even in good faith? Such a provision is not recognised in Islam and shall impede the development of the law".⁷⁶

If this fear has foundation and effectively silences comment on judicial decisions, then it can be seen as an unnecessary fetter on the freedom of speech and another restraint on the legal profession in particular.

Legal aid

There is no state funded legal aid system in Pakistan, although the Government, both Federal and Provincial, do have a statutory obligation to make "grants in aid" to Bar Councils under the Legal Practitioners and Bar Councils Act 1973. We understand that no grant in aid payments have been made to any Bar Council for several years. At the present time, lawyers provide their services free of charge to those who cannot afford legal representation. A scheme was proposed by the Pakistan Bar Council, whereby a proportion of the court fees paid on every court document would be given to the Bar Council to establish a legal aid fund, which would also require, initially at least, an adequate donation by the Government to instigate the scheme. These proposals have not been implemented and there appear to be no plans by the Government to provide the much needed resources for the large numbers of the needy and poor who cannot afford legal services.

Legal education

To complete a law degree in Pakistan, a candidate must complete a Bachelors Degree, and complete a two year part-time law course. These courses are taught by practising advocates in the evenings. There was widespread dissatisfaction among the legal community about the minimal requirements to obtain a law degree and the inadequate nature of the courses. Many lawyers who can afford the cost, study and obtain law degrees from overseas universities.

However there is a need to establish adequate full-time law courses in the Pakistan Universities, which will ensure a well educated legal profession. Again, the Pakistan Bar Council has framed rules for legal education, which have not been implemented by the Government. In addition, funding is required to provide adequate facilities and full-time lecturers.

The Ombudsman

The office of Ombudsman or Wafaqi Mohtasib was established in 1983. His powers allow him to undertake "any investigation into any allegation of mal-administration" on the part of any Agency, which includes any department of the Federal Government or any institute controlled by the Federal Government. He does not, however, have any jurisdiction to investigate any matter which relates to the defence of Pakistan, or anything to do with the military, naval or air forces of Pakistan.

As noted in his annual report, the complaints received mostly contain "allegations of delay, neglect and inattention, inefficiency and ineptitude, indifference and carelessness, discrimination and favouritism, corruption, departure from the law, rules or regulations, unjust and biased decisions or administrative excesses and abuses."⁷⁷

From his report, it is clear that administrative inefficiencies of the Government are often rectified by an intervention by the Ombudsman, such as the failure to connect electricity to a village, the failure to provide telephone services, excess charges or the delay in paying family pensions.

However, the flagrant abuses perpetrated by the law enforcement agencies, which we were told were under the control of the military, are not able to be investigated by the Ombudsman.

If Government accountability is to be a reality in Pakistan, then there is a need for the actions of the military to be reviewed and/or investigated, particularly where court action is not possible because the identity of the perpetrators is unknown or uncertain. There is a clear need, therefore, for the jurisdiction of the Ombudsman to be extended to include all areas of law enforcement, regardless of whether agencies thus investigated are under civilian or military control.

Notes

1. The first martial law period was under General Ayub Khan on 8 October 1958; the second occurred in March 1969 under General Yahya Khan and the third on 5 July 1977 under General M. Zia-ul-Haq till 30 December 1985.
2. The first Constitution, the Constitution of the Islamic Republic of Pakistan came into force on 23 March 1956 and was abrogated on the promulgation of martial law in 1958; the second Constitution, the Constitution of the Republic of Pakistan 1962, was subsequently amended in 1963 and 1964, and was suspended on the proclamation of the Defence of Pakistan Emergency in 1964; the third Constitution, the Constitution of the Islamic Republic of Pakistan in 1973, which came into force on 1973, was in abeyance from 5 July 1973 to 26 December 1985.
3. Universal Declaration on the Independence of Justice, from the World Conference on the Independence of Justice, 1983 No 12 CIJL Bulletin, Geneva, pp. 27-55.
4. Chief Martial Law Administrators Order 1 of 5 July 1977.
5. Clause 3 *ibid.*
6. Proviso to Clause 2 *ibid.*
7. Clause 4 *ibid.*
8. "Justice Patel on 1973 Constitution" MAG January 31-February 6 1985 pp. 8-9 at p. 9.
9. Introduction to "The Constitution of the Islamic Republic of Pakistan" by Makhdoom Ali Khan p. xxxvi.

10. One such decision was made by the Division Bench of the Karachi High Court in *Aizaz Nazir v. Chairman Summary Military Court* PLD 1980 Karachi 444, in which it held that the petition before it had not abated and the Court had the power of judicial review.
11. *Judicial Review of Martial Law Actions* M. Farani, 1986, Lahore Law Times Publications, contains a collection of cases decided by former High Court Judge Mian D. Mahmood, in which many martial law actions and proceedings were set aside as illegal and without lawful authority.
12. Clause 3B Constitution (Amendment) Order 1980.
13. Clause 3C *ibid.*
14. Shariat Benches of Superior Court Order 1978, President's Order 1978, President's Order No. 22.
15. As at 6 February 1986, Chapter 3A had been amended 16 times. R. Patel *Islamisation of Laws in Pakistan*, 1986, Faiza Publishers, p. 88.
16. Introduction to "The Constitution of the Islamic Republic of Pakistan" (*supra*) at p. xi.
17. *ibid.*
18. Article 5 of PCO 1981.
19. Article 8 of PCO 1981.
20. Article 10 of PCO 1981.
21. Article 7.
22. Article 12.
23. Article 9.
24. "Address of Welcome to the Prime Minister of Pakistan". Fifth Pakistan Jurists Conference, Karachi, March 28-30 1986 by the Pakistan Bar Council reprinted April 1986, No. 17 CIJL Bulletin, Geneva, p. 29.
25. Introduction to the 1973 Constitution (*supra*) p. xii.
26. Resolution of the All Pakistan Lawyers Convention "Independence of the Judiciary".
27. Sections 59A & 59B of the Legal Practitioners and Bar Councils Act 1973, inserted by Legal Practitioners & Bar Councils Amendments Act 1982.
28. See note 24.
29. Legal Practitioners and Bar Councils Amendment Act 1985.
30. P.O. No 14 1985 Art. 2 and Sch. item 34 repealed Art. 179 Clauses 2-6 of the 1973 Constitution.

31. P.O. No 14 1985 Art. 2 and Sch. item 37 repealed Art. 195 Clauses 2-6 of the 1973 Constitution.
32. P.O. No 24 of 1985 section 3 inserted Article 200 Clause 4 in the 1973 Constitution.
33. P.O. No 4 of 1984 subsection 4.
34. R. Patel, *Islamisation of Laws in Pakistan (supra)* at p. 97.
35. For a further discussion on the Islamic Laws of Hudood see Chapter 5 (*infra*) on "The Impact of Islamisation on the Rights of Women".
36. Constitution (Second Amendment) Order 1982 (P.O. No. 5 of 1982) ss 4 inserted. Article 203-DD (a) in 1973 Constitution.
37. Constitution Amendment Order 1984, P.O. No. 1 of 1984 p. 2(a) inserted ss 1-A to Article 203D of the 1973 Constitution.
38. Constitution (Second Amendment) Orders 1981 (P.O. No. 7 of 1981).
39. Constitution (Third Amendment) Order 1982 (P.O. No. 12 of 1982) section 2.
40. Article 203 F (3) of the 1973 Constitution.
41. article 270 A subsection 1.
42. Article 270 A subsection 5.
43. "Notifications" *Dawn*, December 30 1985.
44. Article 239 subsection 5.
45. Universal Declaration of Human Rights, Article 8.
46. *Pakistan Times*, 10 December 1986.
47. "Universal Declaration on the Independence of Justice" (*supra*) p. 34 para. 2.07 (d).
48. eg. Pakistan Bar Council, (*supra*).
49. Articles 181, 182 and 197 of the Constitution.
50. Articles 179 and 195.
51. Pakistan Bar Council (*supra*).
52. The word "fourteen" was substituted for the word "five" by P.O. No. 14 of 1985 Article 2 and Schedule item 33 with effect from 2 March 1985.
53. Clause 6 Code of Criminal Proceedings 1898.
54. Clause 9 *ibid*.
55. Clause 10 *ibid*.
56. Clause 12 *ibid*.
57. Clause 14 *ibid*.
58. Clause 15 *ibid*.
59. Clause 37 *ibid*.

60. Clause 41 *ibid*.
61. Clause 3 Code of Civil Procedure 1908.
62. Clause 5 *ibid*.
63. eg. Pakistan Bar Council (*supra*), and the Lahore High Court Bar Association contains an object in its Constitution seeking the separation of the judiciary from the executive.
64. See *ante* under headings "Constitution (Amdt) Order 1980-B "The Federal Shariat Court" and "The Period prior to the lifting of Martial Law".
65. "The Independence and Freedom of Lawyers in Pakistan", Report to Lawasia Council, March 1983 p. 57.
66. S.1(a) Article 203D of the 1973 Constitution.
67. PLD 1981: Federal Shariat Court p. 145.
68. Article 203 E (9), added by Constitution (Amendment) Order 1981 (P.O. No. 5 of 1981).
69. *Fed of Pakistan v. Hazoor Bux* PLD 1983 Federal Shariat Court p. 255.
70. PLD 1984: FSC p. 136.
71. PLD 1984: FSC p. 136.
72. PLD 1986: FSC p. 1051.
73. By Article 2 A.
74. Articles 2.04, 2.05, 2.07 (a) and (b), 2.16, 2.20 and 2.41 of the Universal Declaration on the Independence of Justice (*supra*).
75. P.O. No. 14 of 1985 Art. 2 and Sch. item 44.
76. "Address of Welcome" (*supra*).
77. Wafaqi Mohtasib (Ombudsman)'s Annual Report 1985 p. 65.

LUSAKA SEMINAR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

The CIJL and the ICJ co-sponsored with the African Bar Association a seminar on the independence of judges and lawyers in Lusaka, Zambia from 10 to 14 November 1986. The seminar brought together judges, attorneys-general, practising lawyers and academics from Botswana, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Its purpose was to create a forum for a frank exchange of views on problems existing in the southern and eastern African anglophone countries, and to increase awareness of work taking place at the international level.

The seminar was officially opened by HE President Kaunda who expressed simply and eloquently one of the underlying themes of the conference, that people and governments "should not shirk from (their) responsibility to establish, nurture and safeguard vital institutions such as the judiciary for there is evidence from all over the world that societies which took matters for granted have at one time or another regretted the results of their lack of vigilance".

A plenary session was devoted to the role of courts and the role of lawyers in society. The participants then divided into four working groups which considered: the organisation and jurisdiction of the courts; the status and rights of judges; the independence of the judiciary, its status as a separate branch of government; and the independence of the legal profession. The recommendations of each working group were considered, amended and adopted by the closing plenary.

The CIJL is publishing the recommendations to give them wide publicity in accordance with the seminar's final resolution and in the belief that many have relevance to the situation in other regions of the world.

RECOMMENDATIONS of the Lusaka Seminar on the Independence of Judges and Lawyers

I. Recommendations Concerning the Organisation and Jurisdiction of the Courts

Organisation of the Courts

1. The courts should be organised hierarchically, integrating the institutions of both the traditional and the received law. Further, there is need to re-assess and re-evaluate the approaches and assumptions on which the subject matter jurisdiction of various courts is based.
2. The courts at the lowest level should be presided over by legally qualified persons trained in customary law, assisted by lay members. Informal methods of settlement of disputes should be encouraged.
3. Consideration should be given to including, in appropriate cases, lay members in higher courts exercising original jurisdiction.
4. Legal practitioners should have a right of audience in all courts.
5. Informal methods of dispute settlement should be encouraged.

Jurisdiction of Courts

6. Although the High Court or the Superior Court of first instance should have unlimited jurisdiction in criminal matters, they should, as far as possible, hear only the most serious criminal cases.
7. There should be a right of appeal without payment of court fees in all criminal cases.
8. In civil cases, subject to the decision of the court to which the appeal lies as to whether or not there are merits in the appeal, such appeal shall lie. In the case of a litigant in a civil case who wishes to appeal and has no means to pay court fees, the court to which the appeal lies should have the power to waive payment of such fees.

Petitions of Habeas Corpus

9. The superior courts in each country should be given the right on the application of the aggrieved party to inquire into all matters of arrest and detention.

10. Detention without trial should be abolished, except where there is justification for exercising emergency powers. Such detention should be subject to review by the courts, the detaining authority having to furnish justification for continued detention.

Fairness of Proceedings

11. The courts should have the unfettered right to grant or refuse bail. The bail conditions must be reasonable and where bail is refused, adequate reasons must be given by the court.

12. As legal aid should be universal, courts should ensure that unrepresented persons are treated fairly and given all possible assistance by the court in the presentation of their case.

13. It is proper for judges and magistrates to ensure that both prosecutors and defence counsel conduct court proceedings fairly and speedily. Furthermore, judges and magistrates should treat all parties and counsel appearing before them with fairness and courtesy. In like manner, parties and counsel appearing before the courts must give due respect to the judges, magistrates and the court generally.

14. Neither the courts nor the prosecution and the defence should be victimised because of the conscientious discharge of their functions.

Mistreatment of Prisoners and Detainees

15. Judges and magistrates should visit prisons and detainees within their jurisdiction on a regular basis and should be free to make enquiries into the conditions of prisoners and detainees.

16. Prisoners and detainees should be given the liberty to speak to the visiting judge or magistrate freely and out of the presence or hearing of a prison officer.

17. Visiting judges and magistrates should have the power after due inquiry to give directions regarding the conditions and treatment of prisoners and detainees. These directions should be addressed to the relevant authorities, who should be required to inform the court within a specified period as to what remedial measures they have taken with regard to such persons.

18. Where a prisoner or detainee has been released by the court on the merits of his/her application, the executive should not re-detain that person on the same grounds.

19. Where any matter is pending before a court, or is likely to come before a court, neither the government nor any other authority or person should take any action which would frustrate or interfere with the process of the court.

20. Detainees and persons awaiting trial should not be treated as though they were convicted prisoners.

Special Courts

21. While there is need for administrative courts or tribunals, there should, however, be a right of appeal from these courts or tribunals to the ordinary courts of law, and the right to legal representation should be assured throughout.

22. The state should not establish special courts to usurp the jurisdiction of the ordinary courts. This does not apply to duly constituted courts martial trying military personnel.

Resources

23. The executive should ensure that the courts are adequately supplied with judicial officers and supporting staff.

24. The courts should, as far as possible, make use of modern aids to simplify and accelerate court proceedings, and governments should be urged to provide, as far as possible, adequate funds to the judiciary for this purpose.

25. In countries where a sufficient number of lawyers are available, judges should be assigned lawyers as legal assistants.

Attire

26. The question of the type of attire to be worn by judicial officers in court be considered and rationalised.

II. Recommendations Concerning the Status and Rights of Judges

The Rights of Judges

27. Principles 8 and 9 of the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles, see CIJL Bulletin No. 16), concerning judges' freedom of expression and right to form associations, should be implemented at the national level.

Transfer

28. The power to transfer a judge from one court to another should be vested in a judicial authority.

Qualification, Selection and Training

29. Principle 10 of the UN Basic Principles providing for the non-discriminatory selection of judges of integrity and ability, should be implemented at the national level.

30. A qualified judicial service commission is an appropriate mechanism for the selection of persons for appointment to judicial office and the membership of such a commission should reflect the various fields of the legal profession.

31. With the exception of the person holding the office of Attorney General, it is undesirable that a member of the executive be a member of such a commission.

32. Judges, along with other judicial officials, should promote the establishment of institutions for professional training for various cadres of judicial officers locally or on a regional basis.

Conditions of Service and Tenure

33. Principle 11 of the UN Basic Principles providing that "The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law," should be implement at national level.

34. Appointments to judicial office should not be dependent upon membership in a political party or parties.

35. The government as well as the political parties should respect the independence of the judiciary.

36. Principle 12 of the UN Basic Principles calling for guaranteed tenure should be implemented at the national level.

37. A judge, other than a contract judge, who retires early or otherwise should receive adequate pension or other terminal benefits.

38. Principle 13 of the UN Basic Principles calling for promotion of judges based on ability, integrity and experience, should be implemented at the national level.

39. The institution of temporary judges should not be encouraged.

40. A judge should refrain from involving himself in business.

42. Principle 14 of the UN Basic Principles making the assignment of cases to judges an internal matter of judicial administration should be implemented at the national level.

Professional Secrecy and Immunity

43. Principles 15 and 16 of the UN Basic Principles guaranteeing professional secrecy and providing for personal immunity from civil damage actions should be implemented at the national level.
44. No legal action should be commenced against a judge without the leave of the High Court.

Discipline, Suspension and Removal

45. Principles 17 to 20 of the UN Basic Principles, guaranteeing a judge a fair confidential disciplinary hearing in accordance with established standards of judicial conduct, providing that suspension or removal shall only be imposed for incapacity or misbehaviour, and providing for independent review of disciplinary decisions, should be implemented at the national level.

III. Recommendations Concerning the Independence of the Judiciary: Its Status as a Separate Branch of Government

The Judiciary as a Separate Branch of Government

46. An undemocratic system of government is not conducive to the fullest realisation of the independence of the judiciary. A political system which does not allow for a separation of powers enshrined in a constitution does not promote judicial independence. States should therefore strive to establish and uphold constitutions which incorporate the principle of separation of powers and democratic values.
47. Abuse is being made of acting appointments with regard to judges. In that regard, where a vacancy for appointment to a substantive post of judge exists, the appointment of a judge in an acting capacity in such a way as to give an impression that the judge is on probation, thereby creating the possibility of currying favour with the executive, should be avoided. Under no circumstances should civil servants be appointed

to act as judges while retaining their substantive positions. Secondly, the appointment of contract judges should as far as possible be avoided, especially where there are suitably qualified local candidates for the job. Every government should create the necessary conditions which would encourage qualified local citizens to take up permanent appointment in the judiciary. In no circumstances should nationals of a country be appointed to the judiciary on contract where the possibility of permanent appointment does exist. The salaries and conditions of service in the judiciary should be such as to induce nationals of a country to join the judiciary and thereby remove reliance on expatriate and contract personnel.

48. Noting the special position of the judiciary, judges should be accorded the respect and dignity that they deserve in view of their high office. At the same time this entails a responsibility on the part of lawyers and judges in safeguarding their independence. A measure of self-restraint is called for and conditions should not be created that might invite reprisals from the executive and the public at large which will seriously undermine the independence of the judiciary and the legal profession. Under no circumstances should conditions be created whereby the lives of judges and lawyers and those of members of their family are placed in jeopardy.

Administration of the Courts

49. The judiciary, being a separate branch of government, should fall under the sole responsibility of the Chief Justice. Problems may arise where the judicial branch is considered as a department of a Ministry. Conditions should therefore be created whereby the judiciary has a greater say in the allocation of funds to the judiciary.

50. Assignment of cases should be left exclusively within the province of the judiciary. The judiciary should therefore not be interfered with in any way with regard to the assignment of cases to individual judges and judges should discharge their functions competently and diligently so as not to create room for interference.

The Role of Lawyers and Judges in the Protection of Judicial Independence

51. Both lawyers and judges have a crucial role to play in the promotion and protection of judicial independence. Lawyers can, for example, involve themselves in the measures which are taken for the enhancement of judicial independence. Judges are to guard against the erosion of their independence.

52. Judicial independence is meaningless without access to the courts. In order to ensure the provision of legal services, including legal education, to ordinary people:

- Lawyers' associations should be enabled to participate in the establishment of judicial services and other measures whose purpose is to enhance judicial independence.
- Judges should be vigilant and guard against action which erodes judicial independence regardless of whose action it is.
- The provision of legal services should be seriously considered by States. The provision of legal services should involve the organisation of various available resources in the public and private sector for the provision of such services. This means the involvement of governments, lawyers' associations and other specialised non-governmental organisations.
- Educational programmes for informing the public about judicial independence and human rights should be instituted as part of the process of educating the public about democratic values.
- Legal services and educational programmes should be taken to the people in rural areas instead of being centred in urban areas away from those they are intended to serve.

Freedom of Expression – the Judiciary and the Legal Profession

53. Basic human rights relating to freedom of expression and association for judges and lawyers are necessary conditions for the preservation of their independence. The judiciary and the legal profession have a responsibility to associate and speak out in support of their independence. However, the executive and the judiciary sometimes make certain controversial pronouncements which invite undesirable public response. Restraint on the part of the executive and

the judiciary is therefore important to avoid unnecessary controversy between themselves and between the judiciary and the public.

54. Lawyers everywhere and, in particular, those from South Africa and Namibia, who are persecuted in their determination to uphold the human rights of their clients and the legal profession deserve special assistance in countries where they might seek asylum.

55. As an undemocratic system of government is not conducive to the independence of the judiciary, the abolition of the system of Apartheid is a precondition to the existence and promotion of the independence of the judiciary.

IV. Recommendations Concerning the Independence of the Legal Profession

Right to Effective Legal Representation

56. What are often described as the rights of lawyers in the present context are essentially the rights of their clients – the lawyers only have those rights for and on behalf of their clients. Accordingly, those rights must be exercised responsibly and with care and in accordance with strict ethical standards. Further, the privileges and status of lawyers should be earned by their adherence to these standards and the quality of their service to the community.

57. The duties of lawyers in this regard can be placed into three broad categories:

- competence
- honesty, integrity, fair dealing, and ethical standards;
- understanding of the social environment and acceptance of their social responsibilities.

58. While the question of competence is dealt with under "education and training of lawyers" and while general ethical standards are fairly well understood, the issue of social responsibility needs amplification. This involves an understanding of the lawyer's social

environment without which he is unable to provide competent and effective legal services. Further, by reason of his special position in society and specialised training, a lawyer accepts the responsibility of providing legal services generally where these are required by the community. While he should be entitled to earn a reasonable living from such work, this is not the only or primary concern. "Legal Services" in this context means the provision of legal advice, legal representation, and public legal education. The unmet requirements of the needy, in particular those in rural areas, must not be overlooked. The principles set out in paragraphs 29 to 32 of the Draft Principles on the Independence of the Legal Profession formulated at Noto, Sicily, in May 1982, are to be supported.

59. Three factors militate against the independence of the legal profession and deny justice to the people:

- threats and intimidation, actual detention, assault and deportation of lawyers and improper use of other laws or procedures to hamper or restrict their legitimate activities on behalf of those whose human rights are abused;
- the tendency by the public and the executive to identify the lawyer with the cause of his client, particularly in an unpopular cause, or the view that such defences are conducted "purely for pecuniary reasons" rather than in the interest of justice;
- unnecessary bureaucratic formalities, disorganised and inefficient administration (not necessarily deliberate) of some courts and public services and, indeed, of the legal profession itself at realistic costs in time and resources leading to the inability of the lawyer to effectively assist the client.

60. Private legal practice is often unpopular in developing countries because of what is perceived (rightly or wrongly) as a tendency for lawyers to overcharge and/or to fail to accept or acknowledge the social responsibility placed on them as trained and privileged persons in such countries. This has in some instances led to, or nearly to, nationalisation of the legal profession or abolition of the right to private practice.

61. Nationalisation is a step in the wrong direction, creating more problems than it solves, in that in conflicts between the individual and

the state, the origin of most basic human rights violations there is even less protection for the individual under a nationalised bar than under a private bar (however weak it may be), and executive action will be unchecked.

62. Without an independent and courageous legal profession (in both the private and public sectors) to conduct cases before the courts an independent judiciary would be almost totally ineffective in enforcing basic human rights since it has by its very nature an exceedingly limited right of free action.

63. The Draft Principles on the Independence of the Legal Profession formulated at Noto, Sicily in May, 1982 should be progressively implemented at the national level and steps taken to ensure their general observance.

Customary and Traditional Courts

64. In many of the countries in our region lawyers are often barred from appearing in traditional or customary courts. This is essentially a denial of the basic right to legal representation (see recommendation no. 4). For the time being, however, and bearing in mind the ability of such courts to provide swift justice in appropriate cases, such provisions should not be considered as encroaching on human rights, provided that certain safeguards recommended below are met.

65. The jurisdiction of customary or traditional courts barring legal representation should be restricted to the resolution of customary law disputes and where such courts are given criminal jurisdiction, this should be limited to petty cases. Further, there should be full rights of review and appeal to the general courts of the land where legal representation is permitted and disputes relating to the jurisdiction of such courts should likewise be resolved in the general courts.

Education and Training of Lawyers

66. Effective representation and advice is not possible without competent lawyers. At least three requisites, the details of which would tend to vary from country to country depending on needs and

resources, are necessary to ensure the independence of lawyers as a means of protecting human rights:

- a broad-based training in law and legal principles;
- effective practical training in the art of lawyering; and
- training in professional and social responsibilities, to include an appreciation of the lawyer's environment.

67. It is vital that such principles should be introduced into the curriculum at an early stage so as to ensure, inter alia, that law students are under no illusions as to their future responsibilities.

The Role of Bar Associations/Law Societies

68. The role of Bar Associations in relation to the independence of the legal profession falls into six broad categories:

- monitoring observance of basic human rights generally and taking up violations with the responsible authorities;
- supervising and controlling and giving direction to members of the profession with the dual objectives of protecting the profession itself and of protecting the public;
- monitoring the state of the law generally and recommending changes where appropriate;
- monitoring and participating in both pre-professional and continuing legal education and training;
- involvement in public legal education; and
- involvement in legal aid.

To these ends a bar association should have the same rights of criticism and free expression as an individual while observing the usual constitutional qualification that freedom of association is restricted to "lawful purposes". In no circumstances should membership in a bar association be deemed unlawful.

V. Follow-Up

To ensure that the recommendations of the seminar are given the widest possible distribution in the hope that they will be incorporated into the law and practice of the region, the participants:

69. Decide that each participant should circulate among his or her colleagues at the court, in the Ministry of Justice, the Attorney-General's Chambers, the Bar Association and the University, and should make available to law journals and the press, the resolutions and recommendations of this seminar.

70. Call on the African Bar Association to transmit to relevant government officials, the Chief Justices, judges of the Supreme Courts and High Courts as well as local court magistrates and judges and University officials copies of the final report of the Seminar.

71. Call on law professors to bring the final report of the seminar to the attention of their students and to ensure that it is available in university libraries. Also call upon them to continue to study problems facing the judiciary, the legal profession and the system of the administration of justice and to co-operate with bar associations in bringing about necessary improvements.

72. Call on law societies and bar associations to take up the resolutions and recommendations, and to co-operate with academics in identifying steps to be taken in furtherance of their implementation.

73. Call on the Centre for the Independence of Judges and Lawyers to give wide publicity to the final report of the seminar, including its resolutions and recommendations and to bring the report to the attention of the United Nations Committee for Crime Prevention and Control.

74. Call on the Organization of African Unity, the African Bar Association, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers to publish and give wide publicity to the text of the African Charter on Human and Peoples' Rights.

75. Call on the African Bar Association as well as national bar associations and law societies to work with their governments to ensure that the text of the Charter is implemented at the national level.

76. Call on all governments to publish the text of the Charter in their law gazettes as well as local newspapers and to have the text of the Charter translated into local languages.

77. Call on all governments that have not yet ratified the Charter to do so.

78. Urge all governments to complete the reports called for in resolution 1986/10 of the Economic and Social Council concerning implementation of the Basic Principles on the Independence of the Judiciary, and to utilise, if necessary, the expert and other assistance which the Secretary-General of the United Nations has been asked to provide pursuant to the same resolution.

79. Call on Bar Associations to give assistance to their colleagues in South Africa, Namibia and elsewhere who are being harassed or persecuted because of their professional activities.

80. Decide to form a follow-up Committee which will be charged with:

- a) bringing to the attention of governments, the press, non-governmental organizations and bar associations the conclusions and recommendations of this seminar;
- b) inquiring from the participants what efforts they have undertaken to publicise the report of the seminar;
- c) consulting with academics on issues requiring further research;
- d) reporting back to the African Bar Association on their activities and progress made in implementing the report.

The Committee membership is as follows:

A.R. Khan,	Botswana
W.C. Maqutu,	Lesotho
G.M. Ntaba,	Malawi
K.P. Matadeen,	Mauritius

L. Malinga,
C.M. Ngalo,
A.M. Hamir,
A.R. Chigovera,

Swaziland
Tanzania
Zambia
Zimbabwe

81. Call on the African Bar Association to inform the Centre for the Independence of Judges and Lawyers of any progress made and further call on the Centre for the Independence of Judges and Lawyers to give wide publicity to the information supplied by the African Bar Association.

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CIJL BULLETIN

Indonesia and the Rule of Law – 20 Years of 'New Order' Government

*A study by the ICJ and SIM. Published by Frances Pinter Ltd., London, 1987.
Available in English. 208 pp. ISBN 0 86 187 919 8. Swiss Francs 50, plus postage.*

The state of human rights in Indonesia has attracted little international attention in spite of allegations that stability is being achieved at high cost to fundamental rights of the people. This study sets out the constitutional provisions and legislation relating to human rights and assesses their application in practice and compliance with international human rights norms. The detailed chapter on criminal law and procedure fills a gap that existed even in the Indonesian language.

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Pakistan: Human Rights After Martial Law

*Report of an ICJ Mission to Pakistan in December 1986 by Judge G. Petrén, Mrs. Helen Cull, Mr. Jeremy McBride and Mr. D. Ravindran. Published by the ICJ, Geneva 1987.
Available in English. ISBN 92 9037 033 5. Swiss Francs 10, plus postage.*

This mission examined the process of return to a democratic form of government after eight years of martial law rule. In the first detailed investigation of human rights in Pakistan since the lifting of martial law, the mission met with cabinet ministers, members of the Supreme Court and the High Courts, provincial Governors and church and opposition leaders. The general conclusions of the mission were that while the move to constitutional government is a positive development for Pakistan, as yet, there is a general lack of confidence that the Constitution in its present form can be effective in protecting human rights and in preventing a further imposition of martial law. Moreover, aspects of martial law have been institutionalised, and there are still some abuses of human rights and a number of freedoms are being curtailed.

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Human Rights in the Emerging Politics of South Korea

*A report of a mission by Prof. O. Triffterer, Mr. S. Oxman, and Mr. F.B. Cruz in March/April 1987. Published by the ICJ, Geneva, 1987.
Available in English. Swiss Francs 15, plus postage.*

The report examines the constitutional and electoral laws in the light of the changing political order; abuses of fundamental freedoms including arbitrary arrest, search and detention; torture and other ill-treatment of prisoners, infringement of defence rights; and limitation on freedom of the press and assembly. The mission's recommendations include the abolition of the National Security Act, which is used to justify many abuses, the establishing of guidelines for the police, the abolition of official guidelines for the press and ensuring respect for the right to counsel.

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