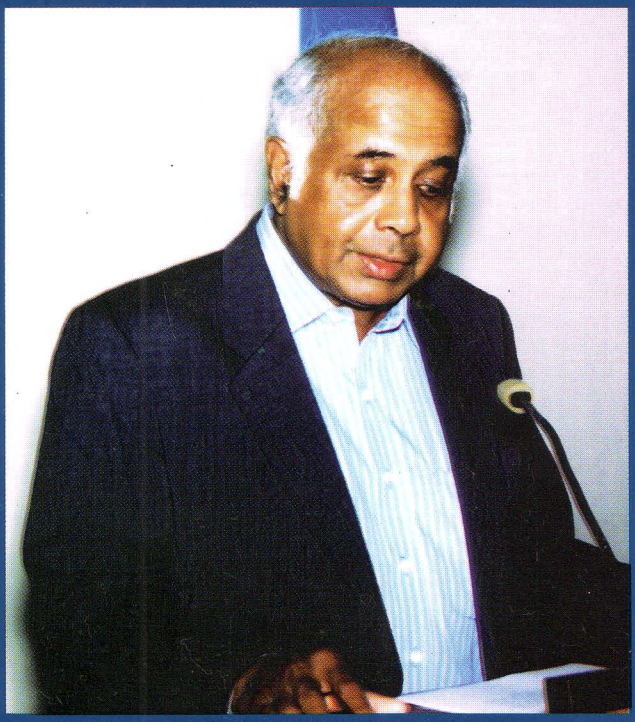
ICES Lecture/ Discussion Series

Tension between Judicial Independence and Judicial Accountability : An International Perspective



Address by

Dato' Param Cumaraswamy

at the

SLFI Auditorium, Colombo

October 17, 2003

International Centre for Ethnic Studies, Colombo

Tension between Judicial Independence and Judicial Accountability: An International Perspective

Dato' Param Cumaraswamy, former UN Special Rapporteur for Independence of the Judiciary & judges.

October 2003

International Centre for Ethnic Studies
2, Kynsey Terrace
Colombo 8
Sri Lanka

Tension between Judicial Independence and Judicial Accountability: An International Perspective

Address by
Dato' Param Cumaraswamy
at the
SLFI Auditorium, Colombo
October 17, 2003

International Centre for Ethnic Studies, Colombo

Tension between Judicial Independence and Judicial Accountability: An International Perspective

Dato' Param Cumaraswamy

Since the early eighties international non-governmental organisations of jurists have been involved in standard setting for the protection of judicial and lawyer independence. They relentlessly pursued in creating universal awareness of the importance of an independent judiciary and the legal profession for the protection of the rule of law and realization of human rights for sustainable development in a democracy. These standards later became the basis of the UN Basic Principles on the Independence of the Judiciary and the Role of Lawyers endorsed by the UN General Assembly in 1985 and 1990 respectively. The Basic Principles on the Judiciary was a compromise bargain with the Eastern European States, then the Communist bloc, who vehemently rejected the original text. Rather than not having any standards at all, the original text was considerably diluted and adopted. In 1990 the 8th U.N Congress on the Prevention of Crime and Treatment of Offenders in Havana, adopted the Guidelines on the Role of Prosecutors.

The continued pursuit of these organizations and the UN Standards were reflected in paragraph 27 of the Vienna Declaration and Programme of Action which reads:

> "Every State should provide an effective framework of remedies to redress human rights grievances or violations. The administration of justice, including law enforcement and prosecutorial agencies and, especially an independent judiciary and legal profession in full conformity with applicable standards

contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the processes of democracy and sustainable development....."

177 nations assembled in Vienna adopted this Declaration. Practically all the sovereign States then in the Asia Pacific region were present there.

Following the adoption of the Basic Principles on the Judiciary and the Role of Lawyers and the Vienna Declaration the international community felt the need to monitor attacks on the independence of judges and lawyers. Hence in 1994 the Commission created the mandate on the Independence of Judges & Lawyers. The mandate was three-pronged. It has an investigatory, advisory and standard setting elements.

Unlike the regions of Europe, the Americas and Africa where there are regional intergovernmental charters on human rights incorporating the principles of due process and providing for an independent judiciary to adjudicate the Asia Pacific region has none. In Europe and the Americas there are also the regional courts on human rights. However, the Asia Pacific region made history in 1995 when Chief Justices in the region gathered in Beijing for the 6th Conference of Chief Justices of Asia and the Pacific adopted the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region commonly known now as the 'Beijing Principles' It was history because in no other region have the heads of the judiciaries got together and agreed to a common set of standards for the promotion and protection of their judicial institutions. Moreover, that such consensus was reached in such a diverse region having different legal systems, leaving alone other differences, was a significant achievement. Such a document emerging from the hands of the eminent Chief Justices could carry greater weight than an intergovernmental document.

In dealing with European States the Council of Europe Standards are useful supplementary materials particularly the 1998

European Charter on the Statute for Judges. Though the 1998 Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence is a welcome set of guidelines on good practice governing relations between Executive, Parliament and the Judiciary in the promotion of good governance, the rule of law and human rights in the Commonwealth yet technically the guidelines have not come into force as they have not been approved by the Commonwealth heads of governments.

It is not my intention today to analyze the various standards or even to discuss the traditional and often spoken of principles of judicial independence such as appointments, security of tenure, judicial salaries etc. There is already a wealth of materials on these principles. What I intend to do is to share some of my experiences in addressing concerns affecting judicial independence and in particular judicial accountability which is not addressed in the international and regional standards.

These concerns are:

(i) independence of judicial officers in the lower judiciary;
(ii) the role of Chief Justices and Presidents of apex courts;
(iii) abuse of judicial independence;
(iv) the parameters of judicial accountability;

Independence of Judicial Officers in the Lower Judiciary

Very often principles of judicial independence are addressed to judges of the higher judiciary namely in the High Courts and the Appellate Courts. These principles are not often addressed at the judicial officers like Magistrates, Session Judges or District Judges of the lower judiciary though a very large proportion of cases particularly criminal cases are tried and disposed of before these courts. The U.N. Basic Principles do not make any distinction between these two categories. Though the word frequently used in the Basic Principles is 'judge' yet it should be read in the context of other terms like "independence of the judiciary" and "judicial

officer". Neither does the Beijing Principles make such a distinction. National Constitutions provide for an independent judiciary. However, the fact remains that in many countries, particularly in the Commonwealth, judicial officers in the lower judiciary are not perceived as independent. Some of the insulations provided for the protection of the independence of the higher judiciary do not apply to these judicial officers.

This disparity is now gradually being challenged before the national courts. It was challenged before the Canadian Supreme Court in 1997,[1] later, the Court of Appeal of Scotland in 1999[2] and the Supreme Court of Bangladesh in 2000[3] and the Constitutional Court of South Africa.[4]

These decisions of the Apex Courts on this very vexed issue are most welcome. I hope they will be disseminated widely for other similar courts in other countries to follow or for governments to take necessary legislative measures to insulate these judicial officers with independence so that in their adjudicative process they are perceived by the consumers of justice as being independent and impartial.

The Role of Chief Justices and Presidents of the Apex Courts

Of late the position of Chief Justices or Presidents of Apex Courts have come under criticism in some countries. Complaints have been largely regarding abuse of power, interference with adjudicative processes of junior judges particularly those who await recommendations from the Chief Justice for promotions, etc. Chief Justices and Presidents are generally given the power to empanel sittings of the appellate courts. In such empanellment there have been allegations of 'fixing' in selective appeals.

The U.N. Basic Principles and the regional standards do not provide for standards for Chief Justices or Presidents though principle 6 of the Beijing Principles regarding interference in the

decision-making process must necessarily apply to Chief Justices. With regard to judicial appointments national constitutions which do not provide for an independent mechanism for selections and recommendations leave it to the Chief Justice to select and recommend. Similarly with regard to promotions. There have been allegations of favoritism, cronyism and nepotism. Recent cases decided by the Indian Supreme Court are in point. The Indian constitution provides for the appointment of judges by the President after "*consultation with the Chief Justice of India*" In a 1993 case the court held that 'consultation' in the context must be genuine and not a sham. When there is a conflict between the opinion of the executive and that of the Chief Justice the opinion of the Chief Justice should prevail. By this judicial interpretation, the Supreme Court in effect removed the power of judicial appointments from the executive and vested it in the Chief Justice.[5]

Controversy thereafter arose whether the power can be vested in just one person like the Chief Justice or should it require consultation with a plurality of judges in the formation of the opinion of the Chief Justice. In 1998 the President of India referred this and other doubts caused by the 1993 judgment back to a full bench of the Supreme Court without the Chief Justice. In a detailed decision the Court held that *"the primacy of the opinion of the Chief Justice of India in this context is, in effect, primacy of the opinion of the Chief Justice of India formed collectively, that is to say, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of his opinion."*[6]

Thus the Indian Supreme Court in its interpretation of the expression "consultation with the Chief Justice of India" in the constitution read into the constitution not only that the Chief Justice's opinion must be a collective opinion formed after taking the views of his senior colleagues but also that when that opinion conflicts with that of the Executive the opinion of the judiciary "symbolised by the view of the Chief Justice of India" should have primacy

Soon after the 1993 decision of the Supreme Court of India a similar issue arose before the Pakistan Supreme Court. The constitution of Pakistan too had such a provision for consultation. Following the 1993 Indian Supreme Court decision the Pakistan Court wrested the power of judicial appointment from the executive. However there was a difference. The Pakistan court held that if the Executive refuses to accept the opinion of the Chief Justice then the executive should give its reasons in writing thus calling for transparency.[7]

On this issue of judicial appointments and promotions considerable executive involvement in the appointment procedure has resulted in the judiciary not being independent or perceived as independent. Provisions for consultation or advice too has resulted in doubts and suspicions whether such consultations and advices are genuine or mere shams. Vesting this power in just one person like the Chief Justice too is fraught with suspicions. However eminent he may be there is always the likelihood of abuse. Hence, the trend now in modern constitutions is to entrust the power of recommendations for judicial appointments with an independent council or commission. Such council or commission is composed of representatives of institutions closely connected with the administration of justice. The Council or Commission then recommends suitable men or women for appointment by the government. Such a commission is now being proposed for England & Wales. A debate is very much alive there.

A good example is the Philippines. In that Republic, pursuant to the 1986 Constitution there was created a Judicial and Bar Council for judicial appointments. This council is composed of the Chief Justice, The Minister for Justice, a representative of the Bar association, a professor of law, a retired member of the Supreme Court and a representative of the private sector. This council advertises for judicial appointments, processes all applications, conducts interviews and selects suitable applicants based on proven competence, integrity, probity and independence which is the criteria provided in the constitution. Whenever there

is one vacancy in the Supreme Court or High Court the council submits to the Executive President three names. The Executive President selects one among the three in the list.

Similarly the 1996 South African Constitution provides for a Judicial Services Commission to recommend to the Executive President suitable appointees for judicial appointments.

The 1998 European Charter on the Statute of judges, referred to earlier, provides, inter alia, "*In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the Statute envisages the intervention of an authority independent of the Executive and Legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representative of the judiciary.*" (emphasis added).

Whatever form the selection and recommendatory mechanism maybe what is essential is that judicial appointments are perceived to be made independently and transparently based on merit and without improper considerations, political or otherwise.

In 2000-2001 differences between the then Chief Justice and the executive Council of the Law Society in Fiji was a matter of concern to me. I expressed my views to the Honorable Chief Justice and the Law Society on the incident. I expressed to the Chief Justice that administratively barring few lawyers in the Law Society from appearing before him and another judge may be seen as a violation of Principle 19 of the UN Basic Principles on the Role of Lawyers. Principle 19 provides that no court or administrative authority shall refuse to recognise the right of a lawyer to appear before it for his or her clients unless the lawyer has been disqualified in accordance with national law

Similarly, I expressed to the government of Sri Lanka my concerns over the manner in which certain processes were handled by the present Chief Justice in the light of proceedings personally against him before the Supreme Court and subsequently when an impeachment petition was admitted in Parliament. These events not only called into question the impartiality and integrity of the

judiciary but politicised the institution. Hence I was not very surprised when I learnt that Justice Mark Fernando has sought early retirement from the Supreme Court. In view of the politics within the judiciary and in particular the conduct of the Chief Justice this early retirement, I suppose is inevitable. Justice Mark Fernando is an independent, able and courageous judge. Obviously he does not wish to continue under those circumstances. He will be a loss to the Supreme Court of Sri Lanka.

In Malaysia there were serious allegations that independent judges who did not toe the line of a previous Chief Justice were not promoted or got transferred out. A few junior judges who wanted to leap frog senior judges for promotion would tailor their judgments to suit the needs of the Chief Justice. An allegation a couple of years ago by a High Court judge that the former Chief Justice attempted to interfere with his adjudicative process in an election petition is still being investigated. Integrity of the Malaysian judiciary has been a concern since 1988.

Very recently leap-frog promotions of three judges who were involved in the Anwar Ibrahim trials and appeals were perceived as rewards for having "delivered" what the Executive wanted. The Bar Council publicly protested and called for an extra ordinary general meeting to adopt resolutions calling for disclosure of the criteria applied and the setting up of an independent judicial services commission to select and recommend judicial appointments, promotions and transfers. Under the Malaysian Constitution recommendations for judicial appointments and promotions are made by the Chief Justice to the Prime Minister who in turn advises the King. The King must accept the advice. The extra ordinary general meeting of the Bar had to be aborted as the required quorum of 2222 could not be mustered.

As the office of the Chief Justice is the embodiment and reflection of the independence, impartiality and integrity of the judiciary in any democracy it is therefore imperative that only those who can command that respect be appointed.

Abuse of Judicial Independence

Judges are conferred and clothed with independence in their adjudicative process so that they can dispense justice without fear or favour in accordance with the facts, evidence and the law presented to them. For this purpose many national constitutions provide for conditions with regard to the appointments, promotions, discipline, security of tenure and immunity to insulate them. These conditions are prerequisites for protection of their independence. These are found in the international and regional standards. The guarantee of judicial independence is for the benefit of the judged, not the judges. There have been cases where judges are said to have abused this independence. These insulations are sometimes used as a shield against investigations for judicial misconduct including investigations for corruption. They know that they cannot easily be removed; they know that they cannot be sued for their conduct or words uttered in the adjudicative process; they know that their salaries cannot be reduced. The common complaint of this abuse is the kind of terse and curt language some judges use against parties, witnesses, counsel and even against parties not in court. In some countries such conduct triggered a public furore through the media drawing the executive, supported by the public, to seek greater accountability from the judiciary.

Judicial Accountability

Accountability and transparency are the very essence of democracy. Not one single public institution, or for that matter even a private institution dealing with the public, is exempt from accountability. Hence, the judicial arm of the government too is accountable. In an interview to India Today in 1996 former Chief Justice of India, Justice Verma, was asked what his opinion regarding making the judiciary more accountable. The Chief Justice's reply was:

> *"It's long overdue. With the increase in judicial activism, there has been a corresponding increase in the need for judicial accountability. There is a perception that the people are doubting whether some of us in the higher judiciary satisfy the required standards of conduct. Since we are the ones laying down the rules of behaviour for everyone else, we have to show that the standard of our behaviour is at least as high as the highest by which we judge the others. We have to earn that moral authority and justify the faith the people have placed in us. One way of doing this is by codifying judicial ethics and adhering to them.* (emphasis added)"

However, judicial accountability is not the same as the accountability of the executive or the legislature or any other public institution. This is because of the independence and impartiality expected of the judicial organ. Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons), fairly and delivering their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by the appellate courts. No doubt legal scholars and even the public including the media may comment on the judgment. If they misconduct themselves, they are subject to discipline by the mechanism provided under the law. Beyond these parameters, they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

However, it must be stressed that the constitutional role of judges is to decide on disputes before them fairly and to deliver their judgments in accordance with the law and the evidence presented before them. It is not their role to make disparaging remarks about parties and witnesses appearing before them or to send signals to society at large in intimidating and threatening terms, thereby undermining other basic freedoms like freedom of expression. Another source of concern is the manner in which

contempt of court powers are used to instill fear. When judges resort to such conduct, they lose their judicial decorum and eventually their insulation from the guarantees for judicial independence. They open the door for public criticism of their conduct and bring disrepute to the institution. That could lead to loss of confidence in the system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers except in extreme cases. The judiciary must earn its respect by its own performance and conduct.

No doubt judges too have freedom of expression. The UN Basic Principles on the Independence of Judges and lawyers requires judges to exercise their freedom of expression "in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary". Similarly the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region states that judges are entitled to freedom of expression "to the extent consistent with their duties as members of the judiciary." If follows that judges do not have a carte blanche to say all and sundry both in the adjudicating process or even in their extra judicial capacities. Particularly in the adjudicating process they must be circumspect with their words to maintain their objectivity and impartiality.

Let me give a few illustrations. In 1996 a Superior Court Judge of Quebec in Canada in dealing with the sentencing of the accused woman found guilty of second degree murder in the death of her husband berated a jury and made insensitive remarks about women and Jews. The remarks were:

> "When women ascend the scale of virtues, they reach higher than men..."but..when they decide to degrade themselves, they sink to depths to which even the vilest men could not sink". He also said "even Nazis did not eliminate millions of Jews in a painful or bloody manner, they did in the gas chamber without suffering".

Those remarks caused an enormous controversy in Quebec. Many including the media called for the removal of the judge. Women's rights associations went in an uproar. The judge did not resign. The matter went before the Canadian Judicial Council.

By a majority of 4 to 1, the Inquiry Committee of the Council found the judge unfit for office. They went on to say that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. This recommendation went before the full Judicial Council headed by the Chief Justice. By a majority of 22-7 the Council recommended to the Minister to move Parliament for the removal of the judge. The Judge eventually resigned.[8]

In another recent case again in Canada a judge of the New Brunswick Provincial Court was removed for derogatory comments about the residents of a particular district while presiding over a sentencing hearing. The majority of the disciplinary panel found her comments incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge makes them even more inappropriate and aggressive. The Supreme Court of Canada upheld the finding. Soon after the judge made those comments she apologized to the residents in open court during the proceedings of an unrelated matter. The apology did not mitigate the damage done.[9]

In December 2001 the New South Wales Court of Appeal delivered a judgment criticizing the conduct of a District Court Judge as having fallen "far too short of acceptable judicial behaviour" and might lead to an apprehension of bias.[10] The appeal judges added that her conduct was disturbing "comments totally unnecessary". That the judge "made little to maintain the proper decorum of either the court or herself" They described one of her statement as "disgraceful and totally unjudicial". In an opinion column an Australian daily which reported this case the author in conclusion asked "How on earth do people like the judge concerned get appointed to courts in this country?" It is not known whether any disciplinary action was taken against that judge.

In South Africa in October 1999 in sentencing a 54 year old man to 7 years imprisonment in the Cape Town Court for raping his 16 year old daughter the judge said that while raping his daughter was "morally reprehensible" the act was "confined" to his daughter and that therefore the man did not pose a threat to society. He further said that the girl had a good chance of recovery. In a country where it is said that there is a rape committed every 36 seconds and where the law provides a minimum sentence of life imprisonment unless there are mitigating circumstances these pronouncements unleashed a wave of anger in women's rights groups. The prosecutor instantly filed a notice of appeal. In the aftermath newspapers reported that a Parliamentary Committee had summoned the judge to appear and explain himself over the sentence. This began a counter-protest from judicial circles as such action by Parliament would amount to encroachment into judicial independence. The wisdom of the Minister of Justice in a public statement quelled the situation. He said, inter alia:

> "In terms of our constitution, the judiciary is independent from both the legislative and the executive. The principle of separation of powers and the independence is strongly entrenched in our constitution."
>
> "The judiciary as an organ of State had to be accountable in its actions, but this did not mean that judges should appear before a parliamentary committee to explain their judgments."

These are just a few recent instances where judges have been taken to task by either disciplinary tribunals, appellate courts and the public when they abuse their judicial power. They undermine public confidence in the justice system.

The excessive use of coercive powers like contempt of court has been a concern in some countries. It was a serious problem in Malaysia a few years ago when lawyers were committed and sentenced. The manner in which this power was invoked

summarily by the Supreme Court of Sri Lanka in the Michael Fernando case earlier this year brought the Court into severe criticism from various quarters including myself. It obviously left a chilling effect on public's access to justice and freedom of expression. It even intimidated the legal profession. I am glad that the government has responded to the concerns expressed and has set up a committee to consider the need for a legislation on the parameters of contempt of court. That an unrepresented lay litigant attempting to seek justice in the highest court of the land, however misconceived his grievance may have been, could be convicted and sent to prison for one year is beyond belief. The worst form of injustice in any civilized society is injustice perpetrated through the judicial process. It became aggravated when the court is the highest in the land as there will be no further appeals and moreover it remains a dangerous precedent for lower courts. Another objectionable feature in that case was that the Chief Justice was a respondent to the petition. However ill conceived that move by the petitioner was as a matter of principle and in accordance with S.49(3) of the Sri Lanka Judicature Act the Chief Justice should have disqualified. It was his presence the petitioner seemed to have objected. He was quite right.

The often cited judgments of Lord Atkin in 1936 as a proper balance of the two competing interests and that of Lord Denning in 1968 on how courts should exercise restrain in too readily invoking contempt powers are worthy of constant reminders to judges all over the Commonwealth.

Lord Atkin said:

> *"The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice,*

> *they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men."*[11]

Lord Denning said:

> *"This is the first case, so far as I know, where this court has been called on to consider an allegation of contempt against itself. It is a jurisdiction which undoubtedly belongs to us, but which we will most sparingly exercise: more particularly as we ourselves have an interest in the matter. Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself. It is the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be it own vindication. Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what*

the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done.

So it comes to this. Mr. Quintin Hogg has criticized the court, but in so doing he is exercising his undoubted right. The article contains an error, no doubt, but errors do not make it a contempt of court. We must uphold his right to the utmost."[12]

I know of another case in the sixties when a lay litigant having lost her case threw the books at the three judges of the Court of Appeal of England & Wales. The books flew past the head of the presiding Judge, Lord Denning. All Lord Denning said was a direction to the Court usher to lead her out of the Court. She exclaimed: *"I am surprised that your Lordships are so calm under fire"*. The conduct of Lord Denning in those circumstances demonstrated highest judicial integrity and compassion.

While the executive arm is often apprehensive of judicial independence the judicial arm is often apprehensive of judicial accountability. I have in my reports observed that judicial accountability is not inimical to judicial independence. Though judicial accountability is not the same as accountability of the executive or legislative branches of the government yet judicial accountability without impinging on judicial independence will enhance respect for judicial integrity. The UN Basic Principles do not provide for judicial accountability save for provision on procedure for judicial discipline.

Over the last three years in association with the Judicial Group on Strengthening Judicial Integrity and collaboration with the Consultative Council of European Judges of the Council of Europe and the American Bar Association and Central and European Law Initiative (ABA/CEELI) we deliberated in the drafting of the Bangalore Principles of Judicial Conduct. The drafting was finalized and adopted in November last year at the Hague.

At the last session of the Commission in April this year I presented these Principles for its consideration. There was unanimous support for these Principles from member States. In a resolution the Commission noted these Principles and called upon member States, the relevant UN organs, intergovernmental organizations and non-governmental organisations to take them into consideration.

In my report I observed that these principles would go some way when adopted and applied in member States to supporting the integrity of judicial systems and could be used to complement the United Nations Basic Principles on the Independence of the Judiciary to secure greater accountability. The Bangalore Principles are now available in the six United Nations official languages.

Judicial accountability today is the catch phrase in many countries. Judges no longer can oppose calls for greater accountability on grounds that it will impinge on their independence. Judicial independence and judicial accountability must be sufficiently balanced so as to strengthen judicial integrity for effective judicial impartiality. Establishment of a formal judicial complaints mechanism, is therefore not inconsistent with judicial independence under international and regional standards. Principles 23-28 of the Beijing Principles imply some guidelines for such a mechanism. In this regard judges should take the initiative before it is forced upon them by the politicians.

In South Africa recently the judges themselves drafted a legislation to provide for a judicial complaints commission. There was however a dispute between the executive and the judiciary as to the composition of the commission. The judges wanted the composition entirely of sitting judges. The executive felt that it should not be left entirely with the judges as that would negate transparency. I recommended to the government that the composition should be left entirely to the judges, and if necessary retired judges could be included. Judges who took the initiative to draft the legislation for such a mechanism, should be entrusted

to self-regulate the mechanism for an initial period of at least seven years. Thereafter the effectiveness of the mechanism could be reviewed. I heard very recently that the government has conceded and the Commission will be composed entirely of judges.

The need for a separate complaints mechanism for judges is the subject of debate, I understand, in many countries including the United Kingdom, New Zealand, Australia, Ireland and India. In some jurisdictions informal internal mechanisms have been set up. But these are found unsatisfactory.

Another dimension of judicial accountability is judicial education. Often judges upon appointment feel that they are appointed for their learning and therefore do not require further continued education while holding judicial office. This is a fallacy. Continued legal education for judges should be provided not only to keep them abreast of developments in the law and practice both domestically and internationally but also to what is sometimes described as "social context education" or "sensitivity training". This is to enable them to be aware and better respond to the many social, cultural, economic and other differences that exist in the society particularly in pluralistic societies. Such education should include international human rights, humanitarian and refugee law. Another vexed question is whether such programmes should be compulsory. I have in one of my reports recommended compulsory attendance in such programmes. More than anything attendance at such programmes could improve judicial competency. However, the programmes should be structured and managed by the judiciary.

Conclusion

I have attempted to highlight the prevailing tension between independence and accountability. When the international and regional standards on judicial independence were formulated the issue of judicial accountability was not apparent. Emphasis was all on securing judicial independence resulting in the entrenching

of the requisite protective insulations. No doubt it was implied in these standards that those appointed to the high office of the judiciary will be men and women of the requisite qualities and therefore their performance and conduct will be beyond question.

Judges must also remember that the insulations provided to protect the independence and impartiality were founded on public policy. Public policy can change with times. The discerning public today supported with the fast improving information technology has high expectations of the judiciary. If judges by their performance and conduct do not meet those expectations the insulations will slowly but surely be whittled away, again, on grounds of public policy.

Last year the Marga Institute conducted an inquiry into the judicial system of Sri Lanka and published its findings in a book entitled "A System Under Siege". On Fairness and Impartiality of the system the perceptions of court users were as follows:

> *"Almost 84% (83.98%) of all the respondents did not think that the Judicial System of Sri Lanka was always fair and impartial. In fact, one out of every five thought that it was never fair and impartial. Similarly 87% of the Court Users did not believe that the Judicial System was always fair and impartial. The Remand prisoners constituted the group among Court Users with the least amount of trust in the impartiality and fairness of the Judicial system of the country with 49% asserting that, it was never so."*

On Incorruptibility the perceptions of court users were:

> *"Among the respondents as a whole, the prevalent view (83.93%) was that the Judicial System of Sri Lanka was corruptible with a mere 16.06% asserting that it is NEVER corruptible."*

These figures must be of serious concern to the nation. However, among the stakeholders, the judges formed the single large group, believed that the system was always fair and impartial.

Independence of the judiciary is founded on public confidence – in essence public trust. Without that confidence and trust the system cannot command the respect and acceptance that are essential to its effective operations. It is therefore important that a court or tribunal should be perceived as independent, as well as impartial and the test should include that perception. As said by a former Chief Justice of Canada it is the lifeblood of constitutionalism in democratic societies.

It is not the confidence of the judges or their perceptions that matters. The right to an independent tribunal is that of the consumers of justice. It is the protective right of all human rights. It is neither a right nor privilege of the judges. This must be drawn home to the judges. I have often heard judges asserting that they are independent and impartial. It is how the public perceive their performance and conduct that matters. Judges must remember that public confidence in the system is the ultimate safeguard of their independence. As Shimon Shestreet said his classic work on "Judges on Trial":

> *"Written law if not supported by the community and constitutional practice, can be changed to meet political needs, or can be flagrantly disregarded. On the other hand, no executive or legislature can interfere with judicial independence contrary to popular opinion can survive,"*[13]

References:

1 Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island and others (1997) Vol. 150 D.L.R. (4th) Series, p. 577.

2 Starrs and Chalmers vs. Procurator Fiscal (PF Linlithgow) (1999) SCCR 1052; (2000) SLT 42.

3 *Govt. of Bangladesh & Others* vs. *Md. Masdan Hossain & Others* (Supreme Court of Bangladesh 52 D.L.R. (AD)82. It is learnt that the Govt. applied for review of the judgement by Civil Appeal No. 189 of 2000 but the same application was dismissed by the Supreme Court on 18.6.2001.

4 *Van Rooyen & Ors* vs. *The State and ors* – CCT. 21/01.

5 Supreme Court Advocates on Record Association and anor. V. State of India JJ 1993 4 SC441.

6 Special Reference No. 1 of 1998 JT 1998 5SC 304.

7 *Al –Jehad Trust* vs. *Federation of Pakistan* PLD (1996) SC 324.

8 The Bienvanne Inquiry, Canadian Judicial Council Annual Report 1996-97 p. 30.

9 Moreau-Berube V New Brunswick (Judicial Council) Supra.

10 Damjanovic v. Sharpe Hume & Co (2002) NSWCA 407.

11 *Ambard* vs *AG for Trinidad*, Tobago (1936) 1 704. PC.

12 R.V. Metropolitan Police Commission Exparte. Blackburn (No. 2) (1968) 2All. ER. 319 at 320.

13 Judges on Trial by Shimon Shestreet p. 392.

ICES

COLOMBO

Printed by Unie Arts (Pvt) Ltd.