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The Independence of the Judiciary: A Third World Perspective

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Part II — Techniques and Agencies of Accountability

THE INDEPENDENCE OF THE JUDICIARY: A THIRD WORLD PERSPECTIVE

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I. A Theoretical Premise

The state is universally accepted as a necessity. Individuals need the state to protect their rights, although the state is a coercive mechanism which may be the greatest threat to the realization of those rights. The problem is, therefore, how to control the coercive and arbitrary powers of the state.

The French jurist Montesquieu, following attempts by Aristotle[1] and John Locke,[2] provided a theoretical framework in his doctrine of separation of powers.[3] He was concerned with the preservation of political liberty. He recognized that power has a tendency to be abused; therefore, government should be checked

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1. *See* Aristotle, *Politics* XXX Book IV (B. Jowett trans. 1955). Aristotle expressed ideas on the distinct functions of a state, although he did not suggest that those functions should be administered by different bodies.

2. *See* Locke, *Two Treatises of Government* 382-92 (P. Laslett ed. 1970). Locke recognised three functions of a government, namely legislative, executive and federative. The federative function according to him was to conduct foreign affairs. The separation of the executive and legislative powers from the judicial is not found in Locke.

3. Montesquieu, *The Spirit of Laws* BK XI Chap. 6; M. Richtel, *The Political Theory of Montesquieu*, 245 et seq. (1977). See also M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967); W.B. Glyn, *The Meaning of Separation of Powers* (1965); A.T. Venderbilt, *The Doctrine of Separation of Powers and its Present Day Significance* (1953); G.W. Carey, "The Separation of Powers," in *Founding Principles of American Government Two Hundred Years of Democracy on Trial* (G.J. Graham & S.G. Graham eds. 1977); C. Munro, "The Separation of Powers" (1981) *Public Law* 19; E.H. Levi, "Some Aspects of Separation of Powers," 76 COLUM. L. REV. 371 (1976).

internally by the creation of autonomous centers of power. He conceived that there are three main classes of government functions: the legislative, the executive, and the judicial. Therefore, there should be three main organs of government: the legislature, the executive, and the judiciary, each of which performs a specific function. The role of legislature is to enact laws, of the executive to ensure security and make provisions against invasion, etc.,[4] and of the judiciary simply to pass judgment upon disputes. He thought that to concentrate more than more class of function in any one person or organ of government is a threat to individual liberty. He, therefore, propounded that:

(i) one organ of the government should not perform the function of another organ,

(ii) one organ should not control or interfere with the function and exercise of power of another organ,

(iii) the same persons should not form part of more than one of the three organs of the state.[5]

On the role of the judiciary Montesquieu concluded that:

> There is no liberty, if the power to judge is not separated from the legislative and executive powers. Were the judicial power joined to the legislative, the life and liberty of citizens would be subject to arbitrary power. For the judge would then be the legislator. Were the judicial power joined to the executive, the judge would acquire enough strength to become an oppressor.[6]

Montesquieu's theory of separation of powers in its extreme interpretation means complete isolation of the three departments of government from one another. The three departments must not

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4. Montesquieu had not defined the executive power as that of carrying out the laws.

5. *See* E.C.S. Wade and G.G. Phillips, *Constitutional and Administrative Law* 48 (9th ed., A.W. Bradley 1977).

6. Richtel, *supra* note 3, at 245.

only have separate functions but also separate agencies to perform those functions composed of different persons.

The concept of separation of powers as propounded by Montesquieu was the result of an error of judgment. He based his theory on the assumption that the 18th Century English Constitution had a strict separation of powers. There was no perfect separation in the British experience.[7]

Extreme separation of powers is impossible of achievement and largely unworkable in a multi-functional complex government of today. Watertight compartmentalization of powers is not possible, "since the business of a constitutional government is so complex that it cannot define the area of each department in such a manner as to leave each independent and supreme in its allotted sphere."[8]

In its broader sense the doctrine means merely that one department of government should not be in a position to dominate the others. In the words of Hood Phillips: "What the doctrine must be taken to advocate is the prevention of tyranny by the conferment of too much power on any one person or body, and the check on one power by another."[9]

It is in this broader sense that all modern constitutions conform, in a certain degree, to the principle of separation of powers. The doctrine of separation of powers may not have been

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7. *See* O. Hood Phillips, "A Constitutional Myth: Separation of Powers" (1977) 93 L.Q. REV. 11 (British institutions may recognise in a general way three kinds of governmental power but to attribute that clear distinction of roles to a theory of separation of powers is doubtful). But see Lord Diplock in *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 157; *Chokolongo v. Att. Gen.* [1981] 1 W.L.R. 106, 110; *Hinds v. The Queen* [1977] A.C. 195, 212.

8. C.F. Strong, *Modern Political Constitutions* 276 (7th ed. 1966). *See also* C.H. McIlwain, *Constitutionalism, Ancient and Modern*, 141-42 (revised 1947) (among all the modern fallacies that have obscured the true teachings of constitutional history, few are worse than extreme doctrine of separation of powers); Wade and Phillips, *supra* note 5 at 48 (complete separation is possible neither in theory nor in practice); C. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* 13 (ELBS 7th ed. 1977) (complete separation of powers with no overlapping or coordination would bring the government to a standstill); W. Friedmann, *Law in Changing Society* 66-67 (Penguin 1964) (cooperation rather than separation in a constant interchange of give and take between legislature and executive and judiciary reflects the reality).

9. Hood Phillips & Jackson, *supra* note 8, at 13.

recognized in its absolute rigidity, but a differentiation of the functions of different departments of government is an invariable feature of all written constitutions. The function of the legislature as envisaged is to enact laws, of the executive to enforce and administer laws as well as to determine policy, and of the judiciary simply to interpret the laws. This division of functions is not based on the doctrine of separation of powers as in the U.S. Constitution.[10] Rather, it is a reflection of the British experience, since many Third World countries have adopted constitutions based on the "Westminster Model." As in Britain, these constitutions allow a certain degree of overlapping of functions of various organs of government.

Although there is no rigid separation of powers, by and large the spheres of the executive, legislative, and judicial functions have been demarcated so that the exercise of their powers may be limited to their particular fields. It is not permissible for the executive or the legislature to encroach upon the judicial functions. It is in this sense that there is a separation of judicial power. The judiciary is sought to be free from control and interference in its own department. Separation of judicial power is considered as concomitant with the doctrine of independence of the judiciary.

This paper seeks to examine the extent of the independence of the judiciary in the Third World countries whose legal systems are based on the English common law against this theoretical background. We shall briefly look at the meaning of the concept of independence of the judiciary followed by a critical exposition of factors which are considered important in securing judicial independence and a brief appraisal of the concept as it functions in practice.

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10. *See, e.g.,* M.C. Setalvad, *The Common Law of India* 174-75 (1960); S.M.F. Ali J. in *S.P. Gupta v. President of India* A.I.R. 1982 S.C. 149 (Constitution does not recognise separation of powers as in the U.S. Constitution, though these powers are separately dealt with in the Constitution).

II. The Meaning of the Independence of the Judiciary

Independence of the judiciary is a relatively new concept for Third World countries. During the colonial era, the judiciary was an integral branch of the executive rather than an institution for the administration of justice. The colonial administration was mainly interested in the maintenance of law and order. It had no respect for the independence of the judiciary or for the fundamental rights of the ruled. The judiciary was that part of the structure which enforced law and order. It was therefore identifiable as an upholder of colonial rule. To an average citizen, the judiciary, as an instrument of control of the executive power, lacked credibility and therefore enjoyed little respect. The judiciary was viewed with suspicion.[11] This attitude unfortunately did not change with independence, because in many Third World countries the judiciary has continued to be manipulated, in a variety of ways, by the executive. It is in this context that the doctrine of independence of the judiciary has acquired new importance in the Third World countries.

In theory, the function of the judiciary is to dispense justice in accordance with the law. The judiciary is responsible for the maintenance of a balance of interests between individual persons *inter se*, between individual persons and the state, and between government organs *inter se*. Under the constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective.

Most constitutional states in the Third World guarantee certain fundamental rights to citizens.[12] A constitutional duty is

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11. For position in colonial period, *see, e.g.*, Yash Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya* (1970); M.P. Jain, *Outlines of Indian Legal History* (1966); McAuslan, "Prolegomenon to the Rule of Law in East Africa," East African Institute of Social Research Conference Proceedings (Kampala, 1964); R. Seidman, *The State, Law and Development* 207 (1978).

12. *See, e.g., Indian Constitution*, Part VI; *Constitution of Kenya* Chap. V; *Constitution of Zambia*, Part III, Section Three, Law of the Fifth Amendment of the State Constitution of 1984 (Tanzania); Part II, Constitution of Malaysia.

imposed on the state not to violate these rights and to ensure that the citizens are protected and not impeded in the exercise of their rights. The judiciary is imparted with the most important function of safeguarding and protecting constitutional and legal rights of the individuals. "The judiciary stands between the citizen and the state as a bulwark against executive excesses and misuse or abuse of power, or transgression of constitutional or legal limitation by the executive as well as the legislature."[13] To facilitate the execution of this role it is necessary that the judiciary be independent.[14]

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13. Justice P.N. Bhagwati, "The Pressures on and Obstacles to the Independence of the Judiciary," Centre for the Independence of the Judges and Lawyers (CIJL) Bulletin No. 23 at 15 (1989); *S.P. Gupta v. President of India* A.I.R. 1982 S.C. 149 at 197-98 per Bhagwati J. Similar views were expressed by Lord Atkin in *Liversidge v. Anderson* [1942] A.C. 206 at 244; Justice E. Dumbutshena, "The Judiciary, the Executive and the Law" (1987) 3 (2) LESOTHO L.J. 237 at 242.

14. Following is a sampling of the literature on the independence of the judiciary. *Draft Principles on the Independence of the Judiciary*, adopted at Siracusa, Italy May, 1981, reprinted in CIJL Bulletin No. 8 at 33 (1981); *Montreal Universal Declaration on the Independence of Justice*, reprinted in CIJL Bulletin No. 12 at 27 (1983); *United Nations Basic Principles on the Independence of the Judiciary*, reprinted in CIJL Bulletin No. 16 at 49 (1985); *Report of the International Commission of Jurists (ICJ) Conference on the Independence of Judges and Lawyers*, Caracas, Venezuela, January 1989, reprinted in CIJL Bulletin No. 23 (1989); ICJ, *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa* (1988); ICJ, *South Asia: The Independence of Judges and Lawyers* (1988); L. Dayal Singh, "The Independence of the Judiciary and its Relationship to Fundamental Human Rights" (1981) 4(2) Commonwealth Judicial Journal 37; P.K.A. Amoah, "Independence of the Judiciary in Lesotho: A Tribute to Judge Mofokeng" (1987) 3(2) LESOTHO L.J. 21; L. Shimba, "The Status and Rights of Judges in Commonwealth Africa: Problems and Prospects" (1987) 3(2) LESOTHO L.J. 1; J.F. Scotton, "Judicial Independence and Political Expression in East Africa — Two Colonial Legacies" (1970) 6 EAST AFRICAN L.J. 1, Sir Kenneth Roberts-Wray, "The Independence of the Judiciary in Commonwealth Countries" in *Changing Law in Developing Countries* 63 (J.N.D. Anderson ed. 1963); A.T. Denning, "The Independence and Impartiality of Judges" (1954) 71 SOUTH AFRICAN L.J. 345; S.B. Pfeiffer, "The Role of Judiciary in Constitutional Systems of East Africa" (1978) 10 CASE WESTERN RESERVE J. OF INT'L L. 11; Justice Bora Laskin, "Some Observations on Judicial Independence" (1977) 3 COMMONWEALTH LAW BULLETIN (C.L.B.) 673; S. Shetreet, Judges on Trial (1976); S.A. de Smith, "Judicial Independence in the Commonwealth," THE LISTENER, 15 January 1959; K.S. Rosenn, "The Protection of Judicial Independence in Latin America" (1987) 19 INTERAMERICAN L. REV. 1; Niki Tobi, "Judicial Independence in Nigeria," 6 INTERNATIONAL LEGAL PRACTITIONER 61 (July 1981); S. Shetreet, "Judicial Independence and Accountability in Israel" (1984) 33 INT'L & COMP. L.Q. 979.

The expression "judiciary," in its strict meaning, refers to the "judges of a state collectively," but it is often used in a wider sense to embrace both the institutions (the courts) and the persons (judges) that comprise them.[15] So the independence of the judiciary comprises two fundamental and indispensable elements, namely (1) independence of the judiciary as an organ and as one of the three functionaries of the state, and (2) independence of the individual judge. Although "judicial independence" is a concept fraught with ambiguities and unexamined premises,[16] many attempts have been made to define and quantify it.

Traditionally, judicial independence means that the judicial arm of government and individual judges are left free to operate without any undue pressure or interference from either the legislature or the executive. D. Harris succinctly expressed this in the following words: "The primary meaning of 'independence' is independence of other organs of government in the sense of separation of powers; in particular a judge must not be subject to the control or influence of the executive or the legislature . . . ."[17]

This definition obviously needs several modifications. The concept of impartiality requires a judge to be free of personal biases and prejudices. He must not be committed to a political party or to one side in the litigation or to his race, class, caste, community, tribe or religion when he comes to judgment.

Therefore, independence of the judiciary includes "independence from political influence whether exerted by the political organs of the government or by the public or brought in by the judges themselves through their involvement in politics."[18] By politics we mean politics in its narrow sense, organized or party

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15. B.O. Nwabueze, *Judicialism in Commonwealth Africa* 265 (1977).

16. K.S. Rosenn, *supra* note 14.

17. David Harris, "The Right to Fair Trial in Criminal Proceedings as a Human Right" (1967) 16 INT'L. & COMP. L.Q. 352, 354.

18. Nwabueze, *supra* note 15, at 280. *But see* S.B.O. Gutto, "Judges and Lawyers in Africa Today" in *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa, supra* note 14 at 54 ("Judges are creatures of politics, and attempts through law or otherwise, to claim that they can distance themselves from politics, is not realistic. The real question is *whose politics* and not whether they ought not to participate in politics").

politics.[19] Judges are parts of the machinery of authority within the state and as such cannot avoid performing political functions. In the words of J.A.G. Griffith: "In both capitalist and communist societies the judiciary has naturally served the prevailing political and economic forces. Politically, judges are parasitic . . . . Their principal function is to support institutions of government as established by law."[20]

In supporting the institutions and stability of the system of government, the judges do perform a political function. The judiciary is not only a legal but also a government institution and therefore political in nature. Apart from independence from the executive, the legislature and political pressures, the concept of independence of the judiciary has some other dimensions. At times, threats to individuals' rights may come from influential individuals or private groups in society, or powerful economic interests may try to influence judges to invalidate statutes which are not to their liking. This then requires that the judiciary must also be free from pressures from private powers. In the words of Teleford Georges, former Chief Justice of Tanzania, independence "must be defined in terms of the absence of domination by the executive, political functionary or pressure groups."[21]

Bhagwati J. (as he then was) has put it bluntly, in *S.P. Gupta V President of India*,[22] when he emphasized that:

> The concept of independence of the judiciary is not limited only to independence from executive pressure or influence but is a much wider concept which takes within its sweep independence from many

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19. In one-party states, e.g., Tanzania and Zambia, judges can take part in politics. They are at liberty to join the party. However, it is felt that despite political commitment a judge, once he is out of the right calibre, can secure an equal degree of objectivity in his legal work. *See* Telford Georges, *Law and its Administration in a One Party State* 27-28 (R.W. James & F.M. Kassam eds. 1973).

20. J.A.G. Griffith, *The Politics of the Judiciary* 215 (1977). *See also* Paterson, "Judges: A Political Elite?" (1974) 1(2) British J. of L. and Society 118; E.P. Thompson, *Whigs and Hunters* 259 (1975) (Government is the political manifestation of the economic forces and the judiciary also subserves those forces).

21. Georges, *supra* note 19, at 6.

22. A.I.R. 1982 S.C. 149.

> other pressures and prejudices. It has many dimensions, namely fearlessness of the power centres, economic or political and freedom from prejudices acquired and nourished by the class to which the Judges belong.[23]

The use of the expression "the class to which the Judges belong" may be objected to by those who refuse to countenance any theory that postulates the determination of social attitudes by economic class and those who dismiss the very concept of class, but even without it the definition may serve a useful purpose.

A Committee of Experts organized by the International Association of Penal Law, the International Commission of Jurists, and the Center for the Independence of Judges and Lawyers suggested the following definition in its draft proposals adopted at Siracusa, Italy, in May 1981:

> Independence of the judiciary means (1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and (2) that the judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of review, over all issues of a judicial nature.[24]

This definition is quite comprehensive so as to cover practically all factors which may whittle down judicial independence, including private pressures and financial or other beneficial inducements. But the expression "in accordance with his assessment of facts and his understanding of law" is somewhat confusing. Instead of giving an impression that judges should not take instructions or give in to pressures from others, it gives an impression that they may decide matters before them by applying subjective standards. What is required on the part of judges is objectivity. An independent judiciary does not mean that judges can resolve

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23. *Id.* at 198.

24. Draft Principles on the Independence of the Judiciary, *supra* note 14, at 34. A similar definition is adopted at Montreal Universal Declaration on the Independence of Justice, *supra* note 14, at 33.

specific disputes entirely as they please. There are both implicit and explicit limits on the way judges perform their role. Implicit limits include accepted legal values and the explicit limits are substantive and procedural rules of law.[25] Justice Cardozo has made the point more eloquently when he explained:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinate to "the primordial necessity of order in the social life."[26]

Thus, the taught tradition of the law must guide and motivate judges in their decisions.[27] These guidelines, according to a

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25. *See* Robert Martin, *Personal Freedom and the Law in Tanzania* 54-55 (1974); Justice S.M.N. Raina, *Law, Judges and Justice* 144-45 (1979) (independence of the judiciary does not mean license to discharge the function in whatsoever manner one pleases). *See also infra* note 78.

26. Justice B.N. Cardozo, *The Nature of Judicial Process* 141 (1921). *See also Osborne v. Bank of the U.S.*, 9 Wheat 738, 866 (judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the law); M. Kirby, "The Role of the Judge in Advancing Human Rights: Knight Errant or Slot Machine Automation" (1988) 57 NORDIC J. OF INT'L L. 29.

27. The U.N. Crime Congress, which adopted Basic Principles on the Independence of the Judiciary (endorsed by the U.N. General Assembly), perhaps recognised this when it suggested that "the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason." *See* CIJL Bulletin No. 16 at 50 (1985). The emphasis here is that the judges should resolve disputes, "in accordance with the law."

commentator, include adherence to precedent,[28] procedural guidelines, and presumption of constitutionality of legislation.[29]

Desai, J. even went further in saying:

> The judiciary like any other constitutional instrumentality has, however, to act towards the attainment of constitutional goals . . . . [T]he independence of judiciary is not to be determined in all its ramifications as some *a priori* concept but it has to be determined within the framework of the constitution . . . . It is not as if judicial independence is an absolute thing like a brooding omnipotence . . . . Nor should judges be independent of the broad accountability to the nation . . . . One need not too much idolise the independence of judiciary so as to become counter productive.[30]

This means that independence of the judiciary can only be within the framework of the constitution. Independence does not mean independence from broad accountability to the nation or its goals and objectives.[31]

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28. Law is a dynamic concept. Too much adherence to precedents may be counter-productive. But numerous and often conflicting decisions may keep even trained lawyers and legislatures guessing and may hamper national policies. *See* Roscoe Pound, *Law Finding Through Experience and Reason* 13 (1960) ("Law must be stable and yet it cannot be stand still. The legal order must be flexible as well as stable."); C.K. Allen, *Law in the Making* 357 (7th ed. 1964). (In England, "a compromise is gradually worked out between a slavish subjection to precedent on the one hand and a capricious disregard of consistency on the other hand."); Justice P.N. Bhagwati, "The Challenge to the Profession by the Judiciary," CIJL Bulletin No. 11, 24, 25 (law "must undoubtedly be stable but at the same time it must be dynamic and accommodating to change").

29. *See* H.J. Abraham, *The Judiciary, the Supreme Court in the Government Process* 175-81 (4th ed. 1977). Allen had said: Judges must turn to those principles of reason, morality, natural justice, and social utility which are fountainhead of all law, *see supra* note 28, at 298 and 364.

30. *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149, 445. *See also* Justice Krishna Iyer, *Some Half-Hidden Aspects of Indian Social Justice* 124 (1979) ("Judges being human are not non-aligned in terms of socio-economic philosophy, but are bound to advance the philosophy of the Constitution to uphold which they have taken their oath of office.").

31. Draft Principles on the Independence of the Judiciary recognised that judges should "inform themselves fully about the goals and policies of a changing society." *See supra* note 14 at 43. In many countries constitutional goals are expressed in the Directive Principles of the state policy. *See, e.g.*, Part IV of the Indian Constitution; Section Two, Law of the Fifth Amendment of the State Constitution of 1984 (Tanzania).

The independence of the judiciary, therefore, has to be understood to mean the judge's freedom of operation within these limits.

In our opinion, the first part of the definition adopted in Draft Principles on the Independence of the Judiciary[32] should therefore be revised to read as follows:

> Independence of the Judiciary means
> (1) that every judge is free to decide matters before him in accordance with the taught traditions of the law and the principles of the rule of law,[33] with the ultimate aim of bringing about the attainment of the constitutional goals, without any improper influences, inducements or pressures, direct or indirect, from any quarter or for any reason, and . . . .
> (b) . . . .

III. Constitutional Framework

A. Separation of Judicial Power

Invariably all constitutions of the Third World countries that inherited the common law tradition deal under separate chapter headings with the legislature, the executive and the judiciary.[34] The chapter dealing with the judicature invariably contains provisions relating to the establishment of courts, appointments and tenure of judges, etc. But conspicuously, there is no express vesting of judicial power *exclusively* in the judiciary. The Judiciary Committee of the Privy Council, however, in *Liyanage v. The*

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32. *See supra* text relating to note 24.

33. A seminar organised by ICJ in Dar es Salaam concluded: "The cornerstone of the independence of the judiciary lay in its power to dispense justice without fear or favour and with impartiality and respect for the principles of the rule of law." *See* ICJ, *Human Rights in One-Party State* 111 (1978).

34. *See, e.g.,* Indian Constitution Part V Chaps. I, II & IV and Part VI Chaps. II, III and IV; Constitution of Kenya Chaps. II, III & IV; Constitution of Zambia, Parts V, VI and VIII. Constitution of Tanzania, Chap. V.

Queen[35] said that the fact was not decisive. The arrangement of the Ceylon (now Sri Lanka) Constitution into parts among which one was headed "The Judicature" coupled with the fact that judicial power had always vested in courts, led the Privy Council to hold that the Constitution vested the judicial power exclusively in the judiciary. Lord Pearce observed: "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a constitution by which it was intended that judicial power should be shared by the executive or legislature."[36]

In a famous Indian case, *Indira Nehru Gandhi v. Raj Narain*,[37] the appellant who was the Prime Minister of India, filed an appeal before the Supreme Court from the decision of a High Court holding her election invalid on the ground of certain electoral malpractices. Before the appeal could be heard Parliament passed amendments to the election laws and also amended the Constitution to insert a new article 329A, making special provisions as to election to Parliament in case of the Prime Minister and the Speaker. The constitutional amendment in effect wiped out the judgment, the election petition and the law relating thereto. And more importantly, Parliament, by invoking its constituent power, had validated the election and thereby had made a legislative judgment. The amendment was challenged on the ground, *inter alia*, that the amending power did not extend to deciding private disputes. It was contended on behalf of the appellant that in exercise of its constituent power, Parliament could exercise judicial power and Parliament had done so by

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35. [1967] 1 A.C. 259. For similar decisions, *see also Hinds v. The Queen* [1976] 2 W.L.R. 366 (P.C.) (Jamaica); *Okunda v. Republic* [1970] East African L.R. (hereafter E.A.) 453 (Kenya); *Lakanmi v. Attorney General* (West) [1971] I.U.I. L.R. 201 (S.C.) (Nigeria); *Shah v. Attorney General No. 2* [1970] E.A. 523 (Uganda).

36. *Id.* at 287. Similar observations were made by Ray C.J. in *Indira Nehru Gandhi v. Raj Narain*, A.I.R. 1975 S.C. 2299, 2320.

37. A.I.R. 1975 S.C. 2295. For a detailed discussion of this case, *see* H.M. Seervai, *Constitutional Law of India* 1519 *et seq.* (2nd ed. 1976).

article 329A. The majority in the Supreme Court appears to have rejected the contention of the appellant. Beg J. said:

> I do not think that because the constituent power necessarily carries with it the power to constitute judicial authorities, it must also, by implication, mean that the Parliament, acting in its constituent capacity, can exercise the judicial power itself directly without vesting it in itself by an amendment of the constitution.[38]

A Lesotho case, *The Law Society of Lesotho v. The Prime Minister*,[39] although it did not involve constitutional provisions, is relevant in the context. Here, the appointment of a member of the staff of the Director of Public Prosecution as an Acting Judge of the High Court was challenged on the ground that the appointee was a civil servant, whose appointment contravened the provisions of a statute which guaranteed "independent, impartial and competent courts." The Court of Appeal found that the appointee had not in fact resigned his office as a civil servant. It observed that the 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 of the government. Accordingly, the appointment was held invalid.

In our view, absence of express vesting of judicial power in the judiciary is not merely a coincidence. It is done perhaps with a view to dealing with certain exigencies of modern society regarding which judges may sometimes not be competent to decide alone. The establishment of administrative tribunals consisting of laymen in almost all jurisdictions also points to this fact.

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38. *Id.* at 2435.

39. Court of Appeal Civ. App. 5 of 1985 (unreported) discussed in Amoah, *supra* note 14, at 33 and in Amoah, "The Independence of the Judiciary in Botswana, Lesotho and Swaziland," CIJL Bulletin Nos. 19 and 20, 22-23 (1987). *See also Ngwenya v. Deputy Prime Minister*, Swaziland Civil Appeal No. 1 of 1973 (attempt to transfer what was essentially a judicial function from the judiciary to the executive was held *ultra vires* the constitution), discussed in T.A. Aguda, "The Judiciary in a Developing Country" in *Essays on Third World Perspectives in Jurisprudence* 150-51 (M.L. Marasinghe and W.E. Conklin eds. 1984).

In *Sampath Kumar v. Union of India*,[40] the Indian Supreme Court upheld the validity of a statute which excluded the jurisdiction of the High Court in service matters and vested such exclusive jurisdiction in an administrative tribunal because the problem of backlog of cases became very acute and pressing. But the Court warned that the tribunal should be a real substitute for the High Court — not only in form and *de jure* but in content and *de facto*.

B. Constitutional Safeguards for Securing Judicial Independence

Sir Kenneth Roberts-Wray has said:

> To the question how the independence of the judiciary is preserved, I suggest a fourfold answer: First, by appropriate machinery for appointment of judges; secondly, by giving judges security of tenure of office; thirdly, by such general acceptance of, and respect for, judicial independence that the members of the judiciary can rest assured that it is not likely to be challenged and has not continually to be fought for; fourthly, by the terms of service of members of the judiciary.[41]

In almost all constitutional states the safeguards suggested by Sir Kenneth Roberts-Wray are provided to secure judicial independence.[42]

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40. Noted in (1988) 14 C.L.B. 43-44. *See also Minerva Mills Ltd. v. Union of India* A.I.R. 1980 S.C. 1789.

41. Roberts-Wray, *supra* note 14, at 63.

42. *See, e.g.*, Indian Constitution, Part V. Chap. IV and Part VI, Chap. V; Constitution of Kenya, Chap. IV; Constitution of Zambia, Part VIII; Constitution of Tanzania, Chap. V. Malaysian Constitution, Articles 121 to 131; Zimbabwe Constitution, Articles 79-92. L.G. Barnett, *The Constitutional Law of Jamaica*, 318-327 (1977).

1. Appointment of Judges

In all cases the head of the state is invariably empowered by the Constitution to appoint the Chief Justice. But the method of appointment of judges varies.

In some countries judicial appointments are in the hands of the head of the executive branch after considering the Chief Justice's advice (except for the appointment of Chief Justice).[43] In federal systems, judges of state high courts are appointed by the head of the executive on the advice of the state Governor, Chief Justice of the supreme court, and Chief Justice of the respective high court (except for the appointment of the chief justice).[44]

In some other countries, there are judicial service commissions upon whose recommendations judicial appointments are made by the head of the executive (except in the case of the Chief Justice, whose appointment is made by the head of the executive on his own).[45] The idea is to insulate the appointment process from the touch of the executive hand and from political consideration. But this system is also not perfect. Much depends upon the composition of the judicial service commission. If the commission is executive controlled then the justification for its establishment disappears.[46] On the other hand, if the commission is under the control of judges, some undesirable features may develop. It may enable "the judiciary to be self-perpetuating and will result in emphasis of its elitist class character. It even permits judicial nepotism."[47]

It may be seen that appointment of judges is an executive function but proper checks and balances are provided. Firstly, appointments are to be made in consultation with the chief justice,

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43. *See, e.g.,* Article 124, Indian Constitution, Article 108, Constitution of Zambia.

44. *See, e.g.,* Article 217, Indian Constitution.

45. *See, e.g.,* Sections 61, and 68, Constitution of Kenya; Article 110, Constitution of Zambia.

46. E.g., Article 115, Constitution of Zambia, under which and except for the Chief Justice, other members of the Commission need not be lawyers.

47. Claire Palley, "Rethinking of the Judicial Role, The Judiciary and Good Government" (1969), 1 Zambia L.J. 1, note at 30.

governor, or judicial service commission. In some jurisdictions, the head of the executive can act only on the advice of the cabinet.[48] Second, clear rules governing qualifications, professional experience and training, and calibre of persons appointed to the bench are embodied within the constitution.

2. Security of Tenure

It is important to insulate judges from pressure during their tenure of office so that they can act impartially and without any fear of reprisals. Most of the constitutional states therefore prohibit arbitrary removal of judges by the executive. Practically all constitutions stipulate that judges cannot be removed from the office except for proven misbehavior or incapacity,[49] and only by following the procedure prescribed by the constitution. In some countries, judges hold office during good behavior and can only be removed on an address from Parliament.[50] In others, a judge can only be removed after an inquiry and report by a tribunal especially appointed for the purpose.[51]

This system is also not perfect. The tribunal appointed can be manipulated by the executive. A recent example is the dismissal of the Lord President and other two judges of the Supreme Court in Malaysia on the recommendation of the judicial commission, apparently for not toeing the government line.[52]

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48. *See, e.g.*, Article 74, Indian Constitution; H.E. Groves, *The Constitution of Malaysia* 100 (1964). In Jamaica there is a further safeguard: the Prime Minister has to consult the Leader of the Opposition before making recommendation to the Governor-General for the appointment of the Chief Justice of the Supreme Court and the President of the Court of Appeal. *See* Section 98(1) of the Constitution of Jamaica.

49. *See, e.g.*, Article 124, Indian Constitution; Article 113(2), Constitution of Zambia; Article 125(3), Malaysian Constitution.

50. *See, e.g.*, Article 124, Indian Constitution.

51. *See, e.g.*, Article 113, Constitution of Zambia; Section 62, Constitution of Tanzania; Article 125, Malaysian Constitution.

52. *See* G. Robertson, "Malaysia: Justice Hangs in the Balance," *The Observer*, London, August 28, 1988; A.J. Harding, "The 1988 Constitution Crisis in Malaysia," 39 I.C.L.Q. 57 (1990).

In Kenya, after a constitutional amendment made in 1988, a judge could remain in office only at the pleasure of the President.[53] This situation has now been attended by another constitutional amendment providing that a judge can be removed from office only for inability to perform the function of his office or for misbehavior and only after an investigation and recommendation to that effect by a tribunal appointed for that purpose.[53]

Also, in many countries there are express constitutional provisions to appoint ad hoc[54] or expatriate judges[55] for a certain period of time. It may be argued that appointments of temporary judges may affect judicial independence, but in the conditions of the Third World countries such appointments sometimes cannot be avoided, if only because of a lack of qualified citizens. However, there are any number of instances of such judges being accused of serving as lackeys of the executive.

3. Transfer and Other Assignments

A judge may sometimes be transferred from one jurisdiction to another. In many countries, prior consent of the judge whose transfer is proposed is not necessary. But any transfer by way of punishment is not permitted. Transfer with an oblique motive or for an oblique purpose, such as not toeing the line of the executive or for rendering decisions unpalatable to the executive, amounts to a punishment. Such transfers are likely to be struck down by the courts, because they amount to interference with the independence of the judge concerned or of the judiciary.[56]

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53. *See* Section 2 of the *Constitution (Amendment) Act* 4 of 1988 of Kenya.

53. *See The Constitution (Amendment) Act* 17 of 1990, which deleted and substituted Section 2 of Act 4 of 1988.

54. *See, e.g.*, Article 127, Indian Constitution; Article 122A, Malaysian Constitution.

55. *See, e.g.*, Section 61(3)(a) Constitution of Kenya.

56. *See* observations of Tulzapurkar J. in *S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149 at 410. In this case the majority in the Indian Supreme Court held that the transfer of judges, even without consent, was constitutional as it was in public interest. It was also held that the ad hoc appointments were constitutional and the ad hoc judges have no right as such

However, it cannot be said that transfer without consent would always amount to an interference with the independence of the judiciary. Often, transfer may serve the public interest. First, it may be necessary for the fulfillment of broader national goals such as national integration. Second, where services of a competent judge are needed in an area where local talent is scarce. Third, where a judge in his early years is transferred from place to place to enrich his judicial experience. Finally, where there is a danger that justice will not appear to be done, and the prevailing environment is linked with the person of the judge concerned. For instance, certain persons or members of the bar might exploit their proximity to a particular judge which had created considerable misunderstanding and dissatisfaction in the working of the court. Charges against the concerned judge may be difficult to prove or there may be absence of any connivance or complicity on his part. But in such cases, if the atmosphere has to be improved, the transfer of the judge without his consent may become inevitable. However, safeguards, such as consultation with the chief justice, transfer only in public interest and judicial review may insulate against the arbitrary use of the power to transfer by the executive.

Sometimes judges are assigned other functions such as membership of a commission of inquiry or of administrative tribunal. It is better if assignment of such functions is made with the consent of the concerned judge.

4. Other Protections

There are also other rules that protect judges. Judges are insulated from politics and are encouraged to do their work professionally. They are given immunities against legal

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to the renewal of their appointments or to be made permanent. For comments on this case, *see* Jill Cottrell, "The Indian Judges' Transfer Case," 33 INT'L. & COMP. L.Q. 1032 (1984). In some countries the constitution itself permits transfer of judges without consent. *See, e.g.*, Article 122C, Constitution of Malaysia.

proceedings for acts done in their official capacity.[57] They have power to punish for contempt of court. Judges' salaries and remunerations are fixed by the Constitution or statute and are charged permanently on the consolidated revenue fund. It is not a regular fund which is subject of parliamentary discussion and action, and therefore Parliament as such has no opportunity to debate the conduct of the judges. Further, salaries and remuneration cannot be reviewed to the judges' disadvantage.[58]

The *sub judice* rule prohibits publications which may affect the course and the outcome of pending cases. The legislatures cannot debate matters pending before the courts. The conduct of judges cannot be raised or debated in the legislature except on a substantial motion. These safeguards are aimed at making it possible for the judges to perform their function without fear or bias. In addition, the rule against bias disqualifies a judge from sitting in cases in which he has some interest.

No one would seriously argue against these safeguards for protecting judicial independence. But the law of contempt of court is tricky and obsolete. Those who criticize judges do so at the risk of being punished for contempt. It is because of this that judges enjoy immunity from public scrutiny and criticism. But there are dangers in "putting the independence of judiciary on a pedestal."[59] Judges are not monks;[60] they are fallible human beings, not disembodied spirits. They may err or may suffer from vanity. At times they may be intolerant even of constructive criticism, or be overly sensitive to petty matters. For instance, a Kenyan court once jailed a lawyer for three days for contempt of court, merely for banging the table.[61]

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57. *See generally Sirros v. Moore* [1975] Q.B. 118; M. Brazier, "Judicial Immunity and the Independence of the Judiciary," 21 Public Law 397 (1976); D. Thompson, "Judicial Immunity and Protection of Justices," Modern L. Rev. 517 (1958).

58. Malawi is perhaps an exception. *See* Shimba, *supra* note 14, at 16.

59. *S.P. Gupta v. President of India* A.I.R. 1982 S.C. 149 at 445-46 per Desai J.

60. Chief Justice Warren, "The Law and Future," 52 Fortune 106 (November 1955). *See also* J. Frank, *Courts on Trial* 146 *et. seq.* (1950).

61. *See The Standard*, Nairobi, June 10, 1988, at 2.

In *E.M.S. Namboodripad V T.N. Nambiar*,[62] the chief minister of an Indian state was punished by the Supreme Court for contempt, for making a general statement at a press conference to the effect that the judiciary was "an instrument of oppression" and that the judges "were guided by class hatred, class interests and class prejudices, instinctively favouring the rich against the poor."

Recently, a Nigerian lawyer and human rights activist was sentenced to one year's imprisonment for contempt of court for allegedly describing the Acting Chief Justice of Lagos State as a "government judge." Surprisingly, he was given this sentence contrary to the provisions of the Criminal Code for the Lagos State, which prescribe a maximum of three months imprisonment for contempt of court. The charge of contempt arose from proceedings relating to a case in which he brought a legal action against two security chiefs on behalf of a murdered journalist.[63]

In a democratic society, if top executives do not enjoy immunity from criticism, why should a petty magistrate or for that matter any member of the judiciary enjoy absolute immunity from criticism? Cases are not infrequent in many Third World countries where judges have been instrumental in suppression of the fundamental rights of individuals on behalf of the executive. Is it not necessary that such judicial behaviour be subject to respectful and constructive criticism? Lord Atkin has very rightly said that "Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful, even though outspoken, comments of ordinary men."[64] The law of contempt of court as it stands does not admit to clear-cut rules. It is "violative of natural justice in that prosecutor and judge are same."[65] Confidence in the judiciary is best built by performance, not by contempt action.

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62. (1971) 1 S.C.R. 607.
63. *See* Lawyer to Lawyer N.E.T.W.O.R.K. (New York) (January 1990).
64. *Ambard v. Attorney General of Trinidad and Tobago* [1936] A.C. 322 at 335.
65. Justice V.R. Krishna Iyer, *Law and The People* 45 (1972).

IV. The Role of the Judges

Bacon said: "Judges ought to remember that their office is *jus dicere* and not *jus dare*, to interpret the law, and not to make or give law."[66] This declaratory theory of law has long been accepted as a classic description of the judicial function.[67] This theory supposes that judges do not have any discretion; they merely declare what the law is. As far as Mr. Justice Georges is concerned: "This theory presupposes that the legal result of any particular case exists and is not inherent in the case itself, and the judge's duty is merely to seek it, find it and expound it. This myth may be useful but it is not entirely true."[68] In areas where the law is uncertain or ambiguous or where the courts are given discretion or choices of alternatives the judges, "in expounding the law, in effect make law."[69]

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66. Francis Bacon, *Essays, Civil and Moral and the New Atlantis* 13 (C.W. Eliot ed. 1937). *See also* William Blackstone, *Commentaries on the Laws of England* Book III Chap. 22 at 327 (Reprint 1966) (a judge "is only to *declare* and pronounce, not to *make* or *new-model*, the law").

67. For a discussion of the declaratory theory, *see* R. Cross, *Precedent in English Law* 23 *et. seq.* (3rd ed. 1977); *Salmond on Jurisprudence* (11th ed. 1957); D.M. Gordon, "Administrative Tribunals and the Courts" (1933) 49 L.Q. Rev. 94 and 419.

68. Georges, *supra* note 19, at 73.

69. *Id.* at 76. The myth that judges do not make law has long been exploded by the American Realist School of Jurisprudence. *See* K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1965). There is abundant literature on judicial law-making. *See, e.g.,* Allen, *supra* note 28, at 302-11; P. Devlin, *Samples of Law-Making* (1962); W. Diplock, *The Courts as Legislators* (1965); L. Jaffe, *English and American Judges as Law-Makers* (1969); G. Calabresi, *A Common Law for the Age of Statutes* (1982); Ghai & McAuslan, *supra* note 11, at 369, 378; J.A. Hiller, "The Law-Creative Role of Appellate Courts in the Third World" in *Essays on Third World Perspectives in Jurisprudence, supra* note 39, at 167. E. Veitch, "Some Examples of Judicial Law Making in African Legal Systems (1971) 34 Modern L. Rev. 42; Robert Stevens, "The Role of a Final Appeal Court in a Democracy: The House of Lords Today," 28 Modern L. Rev. 509 (1965); T.A. Aguda, "The Role of the Judge with Special Reference to Civil Liberties," 10 East African L.J. 147 (1974); E. Eorsi, "Some Problems of Making the Law," 3 East Africa L.J. 272 (1967). *See also* Justice H.R. Khanna, "Role of Judges," 1 S.C.C. 17 (1979); Justice Michael Kirby, "The Role of the Judge in Advancing Human Rights by Reference to International Human Rights Norms" in *Developing Human Rights Jurisprudence* 67 (1988); Aguda, *supra* note 39, at 137; Lord Devlin, "Judges and Lawmakers," 39 Modern Law Rev. 1 (1976).

In areas where law is certain and unambiguous the judges have no choice but to give meaning to words of the statute without bringing in their own value judgments. On the role of judges, Lord Diplock has this to say:

> Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguity as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral . . . . It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges under the guise of interpretation provide their own preferred amendments to statutes . . . .[70]

An obvious reason for such a restrained approach is that it is not the business of the courts to pronounce policy, for the Constitution has not authorised the judges to sit in judgment on the wisdom of what the legislature and the executive branch do.[71]

The occasions are not rare when judges read their own values in areas of no choice or interpret provisions of the Constitution in such a way as to defeat the ends of the constitution. A recent decision of the High Court of Kenya is an illustration of such an approach. In *Joseph M. Mbacha v. Attorney General*,[72] the

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70. Speech on the independence of the judiciary delivered at the Commonwealth Magistrates Association, Conference at Port of Spain as quoted by Justice Dumbutshena, *supra* note 13, at 239-40. *See also* Chief Justice Bora Laskin, *supra* note 14, at 678 ("If a repressive or discriminatory legislation which is validly enacted leaves little or no room for protection of the individual, judges may express their dismay but will nonetheless be bound to give effect to it"); Sir Charles Newbold, "The Role of a Judge as a Policy Maker," 2 East African L. Rev. 127, 131 (1969) ("It is the function of the courts to be conservative, so as to ensure that the rights of the individuals are determined by the rule of law"); A. Carey Miller, "South African Judges as Natural Lawyers," 90 South African L.J. 89 (1973) ("It is the duty of a judge to enforce the law even if its results are harsh").

71. *See* Justice Frankfurter's Observations in *Trop v. Dulles*, 356 U.S. 86 (1958).

72. 17 Nairobi Law Monthly 36 (July/August 1989). *But see Oliver Casey Jaundoo v. A.G. of Guyana*, 3 W.L.R. 13 [1971], where on substantially similar provisions in Article 19 of the Constitution of Guyana, the Judicial Committee of the Privy Council held that, "The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by any failure of Parliament or the rule-making authority to make specific provision as to how that

applicant approached the Court for a declaration under Section 84 of the Constitution. Section 84 provides that if a person alleges that any of his fundamental rights guaranteed under Sections 70 and 83 of the Constitution of Kenya has been or is being or is likely to be contravened, that person may apply to the High Court for redress. Sub-section (2) of Section 84 provides that in exercise of the above jurisdiction the High Court "shall have original jurisdiction" to hear and determine applications made by any person alleging breach of any fundamental rights and the High Court "may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement" of any of the provisions regarding fundamental rights. By Section 84(5) Parliament is empowered to confer upon the High Court such powers, in addition to those conferred by sub-section (2), as may appear necessary and desirable for enabling the court more effectively to exercise its jurisdiction. By virtue of Section 84(6) the Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to its jurisdiction under Section 84. So far Kenyan Parliament has not made any law conferring upon the High Court such additional powers. Likewise the Chief Justice has not made any rules under Section 84(6).

In the case under consideration, the duty judge, N. Dugdale, who was responsible for allocation of the case to a suitable court, held that Section 84 of the Constitution was not operative. Dugdale, J. purported to found his authority for this holding in a judgment delivered by Chief Justice Miller, in *Gibson Kamau Kuria v. Attorney General*,[73] to the effect that "since the jurisdiction conferred by Section 84 is subject to sub-section (6) of the said Section 84 and there being as yet no operative rules regulating the practice and procedure of the High Court in such an instant matter, there is a void in the search for certainty which is an all-important aspect of jurisdiction whatever, as to the entire Section 84."

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access is to be gained."

73. 15 Nairobi Law Monthly 33, at 34 (March/April 1989).

The decision in *Joseph M. Mbacha* has the effect of abolishing the right of access to the High Court under Section 84 for the enforcement of the fundamental rights, at least until the Chief Justice makes rules under Section 84(6).[74] The decision is open to criticism on several grounds. Constraint of space does not permit us to discuss them in detail. However, it must be said that the issue before the judge was not that of operativeness of Section 84 but just of allocation of the case to a suitable court. The decision is given without any argument on the point and without any consideration of the existing precedent that recognises the operativeness of Section 84.[75] Moreover, in *Gibson Kamau Kuria v. Attorney General*, the Chief Justice simply refused to set up a constitutional court, but he nevertheless did not dismiss the application. Even if it is conceded that in *Gibson Kamau Kuria* it was held by Chief Justice Miller that right to access to the High Court is extinguished by failure to make rules, the Court in *Joseph M. Mbacha* was under no obligation to follow it, because it was given *per incuriam* and without any consideration of authorities on the point and was clearly contrary to the intention of the Constitution. It may be mentioned that Chief Justice Miller was a party to a decision of the Court of Appeal in *Anarita Njeru v. Attorney General No. 2*,[76] which recognised that Section 84 of the Constitution was operative.

It baffles one's comprehension how failure on the part of the Chief Justice to make rules of practice and procedure can render a constitutional provision inoperative, particularly when there is a clear intention of the Constitution to provide unhindered access to the court for the enforcement of fundamental rights. Moreover,

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74. For comments on this case, *see* G. Imanyara, "Constitutional Protection and the Right of Access to the High Court: Mr. Justice Dugdale's Giant Step Backward," 17 Nairobi Law Monthly 4 (July/August 1989).

75. *See Re Kisima Farm Ltd.* [1978] Kenya L.R. 36; *Anarita Njeru v. Republic* (No. 1) [1979] Kenya L.R. 154; *Anarita Njeru v. Republic* (No. 2) [1979] Kenya L.R. 162. *Felix Njagi Marete v. Attorney General*, Nairobi Law Monthly 38 (September 1987); *S.M. Githunguri v. Republic*, Nairobi Law Monthly 19 (October 1987). *Cf. Nkumbula v. Attorney General* reported in Muno Ndulo & Kaye Turner, *Civil Liberties Cases in Zambia* 125 (1984).

76. [1979] Kenya L.R. 162.

why should the complacency on the part of the judiciary to make rules deny citizens their right of access to the court for the enforcement of fundamental rights? This decision further strengthens our argument made earlier that judges are not free to decide matters before them entirely as they please but only according to accepted legal values.[77]

However, in wide areas of constitutional and administrative law, judges do have choices of alternatives. The Constitution has entrusted them with the delicate task of setting limits to the executive and legislative powers of government and to the rights of individuals. It is in this area of law that they are required to set the scale of priorities in balancing various interests, as for example, national security, public order, public interest, public health, morality, social welfare, principles of public policy, personal freedom, property rights, etc. These interests may often conflict but must be considered in a given situation. If instead of striking a proper balance the judges lean in favour of one or more of these interests, the independence of the judiciary is suspect.[78]

This then prompts us to make an attempt to review case law to determine how far the judges have disregarded their strongly held views in resolving specific contradictions and in striking a proper balance of various interests involved.

V. Judicial Independence in Practice

A. The Judiciary in Politically Sensitive Areas

The judiciary acts as an arbiter not only in a dispute between the executive and the individual but also between the executive and the legislature, the executive and the judiciary,[79] and, in a

77. *See* texts accompanying *supra* notes 26 to 32.

78. J. Dugard has suggested that in choosing between competing alternative rules and conflicting factual situations a judge should be guided by accepted legal values. *See* "Judges, Academic and Unjust Laws," 89 South African L.J. 271 at 277 (1972). *See also* texts accompanying *supra* notes 26 to 32.

79. *See S.P. Gupta v. President of India*, A.I.R. 1982 S.C. 149.

federal system, between the federal executive and the state executive and between one state and another state. Sometimes these disputes may be of a political nature, but judges cannot avoid making decisions on them. The bases on which the courts resolve such disputes may be of interest.

In a Malaysian case, *Stephen Kalong Ningkan v. Government of Malaysia*,[80] the appellant was the Chief Minister of a State in Malaysia. The Governor of the State purported to dismiss him on the strength of a letter signed by fifty percent of the members of the State Legislature, to the effect that the members no longer had confidence in the Chief Minister, whereupon the Governor asked him to resign, and upon his refusing to do so, dismissed him. The appellant thereupon commenced an action in the High Court which held that the Governor had no power to dismiss the appellant.[81] Accordingly, the appellant was reinstated. This produced a vigorous reaction on the part of the federal government, which proclaimed a state of emergency in the State. The Federal and State Constitutions were amended authorising the Governor in his absolute discretion to dismiss the Chief Minister. Subsequently, a no confidence motion was passed by the state legislature and the appellant was dismissed. The appellant challenged his dismissal on the ground that the proclamation of emergency was made not to deal with the grave emergency but for the purpose of removing the appellant. The Judicial Committee of the Privy Council held that the appellant had failed to prove that the emergency was for an improper purpose. The issue of the justiciability of a proclamation of emergency was, however, left open but the Federal Court had held that the circumstances which bring about a state of emergency are non-justiciable.[82]

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80. [1970] A.C. 379 (P.C.). For comments, *see* Yash Ghai, "The Politics of the Constitution: Another Look at the Ningkan Litigation," in *Comparative Constitutional Law* 106 (M.P. Singh ed. 1990).

81. [1966] 2 Malayan L.J. 187.

82. [1968] 2 Malayan L.J. 119. *See also Williams v. Maje Kodumi* [1962] All Nigeria L.R. 324 (Nigeria); *The State v. Osman* (1989) 15 C.L.B. 58 (Sierra Leone). *See also infra* notes 139-40 and accompanying text.

On almost identical facts the Supreme Court of Nigeria had held that the governor's source of information as to the prime minister's support or lack of it must emanate from the house itself.[83] But the Judicial Committee of the Privy Council reversed the decision. While recognising the dangers of arbitrariness and abuse inherent in allowing the head of the state so much leeway, it held that the governor was free to act on evidence other than the testimony of recorded votes.[84]

In a one-party state, the party *de facto* acts as a fourth organ of the state. Sometimes a dispute may arise between the party and its members, which may affect the democratic process in the country. In such situations the courts face a difficult task of resolving disputes which essentially are of political nature.

In a Kenyan case, *James Keffa Wagara v. John Anguka*,[85] the plaintiffs were members of KANU (Kenya African National Union), the only party then allowed to function in Kenya by virtue of Section 2A of the Constitution (this Section is now deleted by the *Constitutional Amendment Act* 12 of 1991), which provided for a one-party state. The plaintiffs took part in what was popularly known as the "KANU nomination exercise" to nominate the KANU candidates to stand for a parliamentary seat at the general elections. Their grievance was that the returning officer for the nomination exercise had committed irregularities in nominating another candidate as the sole and unopposed candidate for the parliamentary seat and that they were not allowed to witness the counting of votes contrary to the KANU Nomination Rules. The High Court refused to interfere on the ground that the Court had no jurisdiction to hear such a case, because to do so would be tantamount to interfering with the internal affairs of KANU. The Court opined that in such cases it can intervene only if the

83. *Adegbenro v. Akintola* F.S.C./1982.
84. [1963] A.C. 614.
85. Nairobi Law Monthly 12 (March 1988).

property rights of the plaintiffs were affected by the irregularities or the office bearers had acted in bad faith.[86]

Thus, matters affecting elections to Parliament were considered as domestic affairs of the party, in spite of the fact that, by virtue of Section 34(d) of the Constitution of Kenya, only the approved and nominated members of the party are entitled to contest the elections and can become the members of Parliament. This situation was not unique to Kenya. Justice A. Hayfron-Benjamin observed regarding many African countries:

> A political party . . . is juridically considered a voluntary and private law association . . . and not an institution of public law, notwithstanding that it has been declared the sole party in the state and accorded supremacy over other public institutions. Thus elections to office within these sole parties, the dismissal from membership and the functioning of these parties are not subjected to any legal or judicial controls or supervision.[87]

At times, there may be marked reluctance on the part of the judiciary to set down for hearing cases involving sensitive political issues. In a Pakistan case a petition was filed on December 29, 1984 in the Lahore High Court challenging the authority of the provincial government in closing down and sealing a newspaper, *Al Fazal*, belonging to *Ahmiddyan*, a sect in Islam. It must be mentioned that the Admiddyan sect was declared non-Muslim by Mr. Z.A. Bhutto's government around 1977 and religious persecution of Ahmiddyans reached its peak during President Zia-Ul-Haq's time. The closing down of *Al Fazal* was a sequel to such persecution. In the instant case, from the date of filing till 1986

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86. Similar decision is to be found in *Mathew Ondeyo Nyaribari v. David Onyana*, 10 NAIROBI LAW MONTHLY 34 (October 1988). *See also Charles Nderitu Mukora v. Attorney General*, NAIROBI LAW MONTHLY 13 (March 1988). But the High Court of Malaysia interfered in the internal affairs of the party when it declared the ruling party illegal because of certain irregularities in the party elections: *see* Robertson, *supra* note 52.

87. Justice Hayfron-Benjamin, "The Courts and the Protection and Enforcement of Human Rights in Africa," CIJL Bulletin No. 9, 33 at 38 (April 1982) (shortened version of the address presented at the Fourth Biennial Conference of the African Bar Association, in Nairobi, in July 1981).

more than twenty-one adjournments were granted by the Court, principally at the request of the Attorney General. Till December, 1986, the matter had not been given a hearing date.[88]

It would appear that in politically charged cases the courts have generally shown excessive self-restraint adopting interpretations working to the advantage of the executive. But sometimes the courts may even go further. In Nigeria in the 1960s, the courts seldom ruled against the government and never in election cases.[89] With one exception, all the constitutional cases went in favour of the government. Most of these decisions concerned individual liberties.[90]

B. Personal Rights

Perhaps there is no other area so sensitive and delicate as state security and public order, where the courts have to maintain a delicate balance between individuals' rights and the exercise of executive powers. Traditionally, judges are thought of as the defenders of the rights of individuals. But in most of the Third World countries, this tradition is only occasionally upheld.[91]

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88. *See* "Pakistan — The Independence of the Judiciary and the Bar After Martial Law" (a Report of ICJ Mission), CIJL Bulletin No. 19 and 20, 66 at 79 (1987). *See also Mujeeb-ur-Rehmam v. Pakistan*, Pakistan Legal Decisions (P.L.D.) 1984 F.S.C. 136 (where an ordinance prohibiting *Ahmiddyan* from calling themselves Muslims was unsuccessfully challenged). For a discussion on religious freedom and religious intolerance, *see generally* D.J. Sullivan, "Advancing the Freedom of Religion and Belief Through the U.N. Declaration on the Elimination of Religious Intolerance and Discrimination" (1988) 82 American J. of Int'l. L. 487. *See also infra* notes 122-124 and accompanying text.

89. *See* D.L.O. Eweluka, "The Constitutional Aspects of the Military Takeover in Nigeria" (1967) 2 Nigeria L.J. 1-2; G. Ezejiofor, "Judicial Interpretation of Constitution: The Nigerian Experience" (1967) 2 Nigeria L.J. 70 at 82.

90. Nwabueze, *supra* note 15, at 242.

91. India is a notable exception where the courts are overzealous in protecting fundamental rights, which led a commentator to remark that for a nascent Republic dedicated to a social welfare objective, an overzealous indulgence in judicial activism would have been not merely harmful but positively self-defeating. *See* S.N. Ray, *Judicial Review and Fundamental Rights* 220 (1974). For Indian position, *see generally* Seervai, *supra* note 37; D.D. Basu, *Commentaries on the Constitution of India* (6th ed. 1973-78); V.N. Shukla, *The Constitution of India* (D.K. Singh ed. 7th ed. 1986).

In a Nigerian case, *D.P.P. v. Dr. Chike Obi*,[92] the defendant, a member of the House of Representatives and leader of a political party, was charged with the offence of sedition under the Criminal Code. It was alleged that he had distributed a seditious pamphlet entitled "The People: Facts that You Must Know," in which appeared the words: "Down with the Enemies of the People, the Exploiters of the Weak and the Oppressors of the Poor . . . ." In substance the pamphlet simply alleged that Ministers were not interested in the well-being of the masses but only interested in benefiting themselves. The defendant pleaded freedom of speech and expression and argued that

> a law which punishes a person for making a statement which brings the Government into discredit or ridicule or creates disaffection against the Government irrespective of whether the statement is true or false and irrespective of any repercussions on public order or security, is not a law which is reasonably justifiable in a democratic society.

It was held that the provisions relating to sedition under the Criminal Code conformed with the right to freedom of expression necessary in a democratic society. The Supreme Court made the sweeping statement: "It must be justifiable in a democratic society to take reasonable precautions to preserve public order, and this may involve the prohibition of acts which, if unchecked and unrestrained, might lead to disorder . . . ."[93]

Accordingly, the defendant was convicted. The Court failed to appreciate that the alleged statement did not endanger public security nor did it in fact have any repercussion on public order. The statement intended simply to induce the people not to vote for the party in power at the next elections. The Court also failed

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92. (1961) 1 All Nigeria L.R. 186. Similar decisions are to be found in the following Kenyan case: *Maina wa Kinyati v. Republic*, Court of Appeal Crim. App. No. 60 of 1983 (unreported), discussed in K. Kibwana, "Human Rights in Kenya" in *Bottlenecks to National Identity* 53 (J.J. Ongong'a and K.R. Gray eds. 1989); *Republic v. David Onyango Oloo, Daily Nation*, Nairobi, High Court Crim. Case No. 25 of 1981 (unreported).

93. *Id.* at 196.

to fix a point at which the restrictions on personal freedoms become acceptable, judged by universal standards, and at which the public interest overrides the interests of the individual.[94]

Similar is the approach of the court in preventive detention cases. Almost all Third World countries have legislation dealing with preventive detention, which allows detention of an individual without trial. Ironically, these laws were established originally to maintain colonial rule and have been kept by independent governments to secure their control. In many countries the legislation does contain provisions giving a right to the detained person to be informed within a certain period of time of the grounds on which he is being held, and to be granted an opportunity of making representation to the head of the state or the review board constituted for the purpose. The review board is authorised to review detainees' cases periodically. There is a general complaint that in some countries these provisions are seldom complied with.

In a Ugandan case, *Uganda v. Commissioner of Prisons Exparte Matovu*,[95] it was found that the detention of the applicant on an order signed by the Minister was in accordance with the provisions of the Constitution except for the statement of the grounds of his detention, which was inadequate; but even then it was held that the failure to furnish the applicant with an adequate statement of the grounds of his detention could be cured by a direction of the High Court under the provisions of the Constitution that a proper statement be supplied. Udo Udoma C.J. observed: "Insufficiency of the statement of grounds of detention served on the applicant is more a matter of procedure. It is not a condition precedent but

94. *See also* D.C. Holland, "Human Rights in Nigeria" (1962) Current Legal Problems 145; Nwabueze, *supra* note 15, at 302-03.

95. [1966] E.A. 514. For critical analysis of this case, *see* R.B. Martin, "In the matter of an Application" by Michael Matovu, 1 Eastern African L. Rev. 61 (1968); Y.P. Ghai, "Matovu's Case: Another Comment," *id.* at 68.

a condition subsequent . . . it is not fatal to the order of detention made by the Minister."[96]

In preventive detention cases the courts in most Third World countries have taken the view that power to detain persons deemed prejudicial to national security rested solely with the executive, acting on its subjective judgment as to whether detention was necessary. If the detention order is presented and found to be prima facie in order, then the courts cannot go behind the detention order to inquire why the person was actually detained. They would not go into the merits of the grounds for issuing the detention order.[97]

The judicial approach toward the right to freedom of movement is also not very different. In *Mwau v. Attorney General*,[98] a Kenyan High Court held that the issue and withdrawal of passports is the prerogative of the President and, being purely in the exercise of the presidential prerogative, was not subject to judicial review. On the scope of Section 81 of the Constitution in Kenya, guaranteeing freedom of movement, the Court said that the Section does not impose any obligation on any

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96. *Id.* at 546. The same line of judicial approach is to be found in *Karam Singh v. Mentri Hal Ehwal Dalam Negeri* [1969] 2 Malayan L.J. 129 (Malaysia); *Re Ong Yew Teck* [1960] Malayan L.J. 67 (Malaysia); *Theresa Lim Chin v. Inspector General of Police* [1988] 1 Malayan L.J. 293 (Malaysia), *Ooko v. R.* High Court Civ. Case. No. 1159 of 1966 (Kenya), *see* text accompanying note 116 *infra* for a discussion on this case; *R. v. Commissioner of Prisons Ex parte Kamonji Kang'aru Wachira and others*, 21 Nairobi Law Monthly 40 (February 1990), (Kenya) *Raila Odinga v. Attorney General*, Nairobi Law Monthly 31-32 (October 1988) (Kenya); *Mutale v. A.G.* [1976] Zambia L.R. 139. *But see Attorney General v. Chipango* [1971] Zambia L.R. 1 (Zambia) (detailed reasons is an essential prerequisite; otherwise the detention is unconstitutional and unlawful); *Ram Krishna v. Delhi* A.I.R. 1953 Delhi 318 (India); *Khudiram Das v. West Bengal* A.I.R. 1975 S.C. 550 (India); *Minister of Home Affairs v. Austin* (1987) L.R.C. (Const.) 567 S C noted in (1988) 14 C.L.B. 47 (Zimbabwe).

97. *See, e.g., Ooko v. R.*, High Court Civ. Cas. No. 1159 of 1966 (Kenya) (the truth of the grounds of detention and the question of necessity or otherwise of detention are not matters for the court); *Re Ibrahim* [1970] E.A. 162 at 168 (Uganda) (courts cannot go behind valid detention order); *Raila Odinga v. Att. Gen.* 10 Nairobi Law Monthly, 31 at 32 (October 1988) (Kenya); *Padilla v. Enrile*, noted in CIJL Bulletin No. 12 at 8 (1983) (Philippines).

98. Noted in (1984) 10 C.L.B. 1108.

authority to take active steps to secure this right to leave Kenya by issuing a passport.[99]

Decided cases point to the fact that in conflict between the interests of the state and the personal rights of an individual the latter must give way to the former. In politically sensitive cases as well as in cases involving personal rights, the courts would be loathe to invalidate executive actions of the top echelons of the executive hierarchy. In fact, these two types of cases overlap to a certain extent.

C. Property Rights

The courts, in almost all jurisdictions, appear to be more firm in protecting property rights. They have shown much activism in this area. In India, major constitutional development is owed to the courts' zeal for the safeguard of private property.[100] Since Independence in 1947, the Indian legislatures have tried to bring certain socio-economic reforms, particularly land reforms. But the courts invalidated the major land reform legislations on the ground that they infringe upon the fundamental right to property guaranteed by the Constitution.[101] This led to a number of constitutional amendments, which gave rise to a sort of tussle between the legislature and the executive on one hand and the judiciary on the other.[102] This again led to the decision of the Supreme Court in *Golak Nath v. Punjab* (hereafter *Golak Nath*),[103] one of the most controversial cases in Indian

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99. *But see Maneka Gandhi v. Union* A.I.R. 1978 S.C. 597 (right to go abroad was comprehended within "personal liberty" guaranteed by the Indian Constitution). For an analysis of this case, *see* Justice Bhagwati, "Human Rights as Evolved by the Jurisprudence of the Supreme Court of India," 13 C.L.B. 236 at 238-41 (1987).

100. It must be noted that by virtue of the Constitutional (Forty-fourth Amendment) Act 1978, property right is no more a fundamental right in India. It is only a legal right under Article 300A of the Constitution.

101. *See, e.g., Sankari Prasad v. Union*, A.I.R. 1957 S.C. 450; *Sajjan Singh v. Rajasthan*, A.I.R. 1965 S.C. 845.

102. For details, *see* Seervai, *supra* note 37 Chaps. XV and XX.

103. A.I.R. 1967 S.C. 1643.

constitutional history. In this case validity of certain land reform legislation and various constitutional amendments were challenged. The Court held that Parliament has no power to amend the Constitution in such a way so as to take away or abridge any of the fundamental rights guaranteed under the Constitution. This case had overruled the prior decisions of the Supreme Court, which categorically held that there is no limitation on Parliament's power of amendments except the procedure for amendments provided by the Constitution itself.[104] *Golak Nath* had virtually amended the Constitution and apparently judicial power had encroached upon the constituent power of the legislature.

In *R.C. Cooper v. Union*,[105] the question of nationalisation of fourteen Indian scheduled banks with deposits exceeding Rs. 500 million arose. Here the petitioner, a shareholder of a nationalised bank, challenged the nationalisation legislation on the ground, *inter alia*, that it did not lay down a principle for determining compensation. The majority in the Supreme Court held that the nationalisation legislation violated the guarantee of compensation in that it provided for giving certain amounts determined according to principles which were not relevant in the determination of compensation and the amount so declared could not be regarded as compensation. The majority was of the view that "the object of the principle for valuation must be to pay to the owner for what he has lost, including the benefit of advantages present as well as future."

It may be mentioned that the nationalised banks were not parties in this petition and the case was decided in their absence. H.M. Seervai has rightly pointed out that "the majority judgment was rendered in violation of the principles of natural justice . . . . [I]t was necessary to hear the Banks before a final decision affecting their rights was arrived at."[106] The Supreme Court has

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104. *See Sankari Prasad v. Union* A.I.R. 1957 S.C. 450; *Sajjan Singh v. Rajasthan* A.I.R. 1965 S.C. 845.

105. A.I.R. 1970 S.C. 564. *See also Madhavrao Scindia v. Union* A.I.R. 1971 S.C. 530 (privy purses of the former rulers were property and the rulers could not be deprived of them without compensation; the right to the privy purses and recognition were justiciable rights).

106. Seervai, *supra* note 37, at 670.

repeatedly held that any judgment affecting rights of the parties rendered in violation of the principles of natural justice is void.[107]

As a result of these decisions and other events the Supreme Court's prestige was much eroded. Chief Justice Subba Rao, who delivered judgment in *Golak Nath*, resigned immediately after the decision and unsuccessfully ran for the presidential election in 1967, which led opponents to level charges that *Golak Nath* was a politically motivated decision supporting the *status quo* and blocking any legislation seeking socio-economic changes. Again, in 1971 Indian general elections, for the first time the question of power of Parliament to amend every part of the Constitution became the main electoral issue in the manifesto of the ruling party, thus raising political debate. The ruling party led by late Prime Minister Indira Gandhi obtained overwhelming majorities in the elections to Parliament and subsequent elections to state assemblies. It is in this background that the question of validity of land reform legislation and constitutional amendment again arose in *Kesavananda Bharati v. Union of India*.[108] In this case the Supreme Court, in an attempt to improve its image, sought a compromise by propounding the 'doctrine' of 'the basic structure of the Constitution'. Here the Full Bench of the Supreme Court overruled *Golak Nath* and restored to Parliament the power to amend the fundamental rights part of the Constitution, while denying it the power to amend the 'basic features of the Constitution'. The Court held that amending power did not extend to damaging or destroying the basic structure or framework of the Constitution. It must be noted that nowhere is there any mention of basic features in the Constitution and that the "ratio of the majority decision (in *Kesavananda*) is not that some named features of the Constitution are a part of its basic structure."[109]

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107. *See, e.g., Orissa v. Binapani Dei* A.I.R. 1967 S.C. 1269 at 1271.

108. A.I.R. 1973 S.C. 1461.

109. There was a consensus among the judges in *Kesavananda* that democracy is a basic structure of the Constitution, *see id.* at 2372. There was a difference of judicial opinion in *Indira Nehru Gandhi v. Raj Narain* A.I.R. 1975 S.C. 2299 with regard to the question whether equality, the rule of law, judicial review and separation of powers were part of the basic structure of the Indian Constitution. The right to property guaranteed by the Constitution is

Here again the court had transgressed its powers. Justice V.R. Krishna Iyer's comment on the *Golak Nath* case is also valid here:

> [W]hile the Supreme Court is supreme . . . in its declaration of the law of the day, it cannot pontificate on what Parliament shall not do in the days ahead . . . . [I]f judges lay down the dos and the don'ts for future action, parliamentarians may suspect usurpation of power exactly as judges react if parliament passes a resolution as to how the court should construe a piece of legislation or if the executive directs the way a case has to be decided.[110]

Moreover, the Constitution is a dynamic instrument. It is the product of its own period and environment and it cannot remain static. Constitutional law has not only to adapt itself to changed social circumstances, but to changes and development in human knowledge also. Attempts to make it static would make it extremely difficult for changing social needs to be met promptly and systematically.

Also, in India, of the three organs of government, the judiciary is the most independent. The courts in their zeal for the protection of individuals' rights have on many occasions invalidated statutes seeking socio-economic reforms. One would not be wrong in saying that the courts on such occasions have acted as a "third chamber" of Parliament or as a "super legislature."[111] The power of Parliament to amend the Constitution is a positive check and control over the misuse of its

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not a basic feature of the Constitution, *see Kesavananda* A.I.R. 1973 S.C. 461 at 1904 per Khanna J. The freedom of the press, however, is a part of the basic structure of the Constitution, *see infra* notes 126 and 127 and accompanying texts.

110. Justice Krishna Iyer, *supra* note 65, at 4.

111. Pandit Jawahar Lal Nehru, one of the chief architects of the Indian Constitution, had warned, "Within limits no judge and no supreme court can make itself a third chamber." *Indian Constituent Assembly Debates* Vol. 9 at 1195-96; Justice Brandeis on the attitude of the U.S. Supreme Court had said that the Court had converted judicial review into the power of "a super-legislature," quoted in E.S. Corwin, *The Constitution and What it Means Today* 223 (14th ed. 1978).

powers by the judiciary.[112] If that check is in any way removed or weakened, it would be almost illusory to talk about control of misuse of power by the judiciary. This situation is a potential threat to democracy itself.[113]

Zeal for protection of property rights is to be found in other jurisdictions also. In a Kenyan case, *Re Hardial Singh*,[114] the applicants were tenants in common of an agricultural farm together with the public trustee administering the estate of a deceased person. The minister issued an order for the sale of the farm under the provisions of the Agricultural Act relating to mismanaged farms. The order not only wrongly named the registered owners of the land, but it stated that they had not been able to satisfy the minister that they were able to develop the land whereas the Act empowered the minister to issue such an order only where a farm has been mismanaged. No opportunity was given to the owner to make representation regarding the allegation of failure to develop the farm. The Nairobi High Court quashed the order on the ground that it named the owner of the farm incorrectly. It also held that the order was of no effect because the minister had not disclosed any of the facts on which he based his opinion as to mismanagement.

In contrast, as we have seen, the courts have taken the opposite view in preventive detention cases. Insufficiency of grounds of detention has not been considered fatal to the order of

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112. Blackstone had realised long ago that if the definition of legal rights was left to the whim of the judges, the judges would be no better than despots; as noted in Richard A. Posner, *The Economics of Justice* 24 (1983). Commenting on Blackstone's views, Posner had said: "It would seem that English judges *were* despots, albeit petty despots since they were subject to legislative check if they abused their despotic power too much." *Id.* From these observations it follows that legislative control in the form of the power of amendment is necessary to check abuse of power by judges.

113. Claire Palley has pointed out that: "The effect of such a decision (*Golak Nath*) is that only by revolutionary means can the relevant provisions of the constitution be changed." *See supra* note 47, at 6.

114. [1979] Kenya L.R. 18. For other decisions on property rights, *see Re Kisima Farm Ltd.* (1978) Kenya L.R. 36 (Kenya) *Re Marania Ltd.* Civ. App. 62 of 1978 (unreported) (Kenya); *Shah v. Attorney General No. 2* [1970] E.A. 523 (Uganda).

detention.[115] For the sake of comparison, a preventive detention case, *Ooko v. R.*,[116] would not be out of place here. In this case, Patrick Paddy Ooko was preventively detained under the public security regulations. He impugned the detention order on the ground, *inter alia*, that the order had referred to him by a name, Patrick Peter Ooko, that was not his name. The contention was rejected simply by saying that: "There is no doubt that he was in fact the person that the detention order was intended to apply to."

It may be seen that the courts in most Third World countries are more ready to uphold constitutional guarantee of property rights than they are to protect the personal freedoms that are equally guaranteed in the Constitution. It would be too much to blame courts for upholding constitutional guarantees of property rights, but it is the legalistic zeal with which they approach matters of property as compared to personal rights that gives an impression that the courts are 'property-conscious' and *status quo* oriented, and that judges fashion law out of their personal predilections.

D. Invasion of Freedoms by Private Persons

At times a threat to fundamental rights may come from private individuals or groups of individuals. The constitutional guarantee of rights may be of no avail if private invasion of such rights is allowed. Blackstone in his *Commentaries* had assumed that the fundamental rights were rights not only against the government

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115. *See supra* notes 96 to 98 and accompanying texts. Surprisingly, Justice Simpson, who invalidated executive orders for insufficiency of personal particulars in *Re Hardial Singh, supra* note 114, took the view in *R. v. Commission of Prison ex parte Kamonji Kang'aru Wachira*, 21 Nairobi Law Monthly 40 (February 1990), that insufficiency of grounds for detention does not render the detention invalid.

116. High Court Civ. Case No. 1159 of 1976 (unreported) (Kenya); discussed in G. Kamau Kuria and J.B. Ojwang, "Judges and the Rule of Law in the Framework of Politics: The Kenyan Case," Public Law 254 at 272 (1979).

but also against private coercion.[117] Those rights in his view are to be protected against private as well as public invasion.[118]

The judiciary, as a custodian of the rights of individuals, has a duty to protect against private encroachment upon these rights. The judiciary can give protection in at least three ways. First, by directly ruling against private invasion of fundamental rights.[119] Second, by enjoining the state to protect citizen's rights against private coercion because the Constitution imposes a positive duty upon the state to ensure that citizens are protected and not impeded in exercise of their rights.[120] Third, by upholding the

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117. *See supra* note 66 Book I Chap. I; noted in Richard A. Posner, *The Economics of Justice* 18 (1983). John Stuart Mill has expressed similar views: "The fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. The conduct consists first in not injuring the interests of one another; or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights." *Essays on Politics and Society by John Stuart Mill* 276 (T.M. Robson ed. 1977).

118. The enactment and enforcement of a system of criminal law is, in fact, based on this concept.

119. In most jurisdictions superior courts have jurisdiction in the matter of fundamental rights. *See, e.g.,* Articles 32 and 226 of the Indian Constitution; Section 84 of the Constitution of Kenya; Section 30(3) of the Law of the Fifth Amendment of the State Constitution of 1984 (Tanzania). Article 29 of Constitution of Zambia which states: "... if any person alleges that any of the provisions of Articles (guaranteeing fundamental rights) ... has been, is being or is likely to be contravened in relation to him, then ... that person may apply to the High Court for redress." Explaining the scope of this provision, Bason J.P. in *Nkumbula v. Attorney General* said that, "I entertain no doubt whatever that this section applies only to executive or administrative action (or exceptionally, *action by a private individual* (emphasis supplied) Ndulo & Turner, *supra* note 75 at 131. From the above observations of Bason J.P. it is clear that a person has the right to approach the court in cases where his rights have been infringed or likely to be infringed by private action.

See also Republic v. Kadhi of Kisumu ex parte Nasreen [1973] E.A. 153 where an order of the Kadhi's court directing a Muslim wife to return to her husband and for restitution of conjugal rights of the husband was quashed on the ground that the Kadhi's decision unconstitutionally deprived the wife of her personal liberty, freedom of movement and freedom from servitude guaranteed by the Constitution of Kenya. Mr. Justice McCardie said: "The husband cannot restrain her physical liberty .... Her freedom of occupation cannot be restricted by him." A similar decision is to be found in *Ndanui Ogutu & Anor. v. John Okumu*, 21 Nairobi Law Monthly 35 (Feb. 1990).

120. In 1978, the European Court of Human Rights had ruled that the Convention on Human Rights does not merely oblige the authorities of the contracting states "to respect for their own part the rights and freedoms embodied in it, but in addition it requires them to secure the enjoyment of these rights and freedoms by preventing and remedying any breach thereof"; as quoted in A.G. Noorani, "State's Duty to Protect Dissent," Economic and

restrictions imposed by the legislature on the rights of an individual or group of individuals for the purpose of protecting the rights and freedoms of other persons, i.e. by supporting legislation which itself forbids private infringement of rights.[121]

The question of private infringement of fundamental rights has arisen in a very few cases in Third World countries, and the courts appear not to be very enthusiastic about protecting such individual rights.

In an Indian case, *Hasan Ali v. Mansoorali*,[122] the Privy Council held that the petitioner, who was the head of the Dawoodi Bohra community, a sect in Islam, had the right to excommunicate any member of the community after following the procedure indicated by the Privy Council. Shortly after this decision, a statute was enacted to prevent the practice of excommunication which results in deprivation of legitimate rights and privileges of members of religious communities. This statute was impugned in *Sardar Syedna Taher Saifuddin Saheb v. Bombay*,[123] as violative of religious freedom guaranteed under the Indian Constitution. The majority in the Supreme Court declared the impugned statute invalid because it encroached upon freedom of religion guaranteeing that every religious denomination has a right to manage its own affairs. The Court was of the view that the fact that the civil rights of the excommunicated persons were affected was of no consequence.

Political Weekly Bombay, 1723 (August 20, 1988). Similarly, in *Plattform Artze fur das Leben Against Austria*, Application No. 10126 of 1982 decided on March 12, 1987, the European Commission of Human Rights rejected the Austrian government claim that the constitutional guarantee of the right to assemble "does not include a right to the protection of demonstrations against interference by private persons."

121. *See, e.g.*, Kenya Contitution sections 78, 79 and 80; Zambia Constitution Articles 19, 12 and 33; Section 30 of the Law of Fifth Amendment of the State Constitution of 1984 (Tanzania) which allow restrictions on fundamental rights for the protection of the rights and freedoms of others; *Jang Bahadur v. Principal Mohindra College* A.I.R. 1951 Pepsu 59 (India) (rights conferred by the Constitution are subject to the qualification that they do not violate the rights of others).

122. A.I.R. 1947 P.C. 66. *See also supra* note 88 and accompanying text.

123. A.I.R. 1962 S.C. 853.

On similar facts, the Supreme Court of Western Samoa, however, took a different view. In *Tariu v. Sila Fa'amalaga*,[124] the plaintiff was banished from his village by the Chiefs, for his failure to attend church. He brought an action against the Chiefs claiming damages for personal and business losses as a result of banishment. It was held that the Constitution assured to the individual certain freedom regarding religion; and that banishment or other punishment for refusal to attend church or to contribute to the church is prohibited by the Constitution. Accordingly, punitive damages were awarded.

Sometimes, threats to freedoms may come from centres of private economic power.[125] Monopolistic tendency in an industry may affect the freedom of trade or right to property of small businessmen. Similarly, concentration of ownership of the press may affect freedom of speech and expression, freedom of trade and property rights of small newspaper owners or of the general public. The recognition that such a situation exists or may come into being imposes an obligation on the government to protect rights of the small businessmen or other members of the public affected. Any measure on the part of the government may affect rights of big businessmen. The problem before the court then is how to resolve this conflict.

In *Union v. Bennett Coleman & Co.*,[126] a joint-stock company, owners and publishers of a large number of newspapers and magazines in India, started new publications without prior approval of the government, as required under the provisions of an antimonopoly law. The provisions requiring prior approval were enacted with a view to prevent undue concentration of economic

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124. Noted in (1982) 8 C.L.B. 62.

125. Mathew J. had said organisations of big business and labour are no longer private phenomena, and that the constitutional and common law restrictions imposed upon the state agencies must be imposed upon them: *see Sukhdev Singh v. Bhagat Ram* A.I.R. 1975 S.C. 1331 at 1352. A commentator has remarked that the court might extend the application of fundamental rights to private sector which enjoys benefits such as financial help, tax concessions, etc. S.P. Sathe, *Administrative Law* 467 (4th ed. 1984).

126. *See* 62 Comp. Cases 501 (1988) (Bom): A.I.R. 1986 Bom. 321: 63 Comp. Cases 535 (1988) (Division Bench).

power in private hands and applied only to undertakings whose assets were above a certain specified limit. The provisions were of a general nature and applied to all industrial undertakings, including the press industry. On being given notice to show cause, the petitioners challenged the vires of the provisions relating to prior approval on the ground that they infringed on the freedom of the press of the petitioners. The Bombay High Court declared the provisions invalid in relation to the press industry on the ground that they infringed on the freedom of the press, which is basic to the structure of the Indian Constitution.

The Court failed to give sufficient weight to various interests involved, viz. interests of the government in carrying out socio-economic reforms, interests of the small newspaper to propagate their views and protect their business interests, similar interests of the monopoly press, and interests from various shades of opinions. Instead of balancing these various interests, the Court leaned too much in favour of the interests of the owners of the monopoly press. The Court failed to realise the fact that the trend toward monopolisation of the press, and concentration and centralisation of more and more power over public opinion in fewer and fewer hands itself imposes restraints on the freedom of the press. The Court also failed to realize that in a monopolistic situation the public would receive only a single point of view. The scope of communications of ideas would be unduly restricted, as the ideas antagonistic to the proprietors are likely to be suppressed and the biases of the owners of the newspapers are likely to gain wide acceptance, not because of their merit but because of their unnaturally prominent position in the public forum. This in itself would be a threat to democracy.[127]

It would appear that in cases involving infringement of fundamental rights by private persons the judicial attitude is yet to crystallize. The dearth of cases in this area appears to be due to a wrong impression not only of the government but also of public

127. For a comprehensive discussion of this problem, *see* Yash Vyas, "Freedom of the Press and the Anti-Monopoly Law: Problems of Striking a Proper Balance," 10(1) Journal of Media Law and Practice, London 11 (March 1989).

figures and even lawyers that the protection against encroachment upon fundamental rights is available only against the government.

E. Judges and Socio-Political Stresses Within the Society

The judiciary cannot stand aloof and apart from the mainstream of society. They must be sensitive to "the policies and the set economic and social goals of the nation, its economic and political pressures, and social stresses existing within the society."[128] Failure to understand socio-political realities of a particular society may on occasion lead to unhappy conflict between the judiciary on one hand and the executive and the general public on the other.

In a Kenyan case, *R. v. Sandstrom*,[129] the accused, an American soldier, was found guilty of the murder of a Kenyan woman. The Resident Magistrate, Leslie Harris, an expatriate, released the accused on a bond of KShs.500/=and to be of good character for two years. This judgment raised a public uproar that culminated in some Members of Parliament asking the Attorney General to order a retrial. Retrial was not ordered, but the Magistrate's contract was not renewed.

Such decisions have a tendency to destroy the courts' popular image of an impartial and disinterested arbiter between contestants in a dispute.

At times, judges may face very difficult and delicate choices. Cases before them may have international political overtones and may involve highly sensitive issues, or policy matters to which a particular nation is fully committed. In such situations, the mark of the utility of a judicial decision is not the soundness of its logic, but its role in stabilising the social and political activity of the nation.

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128. L. Shimba, *supra* note 14, at 4. *See also* observation of S.M.F. Ali J. in *S.P. Gupta v. President of India* A.I.R. 1982 S.C. 149 at 445-46.

129. Criminal Case No. 45 of 1980 Resident Magistrate's Court Mombasa.

In a Ugandan case, a white mercenary soldier operating in the Congo (now Zaire) illegally entered Uganda. He was convicted and sentenced to twelve months imprisonment by an African magistrate for the breach of the country's immigration laws. On appeal to the High Court, the conviction and sentence were quashed by a white expatriate judge on the ground that the "magistrate was misled into sentencing the appellant more for his former activities as a mercenary in the Congo than his illegal entry into Uganda." This raised an uproar, marked by a racist attack on the judge and some politically motivated remarks against the government in the international press. The decision touched upon a very sensitive issue. Uganda, like other African states, is committed to the objective of the consolidation of African unity and independence. At that time it served on a committee set up by the Organisation of African Unity to deal with the mercenary problem, which was a menace to the objective of independence of the Congo. The decision was clearly contrary to the goals and objectives of the African countries in general and Uganda in particular.[130]

A similar situation arose in a Zambian case, *People v. Silva and Filitas*.[131] There, two Portuguese soldiers, stationed in Angola and engaged in fighting a war against the Angolan freedom movement, entered Zambia illegally. They were convicted and sentenced by an African magistrate to two years' imprisonment or a fine of Kwacha 2,000/- each. Justice Evans in the High Court quashed the conviction on the ground that it was excessive and unlawful in view of the trivial and technical nature of the offence. This provoked public indignation followed by a public attack on the court's decision by the President, imputing political motivation to the judgment. Chief Justice Skinner came out in support of Justice Evans, denying any political motive

130. For a fuller discussion of the case and the controversies it generated, *see* Picho Ali, "Ideological Commitment of Judiciary," 36 *Transition* 47 *et. seq.* (1969); Nwabueze, *supra* note 15, at 141-43.

131. *See* Mubako, *The Presidential System in Zambian Constitution*, unpublished M. Phil. Thesis, University of London (1970); "Kaunda's Clash with Judiciary Sign of a Dilemma," *Tanzania Standard*, Dar es Salaam, July 25, 1969 at 4.

behind the decision. This sparked off demonstrations against the judges. Justice Skinner was on leave and resigned in spite of an apology from the President. Subsequent events show that Justice Skinner did not resign on principle. He eventually assumed the post of Chief Justice of Malawi, where most judges at the time resigned in protest against the government's policy of giving increased powers to customary courts.[132]

The purpose of our discussion here is not to examine the merits or demerits of the above decisions but to put forward a point that indifference to the socio-political realities of the society in which it is operating may affect the credibility of the judiciary. Whether public criticism of judges in such situations constitutes a serious threat to judicial independence is a matter of opinion,[133] but failure to respond to social-economic and political realities too often leads to a lowering of the prestige of the judiciary. Judicial independence depends also upon "the support of public opinion, without which the independence of the judiciary must inevitably be in grave danger."[134]

F. Judges and Constitutional Breakdown

One of the most difficult problems which affects judicial independence in the Third World countries is that of the constitutional breakdown or revolution, which occurs because of constitutional inadequacy or of a successful *coup d'etat* generally followed by imposition of martial law or army rule.[135]

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132. For a fuller discussion on this case and controversy provoked by it, *see* Nwabueze, *supra* note 16, at 278-79.

133. In Britain, a suspended sentence given to a youth for rape provoked criticism of the judge by members of Parliament and the press. Lord Hailsham stated that such moves constitute a serious threat to judicial independence. But Brazier expressed serious doubts with regard to the reality of any threat to independence. *See* Brazier, *supra* note 57, at 397.

134. Sir Roberts-Wray, *supra* note 14, at 64.

135. A revolution takes place when "there was an abrupt political change not contemplated by the existing constitution, that destroyed the entire legal order and was superseded by a new constitution, and by effective government." *Uganda v. Commissioner of Prison Ex parte Matovu* [1966] E.A. 514 at 535 (Uganda). For a discussion of various legal concepts of revolution, *see* Reyntjens and Wolf-Phillips, "Revolution in the Legal Systems of

Constitutional breakdown poses serious problems. It creates an environment in which constitutional and conventional restraints become inoperative.

"The legislative and judicial branches become subordinated to the executive which may itself become subordinated to the military."[136] The independence of the judiciary is undermined by "laws creating special courts and by laws and decrees depriving the courts of jurisdiction to review executive and legislative actions."[137] A situation is created in which the judiciary faces a seemingly intractable dilemma whether to deny validity to the new regime or to legitimatise it. According to Claire Palley, judges have several choices: they may resign, remain in office asserting the pre-revolutionary Constitution and denying validity to any of the revolutionary action, remain but temporise with the new authorities, remain in office but apply the doctrine of necessity to validate actions of the revolutionary authorities, or to identify themselves with the new authorities and to sit as courts of the revolution.[138] Whatever choice is made, the independence of the judiciary is affected. Judges who deny validity to the new regime or decide cases against it may be persecuted or punished and removed from office. On the other hand, those who legitimatise the new authorities might have done it under duress.[139]

Third World States," in *Essays in Third World Perspectives in Jurisprudence, supra* note 39, at 106-110. *But see Begum Nusrat Bhutto v. Federation of Pakistan*, P.L.D. 1977 S.C. 657 ("Such a phenomenon can more appropriately be described as one of constitutional deviation than of revolution.").

136. "States of Emergency — Their Impact on Human Rights," CIJL Bulletin No. 12, 19 at 21 (1983). For a detailed examination of states of emergency in various countries, *see generally* ICJ, *States of Emergency — Their Impact on Human Rights* (1983).

137. *Id.* at 20.

138. Palley, *supra* note 47, at 7-9.

139. The courts have generally adopted two broad categories of approach to legitimatise the new regime: first, the utilisation of the Kelsen doctrine of "revolutionary legality" and, secondly, the application of the "doctrine of necessity." The Kelsen doctrine was followed in the *State v. Dosso* P.L.D. 1952 S.C. 533 (Pakistan); *Uganda v. Commissioner of Prison* [1966] E.A. 514 (Uganda); *Lardner-Burke v. Madzimbamuto* [1968] 2 South African L. Rep. 284 (Rhodesia); *E.K. Sallah v. The Attorney-General*, digested in (1970) Current Cases (Ghana). The doctrine of necessity was followed in *Special Reference No. 1 of 1955* P.L.D. 1955 F.C. 435 (Pakistan); *Attorney-General v. Mustafa Ibrahim* (1964) Cyprus L.R. 195 (Cyprus); *Begum Nusrat Bhutto v. Federation of Pakistan* P.L.D. 1977 S.C. 657 (Pakistan); *Z.A. Bhutto v. The*

In a constitutional breakdown situation it may be too much to expect judges to "stand up" against usurpers. A judge is not a "knight omnipotent" who can smash every attack on judicial independence. It must be realised that the power of the judiciary depends upon the coercive power of the state exercised through the executive. The judiciary depends upon the executive for the enforcement of its decisions. An unwilling executive may render the judiciary powerless. Moreover, the question here is not only of independence of individual judges but of the judiciary as a whole. Individual judges who stand up against the new regime may be removed or dismissed and their vacancies may be filled by those who are willing to be manipulated by the new authorities. The problem, therefore, is not a legal but basically a political one and the solution can only be political.

A related problem is that of governmental declarations of emergency, which similarly undermine judicial independence. However, there is a notable difference. In cases of constitutional breakdown, the courts face the problem of whether or not to legitimatise the new regime which has abrogated the constitution; in cases of declaration of emergency, they do not face such a choice. This is because in most of the Third World countries the Constitution itself empowers the executive to declare a state of emergency in certain situations.[140] In most of the countries the courts have generally taken the view that they would not go into

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State P.L.D. 1978 S.C. 40 (Pakistan). There is abundant literature on the subject. *See, e.g., Reyntjens and Wolf-Phillips, supra* note 135, at 105; Iyer, "Constitutional Law in Pakistan: Kelsen in the Courts," 21 American J. of Comp. L. 759 (1973); S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations [1968] 7 Western Ontario L. Rev. 93; Date-Bah, "Jurisprudence's Day in Court in Ghana," 20 Int'l. & Comp. L.Q. 315 (1971); Choudhury, "Failure of Parliamentary Democracy in Pakistan," 12 Parliamentary Affairs 60 (1958); Mannan, "The Doctrine of Civil or State Necessity," P.L.D. 1979 Journal 22; Ojo, "Search for a Grundnorm in Nigeria — The Lakanmi Case," 20 Int'l. & Comp. L.Q. 117 (1971); Welsh, "The Constitutional Case in Southern Rhodesia, 83 L.Q. Rev. 64 (1967); Hahlo, "The Privy Council and the Gentle Revolution," 86 South African L.J. 419 (1969); Eokelaar, "Splitting the Grundnorm," 30 Mod. L. Rev. 156 (1967); Palley, "Judicial Process: U.D.I. and the Southern Rhodesian Judiciary," 30 Mod. L. Rev. 263 (1967).

140. *See, e.g.*, Article 150, Constitution of Malaysia; Articles 352-60, Indian Constitution; Article 30, Constitution of Zambia.

the merits of the declarations of emergency.[141] They refused to review the circumstances leading to an emergency declaration on the ground that these "were essentially matters to be determined according to the judgment of the responsible ministers in the light of their knowledge and experience."[142] In general, the judicial response to emergencies has been very passive. In a sense this is an understandable application of the doctrine of the separation of powers: i.e., courts do not decide political questions.

VI. Conclusion

This paper has been an attempt to explore the parameters of the independence of the judiciary. In our attempt to explore the meaning of judicial independence we have argued that the concept of independence of the judiciary is not merely independence from other organs of government, but it embraces also independence from political and private pressures and influences. We have also argued that judicial independence can only be within the constitutional framework and accepted legal values.

We find that in most of the Third World countries, effective constitutional safeguards are provided (at least in theory if not in practice) so that the judiciary is free from the executive control that could be exercised through appointment, removal, suspension, transfer, salary reduction or administrative retirement.

Our sample survey of case law from various countries may not be adequate to support firm conclusions, but broad trends can be noticed. In the area of personal rights the courts have leaned more toward the executive interests in safeguarding public security, public order, etc. as against the individual's freedom of expression,

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141. *See supra* notes 80-82 and accompanying text. *See also* Conklin, "The Role of Third World Courts During Alleged Emergencies," in *Third World Perspectives in Jurisprudence, supra* note 39, at 69.

142. *Stephen Kalong Ningken v. Government of Malaysia* [1970] A.C. 379 at 391. Similar decisions are to be found in *Bijayanand v. President of India* A.I.R. 1974 Orissa 52 (India); *Gunasekera v. Ratnavale* (1972) New L.R. 316 (Sri Lanka); *Bhut Nath Mate v. West Bengal* A.I.R. 1974 S.C. 806 (India).

freedom of assembly and association, freedom of movement and right to personal liberty. They have adopted a restrained approach in these areas and have adhered to the strict interpretation of the law, whereas in the cases involving property rights the courts have adopted a flexible approach and have shown much activism. Cynics may call this a false activism. At times the judiciary has flouted rules of natural justice and has transgressed the limits of its powers to encroach upon the areas of other organs of government to protect vested property rights. The concept of judicial independence carries with it an implied limitation that the judiciary remains within the bounds of its power and follows well-established principles of law.

The difference of approach in protection of personal human rights and of property rights is not a unique feature of the Third World. In the American context Benjamin Wright once observed: "There have then been comparatively few cases in which civil rights have been protected and hundreds in which the vastly expanded contract and due process clauses were given as the justification for invalidating acts regulating or taxing property."[143] Professor Griffith has pointed out that the British courts have been far more assiduous in limiting government powers to interfere with property rights than in the protection of civil rights or liberties.[144]

In cases of encroachment of fundamental rights by private powers, the judicial attitude has yet to crystallize, but in limited cases which have come before the courts, the attitude is not very encouraging. The courts have yet to realise that the concept of freedom is based on the idea that society should be so organised as to be dominated neither by the state nor by private groups.

In several countries where the independence of the judiciary is generally respected, a series of decisions invalidating socio-economic reforms as being unconstitutional has given the impression that the courts were acting as super legislatures, a role which was not assigned to them by the constitution. In some cases the courts were insensitive to socio-political stresses within the

143. B.F. Wright, *The Growth of American Constitutional Law* 254 (1967).

144. *See* Griffith, *supra* note 20, at 198.

society. In our view, the judiciary cannot remain indifferent to national goals and aspirations. Judges do not operate in a vacuum but in a society. Justice Georges has summed up this perspective quite aptly when he said: "We in the Judiciary have sought without sacrifice of principle, to remain independent though not isolated, impartial but not indifferent, positive but not inflexible."[145] He also said that judges should lead — but not "from . . . too far ahead . . . ."[146]

It can be seen that judicial independence is a concept fraught with ambiguities and is difficult to achieve in practice. Even if there are sufficient constitutional safeguards, much depends upon the executive and individual judges. In countries where the executive is very powerful it can be achieved only to the extent to which the executive is willing to concede. On the other hand, in countries where independence of the judiciary is in general respected and the judges are able to decide against the government of the day, it cannot always be said that the judiciary is completely independent. It is possible that individual judges might be influenced by powerful economic or political interests, or by the values acquired as a result of their social and cultural background. After all, judges are human and as such are vulnerable to human frailties. In the words of Justice Tan Sri Haji Mohamed Azmi: "It must always be borne in mind that judges are, after all, human and although they are professionally trained to be fair and fearless in discharging their functions, they are as vulnerable as anyone else to human frailties."

In the end, it becomes clear that the problem of achieving judicial independence is not only a legal problem, but a social, cultural and political problem as well.

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145. Georges, *supra* note 19, at 62.

146. At a Seminar on Lecturers on Commercial Law, reported in *The Star* (Penang, Malaysia) January 13, 1987, at 15.