REPORT OF ONE-MAN COMMITTEE FOR REVIEW OF REPORT OF TRIBUNAL OF INQUIRY INTO MINHAJ-UL-QURAN COMPLEX, MODEL TOWN, LAHORE INCIDENT.

BY

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Review of the

Report of Tribunal of Inquiry into Minhaj-ul-Quran Complex

Model Town, Lahore Incident.

The Government of Punjab vide Notification No. SO (SPL-CTS) 9-53/2014 dated 10th September, 2014 constituted one man Committee comprising the undersigned to have independent analysis and expert opinion on Report of the Tribunal of Inquiry on Minhaj-ul-Quran Complex incident dated 17th June 2014. The Home Department on receiving the Report along with the documents from the Tribunal of Inquiry on 9th August, 2014, found the record delivered deficient/incomplete in the following respects:

i. Under the heading "Efforts", "Report" refers to several Annexes from Annex "A" at page 1 to Annex "Q" at page 14. None of these annexes are attached to the "Report" ;

ii. Under the heading "Position" the "Report" refers to affidavit(s) and statements (pages 15 to 20). None of these are attached with the "Report".

iii. Under the heading "Evidence of Witnesses" (pages 21 to 45) the evidence of Inquiry Witnesses ("IWs") has been discussed. The transcript of evidence/statements of theses witnesses is not attached.

iv. The affidavits (Page 46 to 47 of the "Report") are not attached.

v. Also missing from this "Report" are the reports of ISI, IB and Special Branches (pages 48 to 52 of the "Report")

vi. The entire "Snaps Gallery" neither reveals its sources nor is it signed.

vii. In the orders contained under the heading "Order Sheet" (pages 75 to 128), the orders from page 80 to page 128 are not signed.

The Registrar of the Tribunal was requested by the Government of Punjab Home Department on 13th August 2014 to provide the documents mentioned above either in original or certified photocopies thereof. Besides, Government of the Punjab has also requested that original or certified photocopies of all documents and materials, including but not limited to affidavits, statements, reports, transcripts, CDs, DVDs, etc. referred to or relied upon or which form the basis of the "Report" may be provided to enable it to proceed further. The reports of ISI, IB and Special Branch despite request were not provided.

The Report of the Tribunal of Inquiry was examined by the Home Department, the Law Department and the Advocate General Punjab.

1. Preliminary:

Historical Legal Aspects;

The West Pakistan Tribunals of Inquiry Ordinance 1969, the Pakistan Commission of Inquiry Act, 1956 as well as the Indian law on the subject i.e The Commission of Inquiry Act, 1952 have been modeled on the British Act of 1921. The observations of Lord Denning in the introduction of his Report (into the scandal relating to British Defense Secretary John Profumo) as to the nature of the Inquiry and powers conferred upon the Commission, throw sufficient light on the scope of Pakistani and Indian Laws.

Lord Denning in Para 5 of the Report observed:-

"The appointment of a tribunal under the Tribunals of Inquiries Act, 1921 is an elaborate and costly machine, equipped with all the engines of the law- counsel, solicitors, witness on oath, absolute privilege, openness to the

public (so far as possible) and committal of contempt- but it suffers from invincible drawback, in doing justice, that there is no prosecution, no charge and no defence".

In M.V. Rajwade v. Dr. S.N. Hassan, (AIR 1954 Nagpur.71), the scope and content of section 3 of the Act was discussed. Justice B.P. Sinha, C.J. (as his Lordship then was) observed in paragraph 12 of the judgment as follows:

"An Inquiry under the Commissions of Inquiry Act, 1952, on the other hand, is of wholly different character. There is no accuser, no accused and no specific charges for trial; nor is the Government, under the law, required to pronounce, one way or the other, on the findings of the Commission".

Again Supreme Court of India in the case of Ram Krishna Dalmia v Justice S.R. Tendolker (AIR 1958 S.C 538) in the Commission of Inquiry into the affairs of Dalmia Jain Group, observed:-

"Therefore, as the Commission we are concerned with is merely to investigate and record its findings and recommendations without having any power to enforce the, the inquiry and the report cannot be looked upon as a judicial inquiry in the sense of its being an exercise of judicial function properly so called..."

2. Value of Report of the Commission:

The Superior Courts of India have held that a Commission of Inquiry appointed under Section 3 of the Indian Act is merely a fact finding body and its Report is not binding on the Government. (Manohar Lal v. Union of India, AIR 1970 Delhi 178). A Commission of Inquiry is not exercising any judicial function and he is not a Judge and does not behave like one, he is not there to hear and

decide. He is only there to hear and report. Government must no doubt consider it but they are in no way bound by it. Nor are they confined to it (AIR 1971 Orissa 175). (See also, Dr. Baliram Waman Hiray v. Mr. Justice B. Lentin and others, AIR 1998 Supreme Court 2267), "A Commission is obviously appointed by the appropriate Government "for the information of its mind" in order for it to decide as to the course of action to be followed. It is, therefore, a fact finding body and is not required to adjudicate upon the rights of the parties and has no adjudicatory functions. The Government is not bound to accept its recommendations or act upon its findings".

In Mohammad Haneefa v. State of Kerala, it has been observed as follows:

The law relating to Commission of Inquiry as so understood shows that the function of the Commission is only to inquire and report. He does not decide. Government is also not bound by what the Commission says. They are not also confined to the report. It is for the Government to consider and take some action as they deem fit.

In a Full Bench Decision (P.P.M. Thangaiah Nadar Firm v. Govt. of Tamil Nadu, AIR 2007 (NOC) 954(Mad), the Madras High Court held that Report of Commission of Inquiry appointed under Section 3 of the Act is not binding on State nor its findings are binding on those against whom any recommendation is made. The conclusions of a Commission of Inquiry are also not admissible in a Court of law, in any criminal case or even in a civil case. Such conclusions are merely advisory in nature. However, the State would be bound by the findings of a Commission to the extent such report is accepted by the State.

The above stated legal position of the nature, value and legal implications of the Report of Commission of Inquiry should remain in mind

while making the Report and recommendations by the Commission and also in the notice of the Government for rejecting or accepting the Report in full or in part. The recommendations properly made are of great importance to the Government in order to enable it to make up its mind as to what Legislative or Administrative measures should be adopted to eradicate the evil found or implement the beneficial objects it has in view.

Keeping in view these very principles I proceed to examine the Report and the recommendations made therein.

At the very outset it is pertinent to note that in the Report at pages 53 to 60, "Facts revealed chronologically" have been detailed and at pages 61 to 64 "Facts unearth(ed)" by the Tribunal have been noted. These may be treated as findings of facts but the Tribunal then proceeded to record its conclusions, which is record of determination of the Judge in respect of the issues involved.

3. Facts Still Not Unearthed:

The Tribunal of Inquiry despite having received CDs as well material from different TV channels, Print and Electronic media could not know of the incident in which Gullu Butt had spear headed the police team which statedly lodged an attack on the PAT workers. Gullu Butt was shown to have smashed private vehicles under the very gaze of the police officials. The police which is supposed to provide protection to the life and property of the citizens, cannot be allowed by any Government to destroy private property. What was the level of the Police officials who allowed Gullu Butt to indulge in vandalism and smashing of vehicles? Such a vandalism with connivance of the police officials brought much discredit to the Government. The Police officials should have been identified and asked as to whom they were serving by bringing bad name to the Government.

This incident which is till date under discussion in the Print and Electronic media has not come to the notice of the Tribunal of Inquiry.

The other incident involving Gullu Butt not noticed by the Tribunal of Inquiry was mentioned by Tariq Aziz S.P IW-22 in his statement (Page 35 to 37) in following terms:

> "there he saw two armed PAT activists present on the roof tops and the police officials were shouting to save themselves from the bullets. He also met DCO, DIG (Operations), SPs Security, Headquarters, Civil Lines and CIA. Upon the order of DCO the encroachments were being removed but the Crain driver refused to drive due to direct fire on the Crain. A private person, namely, Gullu Butt started driving it. Later, he met him and surprisingly embraced him as an acknowledgement".

These two incidents involving Gullu Butt should have been noticed and dilated upon. Did both the incidents occur under one and the same set of Police teams or under different officers and were both the incidents two distinct occurrences.

The Government will be well advised to hold inquiry into the motives and design of those officers who connived at vandalism of Gullu Butt and thus were responsible for bringing discredit to the Government of Punjab.

4. Facts Ignored:

The second factual aspect repeatedly noted by the Tribunal of Inquiry is that the PAT workers were holding in their hands wooden sticks, CDs provided by Private TV channels do not show any firing from Minhaj-ul-Quran workers' side

and no PAT worker was seen with fire arm weapons. The PAT workers were only throwing bricks and the patrol bombs.

While recording these findings the Tribunal of Inquiry conveniently ignored the report of IB (Page 50 of the report) which is to the following effect:

> "It was reported that at about 09/09:30 a.m on 17.06.2014 the police made another attempt while using tear Gas, etc. to advance toward Minhaj-ul-Quran Secretariat and when this section of police reached near the secretariat a guard manning the post on first floor of the terrace of Tahir-ul-Qadri house opened straight fire which left two policemen injured."

The three police officials received bullet shots at about 9.30 a.m totally unprovoked when the police wanted to recover the besieged police officials. The police officials received gun shot injuries as is apparent from medical record produced during the inquiry.

Tariq Aziz S.P IW-22in his statement (page 35-37) repeatedly states that, PAT workers resorted to severe aerial firing during attacks on the Police. He also makes mention of Gullu Butt in following terms, "there he saw two armed PAT activists present on the roof tops and the police officials were shouting to save themselves from the bullets. He also met DCO, DIG (Operations), SPs Security, Headquarters, Civil Lines and CIA. Upon the order of DCO the encroachments were being removed but the Crain driver refused to drive due to direct fire on the Crain a private person, namely, Gullu Butt started driving it. Later, he met him and surprisingly embraced him as an acknowledgement". The above stated version as to firing by PAT workers appears not to have been challenged in cross-examination by the Tribunal.

Again Salman Ali Khan IW-21 (SP Security) states that he along with Police personnel was made hostage and under siege in different pockets and were rescued by few constables. He again came under attack and ran away followed by miscreants who resorted to straight firing upon them resulting into a firearm injury to Zeeshan Constable. In this connection CCPO's report that two SMGs and three 30 bore pistols were taken into possession from the PAT miscreants.

In the presence of aforesaid evidence on record how could the finding be made that PAT workers had not used fire arms.

5. Inspection of the Site of Incident:

Tribunal of Inquiry visited the Site of Incident on 19-06-2014 that is soon after its constitution. Obviously at that time it was not aware of the respective positions. The inspection was made at *Maghreb* time when the darkness sets in and the visit at such a time would not be of any practical utility. May be for that reason notes of the visit and the facts seen were not prepared, despite requirement of the law. Inspection of the scene of crime intelligently conducted helps in understanding of the events and facts enumerated by the witnesses. Inspection of buildings or the roof tops from where firing was resorted to and the place outside the door where women workers blocked the entrance of Police (see statement of SP Shirazi IW-20 who was caught by the collar and statedly abused) and where the two women received fatal injuries, may have facilitated understanding of the relevant facts.

The inspection of the site was inconsequential but the reader of the Report cannot even guess as to the impression that the Tribunal of Inquiry carried and thus affected its findings and conclusions.

6. Conclusions:

The Tribunal of Inquiry has assumed the role of a Judge while recording verdict/ decision in respect of these issues. These conclusions so recorded suffer from factual and legal infirmities as under :

i. The conclusion that the then Law Minister Rana Sanaullah had the strong point of view who decided not to allow Dr. Tahirul Qadri to take any opportunity to fulfill his objective. The reasons which prevailed with the then Law Minister for directing removal of the barriers on the public roads outside Idara Minhaj-ul-Quran is evident from the very next sentence recorded by the Tribunal in this very conclusion; that "the Commissioner Lahore had reported that the same were considered and treated as encroachment and therefore the Chair decided to remove them with immediate effect". Reference is invited to the report of the Commissioner available at page 594, relevant portion reads as under:

> "Pursuant to a query raised in an earlier meeting as to why the barrier / barricades installed on public roads around Minhaj-ul-Quran Secretariat had not been removed despite an ongoing anti encroachment campaign by the CDGL, I, during a meeting held on 16.06.2014 and chaired by the Minister for Law and Local Government, reported that the facts on the ground had been obtained from CDGL and Capital City Police, who had both reported that there were several barriers at the site and these were already in the notice of the concerned TMA as illegal encroachments. After obtaining views of the participants, the chair decided that the said moveable and static barriers on

public roads being illegal encroachments; be removed with immediate effect."

ii. It is evident that the then Minister Law and Local Government has based the decision for removal of the barriers on legal grounds and not for any extraneous reasons. The observation of the Tribunal suggesting that the decision was taken because of some strong point of view not to allow Dr. Qadri to take any opportunity is therefore not borne out from record.

iii. Again, in the Report the Tribunal has recorded a further finding that so far as the decision for removal of the illegal barriers is concerned, "Dr. Tauqir Shah also consented on behalf of the Chief Minister, Punjab, for the removal of the barriers." It is to be noted that this finding of the Tribunal is also absolutely against the record, as no witness has made any such statement before the Tribunal. In fact, the evidence collected by the Tribunal during the inquiry contradicts this "finding" of the Tribunal too. In this respect reference may be made to the cross-examination of Dr. Tauqir Shah by the Tribunal where, in response to a question pointedly put to him by the Tribunal, Dr. Tauqir Shah has specifically stated that the matter pertaining to removal of illegal barriers did not fall within the purview of Chief Minister, rather it fell within the domain of the Minister for Local Government. This statement by itself is sufficient to establish that there was no question of Dr. Tauqir Shah, the then Secretary to Chief Minister, Punjab, to have consented to the decision for removal of barriers on behalf of the Chief Minister, Punjab. In this context the precise statement made by Dr. Tauqir Shah during his cross-

examination by the Tribunal with reference to the decision taken in the meeting held on 16.06.2014 for removal of the illegal barriers is as follows :

> "I simply said to go by consensus since it was not within the purview of the Chief Minister. I did not convey the outcome of the meeting to the Chief Minister as it was a matter within the domain of Minister Local Government."

Similarly, no other witness in his affidavit, statement on oath or cross-examination has made any statement that "Dr. Tauqir Shah also consented on behalf of the Chief Minister, Punjab for the removal of the barriers." This conclusion of the Tribunal, therefore, is also manifestly against the record. Moreover, Secretary to Chief Minister could not assume the role of the Chief Minister to accord consent on his behalf, neither such a role was ever delegated nor could either be legally delegated. The Secretary at best conveys the consent of the Chief Minister after explicitly obtaining the consent. No such thing has either been asserted or alleged. The conclusion that Dr. Tauqir Shah consented on behalf of the Chief Minister is unfounded.

iv. Again observation of the Tribunal that the participants (of the meeting held on 16.06.2014) "were in knowledge of the Orders passed by Lahore High Court in ICA No. 155/2011 and no legal opinion from Advocate General was sought prior to the decision to start the operation." is thus un-warranted as there is nothing on record that the order passed by Lahore High Court in ICA No. 155/2011 was placed before or discussed during the said meeting. The question about the

order passed in ICA No.155/2011 was put (during cross-examination) in different context to Rana Sanaullah as is apparent from the answer given to the Tribunal. The answer he gave was: "We have not consulted the Advocate General Punjab so as to solicit his opinion on the orders of ICA No.155/2012" (actually 2011). It is thus evident that the said question never pertained to the fact as to whether the Order of ICA No. 155/2011 was placed before or discussed in the meeting of 16.06.2014 and, as such, the inference drawn by the Tribunal that the participants of the said meeting "were in knowledge of the Orders passed by Lahore High Court in ICA No. 155/2011" is not supported by any evidence on the record. Secondly statement of Rana Sanaullah that "it was the duty of the Commissioner, Lahore who was duty bound to get such opinion" has to be read in the context of the factual position, as narrated by all the concerned relevant witnesses, that the report submitted by the Commissioner, Lahore on 16.06.2014 regarding the "several barriers at the site" being "in the notice of the concerned TMA as illegal encroachments" was so submitted pursuant to a query raised in this behalf (i.e. as to why the barriers / barricades installed on public roads around the Minhaj-ul-Quran Secretariat had not been removed despite an ongoing anti encroachment campaign by the CDGL) during an earlier meeting (and not that this matter had been taken up for consideration for the first time on that very day, i.e. 16.06.2014). The Commissioner was never called by the Tribunal or otherwise asked as to whether he had obtained any legal opinion from the Advocate General, Punjab vis-à-vis the Orders passed in ICA No. 155/2011 before submitting his report to the Minister for Law and Local Government.

v. Rana Abdul Jabbar, DIG (Operations) (IW14) in his deposition described these barricades as the mammoth barriers iron barricades at site to be removed to open the roads / public thorough fairs which had been shutdown at their own will under the garb of single stay from the Honorable High Court (which there was admittedly none). The Tribunal of Inquiry noting in the above manner held that such facts and circumstances under which meeting was held lead to the most unfortunate incident in the history of Pakistan, thereby suggesting that violence and deaths which took place on 17.06.2014 when the City District Government had gone to the site for removing the illegal barriers was direct result of the decision taken in the meeting held on 16.06.2014. Even if the order of removal of the said barriers was legally defective, there is nothing on record to imply that the violence and deaths that took place at site on 17.06.2014 were the direct result of or necessitated by the said decision as there is nothing to suggest that while taking decision to remove the said barriers or conveying the same, to the concerned authorities there was slightest indication that removal is to take place come what may and even if violence or excessive force has to be resorted to in order to achieve the said purpose. The participants of the said meeting appearing before the Tribunal made categorical statements that resort to violence was not at all an option for purposes of removal of the barriers. During cross-examination the then Law Minister stated that while conveying my decision to the CCPO, Lahore I told him not to create a *Tamasha* who assured that barriers shall be removed quietly without any problem. He further stated in cross-examination that at 11 a.m I talked to CCPO, Lahore who did not convey any gravity of the situation

requiring the review of my decision as according to him the operation was almost complete. Thus the decision to remove the barriers at site was not the real cause "leading to most unfortunate incident in the history of Pakistan" rather it was something that transpired at the site on 17.06.2014 that triggered off the said incident and the attitude of the Management of Idara Minhaj-ul-Quran which admittedly had given an ultimatum to the SP Model Town to leave within 10 minutes (see page 55 of the report).

6.2. Conclusion as to the role of the police vis-à-vis PAT workers in the Model Town incident:

The conclusions noted at page 66 and 67 of the report read as under:

"According to DCO Lahore on public complaints, the staff of TMA Gulberg Town and TMAs of Zone II reached the spot in the mid night of 16 June for removing the encroachments. The furious mob and sympathizers mainly young men commenced pelting stones on police. The police as retaliatory measure resorted to firing towards the protestors leaving many persons injured at the site of the incident and some of whom succumbed to their injuries afterward. (Report from a security agency). Admittedly, such a level of offensive by police by any stretch of imagination did not commensurate with the level of resistance by unarmed PAT workers. Again such were the facts and circumstances under with 14 persons have been shot on the vital parts of their bodies."

It will be noted that security agency has not been named. The report also has not been identified or made part of the record. So on the basis of such a secret report from a security agency, the Tribunal has proceeded to hold that

"admittedly, such a level of resistance by unarmed PAT workers and that such were the facts and circumstances under which 14 persons have been shot on the vital parts of their bodies. It is not shown as to from where the figure 14 have been taken as the actual fatalities that occurred in the incident is 10 and not 14. The record sufficiently describes the situation which developed resulting into the death of 10 persons and injuries to PAT workers and police officials. It is on record that there was at least three occasions on which the police had attempted to negotiate with the PAT leaders for removal of the barriers on their own, of which two such occasions are mentioned at page 53 of the Report while third is mentioned at page 27 of the Report, wherein statement of Rana Abdul Jabbar, DIG (Operations) has been quoted which reads as under:

> "On 17.06.2014 at about 8.45 a.m he went at the Idara near the Government Model College for boys and started negotiating in order to persuade the administration of the Idara to cooperate in removal of illegal barriers or, in alternate, seconded the earlier offer made by AC Model Town and the SP Model Town to withdraw subject to a written undertaking by them to remove the illegal barriers on their own....".

All these facts are unequivocally incompatible with the conclusion drawn by the Tribunal that the police had gone to the site for committing violence or "to abide by the command announced secretly (or openly) to achieve the target at the cost of even killing the unarmed but precious citizens of Pakistan" (re p.68 of the Report).

It is quite evident that had any such command, "secretly (or openly)" been given by any person, the police would have had no occasion to try to negotiate

with the PAT activists for removal of the barriers on their own on three different occasions, i.e. at 12.45 a.m (night) at 1.30/2.00 a.m (re: p. 53 of the Report) and at 8.45a.m (re:p.27 of the Report)."

It is also pertinent to note the statements of IW-21 and IW-22. Muhammad Tariq Aziz, SP Model Town (IW-22) has stated that they were attacked by the PAT workers who resorted to severe aerial firing. One Sharif, ASI was beaten up and made hostage upon which the DIG assured for sending force from other Divisions for assistance. Police officers arrived and the official was rescued in semi-conscious condition. During this time the PAT workers kept firing and took position at the roof tops of the International Market resulting into bullet injury to three Constables at around 10.30 a.m.

Salman Ali Khan, former SP Security (IW-21) also reached to assist the SP Model Town at the site of operation and statedly made efforts to disperse, arrest the PAT workers and to rescue as well as recover the kidnapped, besieged and wounded police personals. During which he with some police officials resorted to benign and harmless self-defense aerial firing which according to him had not caused any fire arm injury to any PAT worker.

Despite the aforesaid position of the Police, the finding recorded is that the police deliberately withheld information from the Tribunal and did not utter a single word about the person under whose command the police resorted to firing upon PAT workers and concealed the facts as to what transpired at the spot (page 67 of the report).

The facts emerging from the record in respect of afore noted finding of the Tribunal are;

a) 9 police officers appeared as IW-14 to IW-22 and also submitted their detailed affidavits and were also subjected to cross-examination. The Tribunal, therefore, should have been able to bring out the facts which it says have not been disclosed.

b) Rana Abdul Jabbar, DIG (Operations) has given a detailed account of what exactly transpired from the night of 16th to the completion of the so called job by noon of 17th June, 2014. He disclosed the specific incidents at site which actually triggered indiscriminate firing resulting in injuries to scores of persons including 29 policemen and death of 10 persons also.

c) The police officers who appeared before the Tribunal have given a detailed account of their participation in the incident and the refusal of the administration of Idara Minhaj-ul-Quran to voluntary demolish the different kinds of barriers on their own, or to allow the City District Government to remove the same, and the giving of ultimatum to Police to leave the site within ten minutes.

d) It is evident from the Report that when the Administration was holding negotiations, in the meanwhile more and more workers were collected to offer resistance through violent means (pelting stones, petrol bombs and firing); using lady workers as human shield to block entry of the Police into the building from where Police was being fired upon.

e) The City Government Administration was only to demolish the illegal barriers. Assuming that act of removal was illegal, the same could be challenged before the High Court, on the basis of the Order in ICA. Why such an aggression was being resorted to.

Seen the scenario in retrospect the object seems to keep the multiple types of barriers intact to keep the premises of Minhaj-ul-Quran inaccessible for the law enforcing Agencies as from these premises so called Inqlab March was to be commenced. The object of using these premises as safe citadel for launching the movement against the Government explains the stubborn attitude of not showing allegiance either to law and to the Government, leading to the keeping of the Police personnel under siege. This situation necessitated taking of steps by the Police to rescue their officials. These events so taking place triggered response which resulted into death and injury to resisting workers and Police officials.

6.3. Two Contradictory Versions re advancing of the Police towards residence of Dr. Qadri resulting into 10 deaths and injuries to 70 citizens:

The Tribunal of Inquiry has relied on both the versions without realizing that both cannot be true as is apparent from the sequence of events noted by the Tribunal itself (highlighted hereunder):

i. At 9:20 a.m heavy contingent of Police was deployed which started advancing towards the residence of Dr. Qadri under direct command of DIG Operations and DCO Lahore. This was highly resisted, the Police reached the main gate of the house, women workers resisted and grabbed SP Sherazi from the collar. Two women Shazia and Tanzeela were shot down and were moved to Jinnah Hospital at 12:00PM.

ii. An important fact was revealed that in order to circumvent the aggression of PAT workers then DIG (Operations) got assembled S.Ps and DCO Lahore to devise strategy to disperse the crowd from Minhaj-ul-Quran park side. In wake of strategy S.Ps present there,

advanced with force. The facts reveal that till 10:00-11:00 a.m immense firing by the Police was seen in the vicinity".

This finding again is unwarranted. Had there been immense firing by the Police during this time, a large number of people must have received injuries. Hospital record does not show that a large number of people from this alleged firing were taken to any hospital except a few injured persons.

The first injured in this incident reached the hospital at 4:15 a.m and the most of the injured persons reached from 12 noon to 2:28 PM. The wounded persons who died reached the hospital in between 12:02 to 2:19 p.m.

iii. At 11:00 a.m when SPs were reporting to DIG Operations, the SP Security had already called the Elite force which had already arrived around 10:40 a.m PAT workers had heard from each other at about 11:00 a.m that two women have been killed.

This was disclosed by Waqas Masih injured. Perusal of last line of Page 58 and first paragraph of page 59 shows that place where Waqas Masih and other injured persons received injuries is different from the place where the two women received injuries.

iv. It was after the Elite force reached at the site that the Police advanced towards Secretariat of Minhaj-ul-Quran and residence of Dr. Qadri and during this assault the Police resorted to aimed fire which resulted into 10 deaths and 70 injuries (page 59 of the Report).

The version noted about the advancement of the Police towards Dr. Qadri's residence is given as under (Page 56-57)

At about 9:20 a.m a heavy contingent of Police was deployed which started advancing towards the residence of Dr. Qadri under direct

house of Dr. Tahir-ul-Qadri, women workers offered resistance and grabbed him by his collar. Two women Shazia and Tanzeela were shot down. They both sustained firearm injuries and were taken to the hospital at 12:00 a.m.

So the Tribunal of Inquiry has itself given two contradictory versions as to the timings of "advancing towards the residence of Dr. Tahir Ul Qadri and Minhaj-ul- Quran Secretariat".

If it was at 9:20 a.m then these were not the personnel of Elite force as they had reportedly arrived at about 11 a.m on the scene. If the Elite force had launched the attack after 11 a.m then the statement of Waqas Masih that he heard at 11 a.m the two women had been shot dead, cannot be believed, which statement being hearsay is otherwise of no value but the Tribunal of Inquiry has however relied upon it.

In case of a definite finding as to the Police team which had advanced, an inquiry as to the weapons issued them and thus used could be ascertained and the empties if any found from the scene of occurrence or from the body of the victims could be matched. No such thought was employed to arrive at the truth.

6.4. Finding as to manhandling of the women and hearing the Police announcing to call "Hussain and Ali" to save them:

The most unfortunate are the observations made by the Tribunal of Inquiry (at page 57). "It was painfully noticed that armed policeman statedly manhandled the woman and heard announcing to call Hussain and Ali" to save. The said women kept on raising slogans NARA-E-TAQBEER and NARA-E-HAIDERI.

The most regrettable observation is based on the version of Javed Iqbal IW-33 contained in his Affidavit. The mere reading of the affidavit (page 1040) of this witness shows his over zealousness as according to him at 2.00 clock night when the people of Mohallah were sleeping that all of a sudden firing commenced due to which residents of Mohallah woke up and came on the street. He adds that he asked the armed policemen reason for resorting to firing on which he was told that they have come to remove the barriers. Again perusal of the statement made in cross-examination shows the improvements in the allegations made by him therein with the objective of arousing sectarian feelings. He alleges that he could identify the Police Officer who had fired at the women but fails to give even the rank of Police Officer.

As against above, the version noted by the Tribunal as to what had happened at 1.30 to 2.00 a.m. that night is that discussion between SP, AC and Khuram Nawaz Gandapur, Nazm-e-Ala, Minhaj-ul-Quran, was held. The AC offered to the administration of Minhaj-ul-Quran that if they gave in writing undertaking to remove the barriers of their own, the officials will leave. Thus, there was no mention of firing by the Police at that juncture. The assertion of Javed Iqbal IW in his affidavit that the sudden firing resorted to by the Police made the resident of Mohallah to wakeup is false. Moreover, the Tribunal of Inquiry did not question Mr. Sherazi SP who was grabbed by the women from the collar and abused to find out as if he or any of the Police Officials accompanying him had made any alleged sacrilegious call or that what slogans if any the women who had made the human shield to block entrance of the Police into the house of Mr. Qadri were raising. He in his cross examination improved upon the version given in the Affidavit, by saying that the reason why she was gunned shot was that before her death she was raising slogans, NARA-E-TAKBIR, NARA-E-HAIDERI, LABAIK-YA

HUSSAIN and just before death she said LABAIK-YA HUSSAIN. The crafty Javed Iqbal IW-33 knew about the faith of Presiding Officer and intended to invoke his religious feelings.

It was not noticed that his role was to produce before the Authorities a copy of the Order of the High Court. He produced it and that is it. He did not claim to be part of Administration of the Idara Minhaj-ul-Quran but still he takes upon himself to cover all the relevant events of the incident. In any case for making observations which can arouse sectarian feelings, such a bald statement of interested person should not have been relied upon what to say of acting upon it and making such a strong observation. Even S.P Shirazi who was grabbed by the collar by the women and abused was not asked by the Tribunal of Inquiry if such a sacrilegious uttering was made by him or any other Police Officer at that juncture. At the level of Tribunal of Inquiry such a mischievous effort of such a crafty person should not have been allowed to succeed.

6.5. Grievance raised by the Tribunal for not being conferred with power to order police investigation under section 11 of the Punjab Tribunals Ordinance, 1969:

The Tribunal has noted that "the act of the Government not to empower this Tribunal under Section 11 of the Punjab Tribunals Ordinance, 1969 regarding investigation of any matter coming before it is also a bad one", and that the Tribunal considers the non-conferment of this power "as the circumstances to circumvent the process of digging out the truth." (page 68/69 of the Report).

i. In this respect it is to be noted, firstly that, even prior to the writing of the letter by the Tribunal for conferment of powers under section 11 of the Ordinance, the PAT Workers and its Leaders had expressed their distrust vis-à-vis any investigation which may be conducted by

the Punjab Police and, since the power conferrable under section 11 upon the Tribunal was merely "the power to order a police investigation into any matter coming before it", (re subsection 1 of section 11 of the 1969 Ordinance) and such investigation was to be carried out by the police by exercising powers conferred on it in respect of a cognizable case by Chapter XIV of the Code of Criminal Procedure, 1898, it is evident that if the Tribunal too was to rely for its findings on the local police investigation, how could any credibility or acceptability be attached to the Report of the Tribunal? Or, for that matter, what could conceivably have been the point in constituting a one-man Tribunal under the Punjab Tribunals of Inquiry Ordinance 1969 for an independent ascertainment of the facts and circumstances relating to the Model Town incident if the said Tribunal was to ultimately rely on the findings of the local police, the conduct of investigation by whom had already been objected to and repudiated by the PAT Leaders.

ii. It is also noteworthy that the letter soliciting conferment of additional powers under section 11 of the Punjab Tribunals of Inquiry Ordinance 1969 was written by the Registrar of the Tribunal to the Government of Punjab on 20.06.2014, while on 27.06.2014 the Registrar of the Tribunal was informed that since the investigation of the case registered with respect to the very same incident which had been referred to the Tribunal for inquiry had already commenced under Chapter XIV of the Cr.PC 1898 read with the provisions of the ATA 1997 pursuant to the registration of the FIR of the incident on 17.06.2014, it was for this reason that the powers under section 11 of the Punjab Tribunals of Inquiry Ordinance 1969 had not been

conferred upon the Tribunal. Thus observation of the Tribunal at p. 88 of the Report, that the Government of the Punjab had refused to confer power under section 11 of the 1969 Ordinance upon the Tribunal, is not correct as the Government had simply intimated the Tribunal that the said power had not been conferred on it because the same pertained to investigation of the incident by the police under Chapter-XIV of the Cr.P.C which investigation had already commenced pursuant to the registration of the FIR as noted above. Not only this, in its letter No. SO (Judl.III)9-53/2014 dated 27.06.2014, the Government of the Punjab had further conveyed that "if any further assistance be required by this Hon'ble Tribunal we stand committed to provide the same in the interest of justice." It is noteworthy that the order sheet of the proceedings of the Tribunal shows that there is absolutely no further communication by the Tribunal on this subject after the receipt of the Government of Punjab's Letter No. SO (Judl.III)9-53/2014 dated 27.06.2014. It may be further noted that if the Tribunal had any reservations to the reasons given by the Government of Punjab for non-conferment of powers under section 11 of the 1969 Ordinance, it could very well have communicated the same to the Government. As it is, after having written to the Government for such powers vide its Letter dated 20.06.2014 the same was never pursued thereafter, nor does the said letter find mention in any of the orders passed by the Tribunal subsequent to 20.06.2014.

iii. Even in the Report of the Tribunal, there is no discussion or finding as to whether, and if so, on what grounds, the reason given by the Government for non-conferment of powers under section 11 of the

Ordinance was not acceptable to the Tribunal. It is therefore both illogical and unfair on the part of the Tribunal to subsequently turn around and, while preparing the Report, not only raise the aforementioned grievance for the first time behind the back of the Government, but also to proceed to draw an adverse inference against the Government, i.e. that the omission of the Government to empower the Tribunal to have resort to the police investigation is to be considered as "circumstance to circumvent the process of digging out the truth" and, on this peremptory observation, to proceed to infer that "The entire gamut of facts and circumstance speaks volumes that there was no good intention of the Government to arrive at definite and truthful result." (p. 68-69 of the Report).

iv. In the same vein the Tribunal has noted (at page 69 of the Report) that if it had been "empowered to investigate, the hidden truth might have been exposed". What the Tribunal once again failed to understand is that it is not the Tribunal that acquires the powers to investigate under section 11 of the Punjab Tribunals Ordinance, 1969 rather the Tribunal only gets the authority "to order a police investigation into any matter coming before it", and that too in terms of Chapter XIV of the Cr.PC Be that as it may, since the matter before it (the Tribunal) was already being investigated by the local police, and , thereafter, by a duly constituted Joint Investigation Team and, more importantly, the PAT workers and its Leaders had already expressed their distrust over any investigation which was to be conducted by the local police, there could be no possible logical reason for empowering the Tribunal to have the matter referred to it for inquiry to be carried through investigation by the local police. As a matter of fact, the Tribunal was

constituted only to allay the doubts that might have been in the minds of the PAT workers and its Leaders as to whether an impartial inquiry could be conducted in this matter by any authority subordinate to the Provincial or Federal Government. Thus the very purpose for which the matter was referred to the Tribunal for inquiry would have stood defeated if the Tribunal had been conferred with the powers under Section 11 of the 1969 Ordinance as thereby the Government of the Punjab would have been accused, inter alia, of prompting the Tribunal to be influenced in its inquiry by the investigation conducted by the local police.

v. It is pertinent to note that the Tribunal was notified on 17th June, the request to confer power under section 11 of the Ordinance was made on 20th June, 2014 and by that date no matter was before the Tribunal requiring institution of investigation. Moreover, the Tribunal of Inquiry in its report has not indicated any matter(s) respecting which it wanted to institute investigation by the police.

Thus the conclusion drawn by the Tribunal as noted above, merely because the power under Section 11 of the 1969 Ordinance was not conferred on it, has no legal or factual basis, rather the said inference is inexplicably misconceived.

6.6. Conclusion / decision against the Chief Minister that order of disengagement was not passed at all rather position taken by him appears to be an afterthought defense not taken before the Nation in the Press Conference:

(Last line of page 69 to page 71 of the Report refers). This decision is expressed by saying that while putting the facts and circumstances in juxtaposition, it has become crystal clear that order of disengagement was not passed at all, rather

position taken by Chief Minister, Punjab appears to be an afterthought defense not taken before the Nation in the Press Conference. The facts and circumstances from which adverse influence has been drawn are as follows:

i. Official engagement was started as per the position taken in the affidavit on June 17 after about 9.00 a.m after having seen the standoff at 9.30 a.m on TV, he immediately contacted his Secretary Dr. Tauqeer Shah on phone to order the police to disengage forthwith.

ii. Dr. Tauqeer, Secretary to Chief Minister in his affidavit did mention that order of disengagement was telephonically conveyed to the Law Minister and Home Secretary but in turn was told that the two field officers conveyed the information that the situation is likely to be normalized.

iii. Rana Sanaullah, the then Minister for Law and the Home Secretary, Punjab have not mentioned in their reports about disengagement. As Home Secretary indicated something in the following manner:

> "During this period I also received a call from the Secretary to CM who conveyed the CM's concern regarding the ongoing standoff and said that matter should be resolved peacefully. I informed him that DCO and DIG Operations were on site and trying to resolve the matter peacefully."

iv. The collected reports and the affidavits submitted by the police officers in the filed do not depict that any order of disengagement of the Chief Minister was ever conveyed.

v. The CD of the first Press Conference of the Chief Minister, Punjab after the incident does not specifically mention his direction of disengagement.

The Tribunal came to the finding that record does not reveal its activation, effective communication, implementation, execution or follow-up that the order if any may have been passed listlessly.

The judgment passed by the Tribunal is grossly unfair and unwarranted inter alia for the following reasons:

a. The Tribunal on 24th July, 2014 i.e. at the fag end of the inquiry proceedings required the Chief Minister, Punjab to file affidavit in order to ascertain the facts and circumstances of the incident. The Tribunal did not ask any specific information or explanation. It is an established principal of law that prior to drawing any adverse inference; the Chief Minister should have been confronted with the factors and the contents of the statements so as to give opportunity to explain his position with reference to any such statement. Although Dr. Tauqeer Shah, Secretary to CM in his affidavit did mention the order of disengagement and that he had telephonically conveyed the same to the Law Minister and the Home Secretary, but these averments were not accepted on the assumption that the orders were not carried out. The Tribunal also failed to consider that Rana Sanaullah, the then Law Minister as well as the Home Secretary, Punjab had stated that they received a call from Secretary to Chief Minister who conveyed the Chief Minister's concern regarding the ongoing standoff and concern of the Chief Minister as conveyed was replied by informing Dr. Tauqeer Shah, Secretary to CM (on page 27 of the Report) that DCO and DIG Operations both present at the site were trying to resolve the matter peacefully. It is surprising that despite the aforesaid the Tribunal

arrived at the conclusion that record does not reveal "its activation, effective communication, implementation or follow-up showing that any order had been passed.

This conclusion has been drawn even without asking Home Secretary as to the nature of the Chief Minister's concern conveyed to him by the Secretary to Chief Minister at that particular point of time. In any case, the Home Secretary as well as the officers on the site at the particular time conveyed the assurance that the matter is being resolved peacefully. Even if these were the exact words as opposed to the word "disengagement" conveyed by the Secretary to Chief Minister to the Home Secretary, the same unequivocally mandated that no force is to be used. It is evident that whatever statement on this aspect the Tribunal may choose to believe, or howsoever choose to construe, there is no basis to hold the Chief Minister responsible for any violence that took place at site. The instructions conveyed whether using the word "disengage" or that the "matter should be resolved peacefully", such an instruction is irreconcilable with committing of any violence or use of force at the site. In a nutshell no contradiction can be inferred against the Chief Minister without the later having been confronted with any contrary statement or providing an opportunity to cross-examine the persons who have made any such statement. The inferences drawn against the Chief Minister as such are in breach of rule of natural justice.

b. In this respect the Tribunal has also observed in the Report (at p.71) that "this Tribunal has very carefully seen the CD of the first conference of Chief Minister, Punjab, dated 17.06.2014 made after

the incident in which he did not specifically mention about his direction of "disengagement", despite taking a notice of it in the morning." In this respect it is to be noted that had the Tribunal actually seen the CD of the said press conference "very carefully", it would have definitely noted that at the end of his press conference the Chief Minister had specifically stated that he had come to know of the incident in the morning of 17.06.2014, and he took immediate notice of it, details whereof he would be providing to the "Judicial Commission". This being the actual position, the inference drawn by the Tribunal vis-à-vis the instruction of disengagement imparted by the CM through his Secretary Dr. Tauqeer Shah is manifestly misconceived.

c. For all the foregoing reasons it is evident that there is no factual basis whatsoever to support the Tribunal's inference or finding to the effect that "it has become crystal clear that order of disengagement was not passed at all, rather position taken by CM Punjab appears to be an afterthought defence not taken before the nation in the press conference." In fact the finding given by the Tribunal is itself self-contradictory as on the one hand the Tribunal says that such a direction "may have been passed listlessly" while on the other hand the Tribunal has observed that the "order of disengagement was not passed at all...." (last 8 lines at p. 71 of the Report).

7. Recommendations:

The Tribunal has suggested that to deal with such like situation under the law and noting the provisions of proviso added to section 128 of Cr.P.C 1898 observed as follows:

"In future, to avoid such like situation it is imperative that legislative reforms be brought in to empower the magistrate to pass the order for releasing fire by the Police so that the responsibility can be fixed after ascertaining facts and circumstances".

It would have been appropriate for the Tribunal to have noticed the provisions of sections 127 & 128 Cr.P.C before addition of the proviso and also the law prevailing in the Sub-continent and Commonwealth Countries. Chapter 9 Cr.P.C deals with unlawful assemblies and maintenance of Public Peace and Security. The word Executive Magistrate appeared in Section 127 Cr.P.C along with Officer in Charge of Police Station who could command any unlawful assembly to disperse but Executive Magistrate was omitted vide Amendment introduced in 1972. Then a proviso was added to section 128 Cr.P.C providing that firing shall not be resorted to except under specific direction of an officer of Police not below the rank of an Assistant Superintendent or Deputy Superintendent of Police.

Legal Position in India:

Chapter 10 of Indian Cr.P.C deals with the maintenance of public order and tranquility. Section 129 to 132 deals with Unlawful Assemblies. Any Executive Magistrate or Officer In-charge of a Police Station and in his absence any Police Officer not below the rank of a Sub-Inspector may command any Unlawful Assembly to disperse. Section 130 provides for use of armed forced to disperse

unlawful assemblies. Section 131 deals with the power of certain armed forces to disperse assembly. Section 132 provides for protection against prosecution for acts done under preceding sections.

It is pertinent to note that the power to resort to firing has not been mentioned in the Indian law but the Executive Magistrate or by the Officer In-charge of the Police Station or any Police officer not below the rank of Sub-Inspector has the power to take appropriate measures to disperse the Unlawful Assembly. This power includes power to order firing as the situation may demand. The question whether the resort to firing was appropriate or not has been resolved on case to case basis. The Police Officers invariably do not feel safe to shoulder responsibility of having ordered firing, as there is every possibility of their decision being considered not commensurate with the situation sought to be handled. These were the factors due to which the police in the instant incident have not admitted to have ordered firing though they brought out the facts and circumstances whereby the benign firing as claimed by them had to be resorted in order to rescue the besieged police personnel. So the Legislative amendment to add the words Executive Magistrate should be introduced in section 127 Cr.P.C.

Moreover, the scenario unfolded by the *Dharna* (Sit-ins) needs to be catered through legislative measures. In this connection it would be advisable to seek guidance from the Public Order Act 1986 of the United Kingdom, Crimes Act 1961 of New Zealand, Criminal Code of Canada (RSC 1985, c. C. 46) and Unlawful Assemblies and Processions Act 1958 as amended on 1st July 2014 and Public Order (Protection of Persons and Property) No. 26 of 1971 which lays down provisions relating to Diplomatic and Consular Premises and Personnel and International Organizations.

I have in the opening part of this review given historic legal aspects of the laws and the principles relating to the legal value of such a Report. In addition to the case law noted above, reference is invited to AIR 1998 Patna 15 wherein it was held in para 31 that report of a Commission of Inquiry per se has no legal force unless the same is accepted by the Government.

Again, in AIR 2003 SC 3357 (judgment passed in Appeal against the Patna judgment) in para 10 it has been observed that "The Commission required to submit its report, which may or may not be accepted by the appointing authority."

Similarly in PLD 1998 Lahore 523(355) it was held inter alia, that report of Inquiry Tribunal is "not even binding upon the Government."

Pertinent observations regarding working of Commissions of Inquiry and acceptance of their reports by the Government are also made at pp. 63 (last 3 lines) to 64 of Tom Bingham's lecture on Judicial Independence (photocopy attached), where at p. 64 (second para) he cites incidents inter alia of rejection of such a report by the Government.

The argument is that if Government has the right / authority or even option ro reject a Report, it evidently should have good reason to do so and should, as a matter of record, be able to do so by citing these reasons.

Hence when such a Report is being scrutinized / analysed by the Government through its Law Department, AG Office or otherwise, the concerned Department or Office etc. can give an opinion as to whether the Report should be accepted or not accepted by the Government on the basis of reasons that they consider relevant and appropriate in support of whatever be their opinion.

8. Final analysis:

I for the deficiencies noted herein above and for the reason enumerated would recommend that the Government will be advised not to accept this report. Moreover, making the Report specially the marked pages, will be against public interest as it is likely to damage sectarian harmony and public peace. The Government should however institute enquiry into the matters indicated in this review and also direct the Home and Law Departments to draft appropriate law on the lines indicated for approval by the Legislative Assembly.

30th Sept 2014

(JUSTICE KHALIL-UR-REHMAN KHAN)
Former Judge, Supreme Court of Pakistan.

The Business of Judging

Selected Essays and Speeches

TOM BINGHAM

Senior Law Lord

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UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2000
First published in paperback 2011

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Data available
Printed and bound by
CPI Group (UK) Ltd,
Croydon, CR0 4YY
ISBN 978-0-19-829912-7
ISBN 978-0-19-969335-1 (pbk.)
1 3 5 7 9 10 8 6 4 2

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*Judicial Independence**

It is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence. So many eminent authorities have stated this principle and there has been so little challenge to it, that no extensive citation is called for. It is enough to recall that in 1994 the United Nations Commission on Human Rights recorded that it was:

> Convinced that an independent and impartial judiciary and an independent legal profession are essential pre-requisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.[1]

The Commission went on to appoint a Special Rapporteur to monitor and investigate alleged violations of judicial and legal professional independence worldwide, and to study topical questions central to a full understanding of the independence of the judiciary.[2]

In his most recent report of 1 March 1996 the Special Rapporteur summarized the results of his worldwide investigation, and with reference to the United Kingdom wrote:

> The Special Rapporteur notes with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the judges did not exercise self-restraint, 'it is inevitable that we shall statutorily have to restrict judicial review'. The controversy continued and reportedly prompted the former Master of the Rolls, Lord Donaldson, who was said to have accused the Government of launching a concerted attack on the independence of [the] judiciary, to have said, 'any government which seeks to make itself immune to an independent review of whether its actions are lawful or unlawful is potentially despotic.' The Special Rapporteur will be monitoring developments in the United Kingdom concerning this controversy. That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe.[3]

The need to guarantee judicial independence is accordingly one which we should treat very seriously, not only for the health of our own country but because of the extent to which our own conduct is still seen by other countries, to an extent which may perhaps surprise us, as a model.

* Judicial Studies Board Annual Lecture given on 5 November 1996.

[1] *Commonwealth Law Bulletin* (July 1994), at 957. [2] Ibid. at 958.

[3] At p. 54.

Given the centrality of this constitutional principle, one might expect to find much detailed analysis of what it means, in theory and in practice, in this country. But, as Professor Robert Stevens has written:

> While there is widespread consensus on the obvious importance of the independence of the judiciary, the literature on it is meagre, and the concept itself has never been fully unpacked. Unpacking is a process worth engaging in.[4]

There have, very broadly speaking, been two approaches. One concentrates on the independence of individual judges in their day to day work of judging. This approach was well summarized by the present Lord Chancellor, Lord Mackay of Clashfern, in a lecture on 6 March 1991 when, referring to the judges, he said:

> Their function is to decide cases and in so doing they must be given full independence of action, free from any influence. But in order to preserve their independence the judges must have some control or influence over the administrative penumbra immediately surrounding the judicial process. If judges were not, for example, in control of the listing of cases to be heard in the courts it might be open to an unscrupulous executive to seek to influence the outcome of cases (including those to which public authorities were a party) by ensuring that they were listed before judges thought to be sympathetic to a point of view, or simply by delaying the hearing of the case if that seemed to advantage the public authority concerned.[5]

Thus, on this approach, judges would enjoy full independence in their task of judging, and also in what the Lord Chancellor called 'the administrative penumbra immediately surrounding the judicial process', of which he gave listing as a very good example.

The alternative approach treats the independence of the judge to decide individual cases free from any extraneous influence, and to exercise control or influence over the administrative penumbra immediately surrounding the judicial process, as no more than a part (albeit an important part) of what judicial independence means. On this approach what matters is not only the independence of individual judges but the independence of the judiciary as a separate arm of government. This is the approach which Lord Browne-Wilkinson, as Vice Chancellor, persuasively advocated in his F. A. Mann Lecture, *The Independence of the Judiciary in the 1980s*.[6] On this approach the judges should, with a large measure of independence, control not only the delivery of the final judicial product (the judgment) but also the administrative infrastructure on which the delivery and enforcement of that product depend. The high watermark of that approach may perhaps be found in an article written by Sir Francis Purchas in September 1994, when he wrote:

[4] *The Independence of the Judiciary. The view from the Lord Chancellor's Office.* Professor Robert Stevens, 1993 at p. 3. This is a very interesting book, to which I am much indebted.

[5] See Purchas, 'What is Happening to Judicial Independence', *New Law Journal* 30 Sept. 1994 at 1306, 1308.

[6] [1988] Public Law 44

> Constitutional independence will not be achieved if the funding of the administration of justice remains subject to the influences of the political market place. Subject to the ultimate supervision of Parliament, the Judiciary should be allowed to advise what is and what is not a necessary expense to ensure that adequate justice is available to the citizen and to protect him from unwarranted intrusion into his liberty by the executive.[7]

Even in countries where the judges enjoy a very much larger measure of administrative control than they do here (one thinks, for instance, of the United States and Australia), I doubt whether this ambitious requirement comes anywhere close to being met. Nor, perhaps, should it. As professional judges we naturally, and rightly, put a very high premium on the provision of an efficient and adequately funded legal system, which we regard as a prerequisite to administering justice. But even we cannot overlook the existence of other pressing claims on finite national resources. We would all recognize the defence of the realm as a vital national priority, but I suspect that we would shrink from giving the chiefs of staff *carte blanche* to demand all the resources which they judged necessary for that end. We would all, probably, recognize the provision of good educational opportunities at all levels as a pressing social necessity, but might even so hesitate to give educational institutions all the money which they sought. We would all regard the health of the people as a vital national concern, but could scarcely contemplate the demands of health service professionals being met in full, without rigorous democratic control. I do not myself find these choices, even in theory, offensive; but in any event they must surely, in the real world, be inevitable. As the Chief Justice of British Columbia put it in a recent paper:

> I subscribe to the view that there are other constitutional principles, besides judicial independence, that must be recognized and respected. One principle, possibly equal in importance to judicial independence, is the right of the legislature to decide how public money is to be spent. Thus, I do not support the view that the judiciary should write its own cheque, and I have come to realize that it is, in fact, salutary that the judiciary should not have that power. If mistakes are to be made in budgeting or funding operations, it is better that they be made by someone other than the judiciary.[8]

At least in this country judicial independence cannot be rested on any classical doctrine of the separation of powers. That is not because of the anomalous roles of the Lord Chancellor, the Law Officers and the Law Lords, but for more fundamental reasons. Judges are, after all, appointed by the executive—and even under the American constitution, which enshrines the separation of power doctrine in perhaps its purest form, appointments to the federal judiciary involve both other arms of government. After appointment, judges sit in courts provided by the state, they have offices provided, heated and lighted by the state, they have clerks paid by the state, they use books and computers mostly provided by the

[7] Purchas, op. cit. at 1324.

[8] The Hon Chief Justice Allan McEachern, *Judicial Independence*, paper delivered to the 11th Commonwealth Law Conference, Vancouver (August 1996).

state, they are themselves paid by the state. In all these respects the position of the judges is not very different from that of any other employee of the state. But plainly the position of the judge is, and certainly should be, categorically different from that of other employees of the government. To pinpoint where those differences lie it may perhaps be most fruitful, in the manner of the common law, to eschew statements of general principle and consider particular incidents of the judicial role.

It is convenient to begin at the beginning, with appointment of judges. Since these are effectively made by the executive, in the person of either the Lord Chancellor or the Prime Minister, the opportunity plainly exists to pack the judicial bench with appointees of a certain political persuasion or known social views. This would not be regarded as an abuse in some other countries, such as notably the United States, nor would it always have been regarded as an abuse here. But I think there is no doubt that such a policy, if it were now to be adopted here, would be regarded as an abuse, and I cannot think that it would be long before a different appointments procedure were introduced. There is, I would suggest, virtually no evidence of appointments since 1945 made otherwise than on the basis of perceived merit, and at no time has this been truer than during the last decade. If, without intolerable complacency, one is entitled to regard this as a happy and constitutionally acceptable state of affairs, one may reasonably ask how it has been achieved. I would point to three things. The first is the pool from which candidates for judicial office are selected: whether barristers or solicitors, they have been private practitioners reared in a professional tradition which prizes the exercise of an independent individual judgment above all else. I would point, secondly to the greatly increased difficulty of conducting a legal practice so as to achieve a level of success which would qualify the candidate for judicial appointment while at the same time pursuing a parallel career in politics: the result is that appointments from the ranks of active politicians are now a rarity. Thirdly, I would point to the great care which successive Lord Chancellors have shown in, and the integrity with which they have approached, their task of, appointing judges. From time to time fears have been expressed that judicial appointments might be, or had in effect been, handed over to the Lord Chancellor's Permanent Secretary. In opposing the proposal that there should be a Ministry of Justice, Lord Hewart in 1929 suggested that this was 'an effort to hand over the appointment of Judges to the Permanent Secretary of the Lord Chancellor's Office'.[9] Stevens indeed suggests that when Sir Claude Schuster was Permanent Secretary 'the views of the Permanent Secretary were inevitably seen by Bench and Bar as close to decisive'.[10] I feel bound to say, on the basis of my own experience, that whatever the position may have been in the past, the Permanent Secretary does not now seek to wield influence of that kind. The role of officials in the department is to collate, not to dictate; to gather and marshal opinions on the merits of

[9] Stevens, op. cit. at 31. [10] Ibid. at 42.

possible candidates, but not to decide who should be appointed and who should not.

The key to the successful making of appointments must, I would suggest, lie in an assumption shared by appointor, appointee and the public at large that those appointed should be capable of discharging their judicial duties, so far as humanly possible, with impartiality. Impartiality and independence may not, even in this context, be synonyms, but there is a very close blood-tie between them: for a judge who is truly impartial, deciding each case on its merits as they appear to him (or, of course, her), is of necessity independent.

What really matters, of course, is that judges should enjoy complete independence while serving as such. The protection accorded to the judges of the higher courts, that they enjoy office during good behaviour and are removable only by an address of both Houses of Parliament, has over the centuries proved an effective constitutional guarantee, since no English judge has been so removed. This has not in practice meant, at any rate in recent years, that judges who through no fault of their own have become mentally or physically unfit to perform their duties have remained in office. It has proved possible to arrange consensual retirements in such cases. But it has meant that no judge, when giving judgment or deciding what judgment to give, need concern himself with the acceptability of his decision to the powers that be.

An experienced circuit judge has recently argued with some heat that the constitutional protection accorded to judges of the High Court should be extended to circuit judges also.[11] I can see considerable theoretical force in this argument. The jurisdiction of the County Court has been extended to such an extent, and the weight of cases heard by circuit judges in the Crown Court is now often such, that it is hard to justify different treatment of the circuit bench. But the threat to the circuit bench is perhaps more theoretical than real. The only circuit judge known to me to have been dismissed in recent times would plainly have been removed by the Act of Settlement procedure had he been a judge of the High Court and had he not chosen to resign in order to forestall that process. There is no case in which the decisions of a circuit judge have led to dismissal or (so far as I know) threatened dismissal. Lord Chancellors have, as it seems to me, been notably reticent in exercising their powers of dismissal. Whatever the constitutional anomaly, I cannot see the present situation as giving rise to practical grounds for concern. There are, of course, other and subtler ways in which the executive could, if so minded, seek to undermine the independence of individual judges. One would be by denying promotion to any judge whose decisions were thought to be politically unfavourable. In the past this would not have been a problem: the High Court Bench was very small; the Court of Appeal was even smaller; and appointments to the Court of Appeal or the House of Lords were frequently made on

[11] His Honour Judge Harold Wilson, 'The County Court Judge in Limbo', *New Law Journal* 21 Oct 1994, at 1454

political grounds. So a judge appointed to the High Court bench would have no lively thought or expectation of proceeding further, and promotions from the County Court bench or the circuit bench to that of the High Court have always been relatively rare. With an increased number of Law Lords and a very greatly enlarged Court of Appeal, the situation has plainly changed. This has led some commentators to suggest that the hope of promotion, or fear of non-promotion, has affected judicial decision-making. Writing in *The Commonwealth Law Bulletin* in October 1994, Professor Antony Allott wrote:

> Promotion from the stipendiary bench to the circuit bench is now more frequent. Similarly, one may be promoted either from practice or from a circuit judgeship to the High Court bench. Once a High Court judge, one may hope to receive further promotion to membership of the Court of Appeal or to headship of a Division. The implication offered that, since there is little gain in pay, there is little motivation to seek promotion, is largely false. Honour and standing are at least as effective spurs as cash. As a judge of whatever grade, one can hardly, if ambitious, avoid looking over one's shoulder at the consequences of adopting a particular style or trend of decisions on one's future career as judge.[12]

In similar vein, Stevens has suggested that over the last 30 years or so the myth that there was no career judiciary in England had weakened, and suggested that

> the prospect of promotion [had] sullied the purity of the relationship between the Judiciary and the executive. . . .[13]

While there were in his view other factors at work, this was also a factor.

If any judge were to trim or tailor his judicial decision in order to ingratiate himself with, or avoid offending, any member of the executive who he thought would be influential in deciding on his future promotion, or even any other member of the judiciary whom he thought might be consulted, I would myself regard such conduct as a flagrant violation of judicial duty and I would be equally critical of anyone knowingly influenced by such conduct. But suggestions of the kind quoted, although easy to make, are very hard, if not impossible, to verify. I can only express the firm belief (coupled, if need be, with the fervent hope) that considerations of this kind simply do not intrude into a judge's process of decision making at all. I can imagine no more conclusive objection to promotion than the suspicion that they might have done.

Most of us, I suspect, can call to mind one instance in which it seems likely that a judge, otherwise obviously fitted for preferment, was denied such preferment because his judicial decisions and pronouncements had excited the hostility of an incoming government. Whether this is so or not cannot be decided with confidence until the 30-year rule has operated and the relevant records made available for public scrutiny. If the suspicion turns out to be well-founded, the

[12] Independence of the Judiciary in Commonwealth Countries: Problems and Provisions, *The Commonwealth Law Bulletin* (Oct. 1994), at 1435.

[13] Stevens, op. cit. at 169.

incident must represent a serious blot on the record of those responsible. Our consolation must be that it is very hard to think of any other comparable incident, at any rate in recent times.

Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision making role, should not be independent of government. But they should also be independent of the legislature, save in its law-making capacity. Judges should not defer to expressions of parliamentary opinion, or decide cases with a view either to earning parliamentary approbation or avoiding parliamentary censure. They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever.

Sir Derek Oulton, writing in 1994, suggested that by independence is meant not only independence from improper pressure by the executive, litigants and particular pressure groups but also independence from improper pressure from the media. He wrote:

> One of the most dramatic changes that has taken place over the past thirty years or so has been the increasing freedom felt by newspapers, in particular, to attack judges with a vigour (and one could use a much stronger expression) that was formerly quite unknown. The same applies to Members of Parliament, particularly of the House of Commons. There must be a limit to the well-known breadth of judicial backs. The law of contempt used to be employed to prevent this, and Stevens shows interestingly that in 1899 the Privy Council described such use of the law as 'obsolete', only to have it invented, or re-invented, by the Court of Appeal the following year, in order to prevent press criticism of the extrovert Mr Justice Darling. But the judicial committee understandably regarded it as anachronistic even at the turn of the century, and its use has steadily declined since then.[14]

Save perhaps in the case of jury trial, the law of contempt has no significant contribution to make: first, because of the presumption that a judge sitting alone will not be influenced in the decision he makes by comment in the press; secondly, because such comment often follows the decision and therefore cannot affect it; and thirdly, because such comment is often directed as much to what the judge says (not always fully or accurately reported) as to what the judge decides. In any event, the right of the press to comment on matters of public interest is all but sacrosanct. I am not for my part sure that media attacks on the judges have much to do with judicial independence; but one could wish that those who set out to destroy judicial reputations, with the harassment that almost always accompanies such attacks, gave more thought than is evident to the public interest which they are likely to injure.

The rule that judges must be politically neutral is not only, as I would suggest,

[14] *Journal of Law and Society*, vol. 21, no. 4, Dec. 1994 at 569.

an aspect, and a very important aspect, of their duty to be and appear to be impartial; it is also part of the price of their independence. The point was very well put by Sir Hartley Shawcross as Attorney General in 1950 when he declared that it was:

> a most important principle of our constitutional practice that judges do not comment on the policy of Parliament, but administer the law, good or bad, as they find it. It is a traditional doctrine on which the independence of the judiciary rests. If once that doctrine were departed from, and judges permitted themselves to ventilate from the Bench the views they might hold on the policy of the legislature, it would be quite impossible to maintain the rule that the conduct of judges is not open to criticism or question.[15]

Another author has made a rather similar point but in a more hostile way:

> The British judiciary prides itself on its independence . . . But this independence has been part of a tacit agreement between judges and politicians. Politicians normally do not meddle with the judiciary even when they could. Ministers do not pressure the Lord Chancellor to award judgeships to the party faithful. Party leaders never remove judges and only alter any statute dealing with the courts after extensive consultations. For their part the judges restrict their scope of authority to private law matters, avoiding the 'political thicket'. Most judges have seemed aware that treading too closely to questions of public policy could propel them into an unwinnable battle with the majority at Westminster. English judges traded range of authority for degree of authority in a narrow field, independence for a reduced role on the public stage. . .[16]

It is indeed obvious that if judges were to ventilate personal criticisms of government policy unnecessary for the decision of the case before them, it would only be a matter of time (and not a very long time) before those who were the subject of criticism replied in kind. It is undesirable, and plainly damaging to the independence of the judges, if they become protagonists in a debate in which they have no constitutional right to participate. This duty of restraint does not in any way inhibit the duty which occasionally falls on judges to quash decisions made by ministers or officials as unlawful, nor from giving their reasons for such decisions. Nor has this duty of self restraint been understood to prevent some senior judges from giving expression to their views, or the views of the judiciary, on questions directly pertaining to the administration of justice. It would be absurd if those judges who are members of the Upper House were precluded from offering the benefits of their wisdom and experience on issues directly related to their professional expertise. Valuable though the contributions of retired judges often are, it would be a loss if those still active in the practice of the law were denied the opportunity to contribute. It should not in practice prove too difficult to discern where legitimate observations on the administration of justice end and political controversy begins. Lord Denning's Hamlyn lectures *Freedom under the*

[15] See Stevens, op. cit. at 79 fn 4.

[16] J. T. Waltman, *The Courts of England* in *The Political Role of Law Courts in Modern Democracies* (1988) at 117–18.

Law, although the subject of objection by Lord Jowitt,[17] and Lord Taylor's recent observations on sentencing practice, fell on the right side of the line; letters written by Mr Justice Stephen criticising the Government's policy on India,[18] Lord Hewart's famous book *The New Despotism* and the letter written to *The Times* by Mr Justice Lloyd-Jacob about the hydrogen bomb, one might feel, fell on the wrong side of the line.

Although the Lord Chancellor has no power to penalize judges of the Supreme Court in any way, and no power to penalize judges of the lower courts save by dismissal, Lord Chancellors have on occasion taken it upon themselves to rebuke and reprimand judges whose extra-judicial conduct has given ground for complaint. I imagine Lord Chancellors do this in their role as the formal head of the judiciary rather than in their role as a member of the executive. As it now operates, the practice seems to me unobjectionable provided—and I regard the proviso as fundamental—that such rebuke or reprimand does not relate in any way to a judge's decisions made as such. It would seem to me to subvert the independence which judges are entitled to enjoy if the Lord Chancellor, save when sitting in an appellate capacity, were to base any personal criticism of a judge on the decisions which he had given. I think that this is an area in which, perhaps, the rules have become somewhat clearer. It would, I think, be surprising to find a modern Lord Chancellor writing to a Law Lord asking him to amend the proposed terms of a dissenting speech in a case to which the Lord Chancellor was not himself a party, as Lord Simon did to Lord Atkin in relation to *Liversidge v Anderson*.[19] I would also (although in this case no question of a rebuke was involved) be very surprised to receive from the Lord Chancellor a letter in terms such as those of a letter written by Lord Jowitt to Lord Goddard as Lord Chief Justice in 1947:

> I do sincerely hope that the judges will not be lenient to these bandits [who] carry arms [to] shoot at the police. . . . I may be written down as a Colonel Blimp, but you know I do take the view, which I think you share, that we have got rather soft and woolly when dealing with really serious crime.[20]

As Stevens points out, this was two years before sentence was passed and carried out on Derek Bentley. It must be a consolation to modern judges to learn that Lord Goddard and his Queen's Bench colleagues after the War were regarded by the administration of the day as soft and woolly in dealing with really serious crime.

In many countries, the participation of serving judges in commissions, enquiries and committees not devoted to law reform or the administration of justice is regarded as inconsistent with the independence of the judiciary. In this

[17] See Stevens, op. cit. at 93.
[18] See K. J. M. Smith, *James Fitzjames Stephen* (1988), 145.
[19] See Heuston, *Lives of the Lord Chancellors, 1940–70* (1987), at 59.
[20] See Stevens, op. cit. at 95.

country a different view has been taken; a judge or a senior silk has more often than not been thought the most suitable person to lead or chair such exercises, at any rate where they do not relate to the legal system or the legal profession. A broadly similar view has been taken in New Zealand. Lord Cooke of Thorndon has written:

> In some quarters it has been said that after the recent controversies Judges may not be willing to accept appointment to commissions of inquiry. There are even suggestions that to do so is inconsistent with the judicial role. I must beg to differ. Wherever judicial qualities are called for—that is to say, typically a calm and objective factual judgment of evidence—in my opinion a Judge should be willing to serve. The essential corollary is a judicial approach.[21]

We have tended in this country to take the same view for the same reasons. So long as the final report when delivered is accepted by the government, it is hard to see how any threat to the independence of the judiciary is involved, at any rate where the report commands broad public acceptance also. The situation plainly becomes more difficult when a report is rejected by the government, as the Macmillan Government rejected Mr Justice Devlin's report on Central Africa, or when a report is the subject of acute political controversy and hostile publicity before publication, as was the case with Sir Richard Scott's recent report on Arms to Iraq, or when a major recommendation is instantly rejected, like Lord Cullen's recommendation on handguns, or when a report is regarded as unpersuasive by significant sections of opinion, as proved to be the case with Lord Widgery's report on 'Bloody Sunday'. To date, I think that the standing of the judges involved and the quality of the reports produced have almost always won for such reports a degree of acceptance denied to those who reject or criticise them. But I think that this is an area in which great caution is needed. The reputation which judges generally enjoy for impartiality and skill in arriving at the truth is a priceless asset, not to be lightly squandered. As Lord Devlin himself observed:

> In our own country the reputation of the judiciary for independence and impartiality is a national asset of such richness that one government after another tries to plunder it.[22]

Stevens also has suggested that, in the new climate of today, judges should be far less willing to accept extra-judicial chores.[23]

The connection between judicial salaries and judicial independence may not be immediately obvious. But Robert Stevens in his valuable book on *The Independence of the Judiciary*[24] devotes considerable space to recording exchanges between the judges and the Lord Chancellor's Office on this subject,

[21] *The Courts and Public Controversy* Sir Robin Cooke, Otago Law Review [1983] vol. 5, no. 3, 357, at 365.
[22] Patrick Devlin, *The Judge*, 9.
[23] Hardwicke Lecture, 21 May 1966, *Judges, Politics, Politicians and the Confusing Role of the Judiciary*.
[24] Op. cit.

presumably because he sees the subjects as linked. The Commonwealth Secretariat has recently appointed a working group to study

> the comparative level of remuneration received by members of the judiciary vis-à-vis other national holders of public office, the method of determination of that remuneration, and the process of adjustment of the level so determined over time.

The view that a link exists is, it appears, one shared by the Law Society, which in 1992 made a submission summarized in these terms:

> The question of salaries constitutes one of the Society's major concerns so far as judicial independence is concerned. The opening up of a 'dispiriting chasm' between the relatively low salaries of those seated on the nation's benches and the much more remunerative incomes of the leading practitioners on court floors below them has been the chief subject of apprehension. The disparity of the incomes of those who judge and those whose arguments are judged by them has become shameful, the Society submits.[25]

If that quotation occasions any surprise, I should allay it by making clear that the Law Society in question was that of New South Wales. The point, however, must be the same. In Ireland the constitution has been held to require that judges should receive salaries and pension benefits which are appropriate quite apart from any recruitment considerations:

> Otherwise, the essential independence of judges would be undermined.[26]

In India the level of judicial remuneration is specified in the Constitution and the level of allowances cannot be varied to the disadvantage of the judge after appointment.[27] Under Article III of the Constitution of the United States judicial compensation cannot be reduced while a judge remains in office. Professor Friedland was surely right when he wrote:

> There is, of course, a close connection between judicial salaries and judicial independence . . . if a judge's salary is dependent on the whim of the government, the judge will not have the independence we desire in our judiciary. If salaries could be arbitrarily raised or lowered in individual cases, or even collectively, the government would have a strong measure of control over the judiciary. As Alexander Hamilton stated: 'In the general course of human nature, a power over a man's subsistence amounts to a power over his will.'[28]

There is also, perhaps, another and subtler link between independence and remuneration. In most societies, and subject to obvious exceptions, there is some perceived relationship between what someone earns and the status or prestige which he enjoys. Financial rewards are not, of course, everything, but nor are they nothing. Unless, therefore, the rewards of judicial office (with or without other benefits) are sufficient to attract the ablest candidates to accept appointment,

[25] *Commonwealth Law Bulletin*, (July 1992), 1043.
[26] *McMenamin v Ireland* [1994] 21 LRM 368, at 377.
[27] Article 125, Constitution of India.
[28] *A Place Apart: Judicial Independence and Accountability in Canada* May 1995, at 53.

albeit with some financial sacrifice, the ranks of the judiciary must be filled by the second best, those who (under our system) have failed to make it in private practice, and there would be an inevitable lowering in the standing and reputation of the judiciary and a sea change in the relationship between advocate and judge. There would also, I suggest, be a loss of those qualities of confidence and courage on which the assertion of true independence not infrequently depends, because these qualities tend to be the product of professional success, not the hallmark of professional mediocrity. This is not mere speculation: one need only look at some other countries with a career judiciary, in which those opting for a judicial career are by and large the weaker candidates, to see that the judiciary which results lacks the authority and standing which we very largely take for granted.

I think that our history since the early nineteenth century bears out this analysis. It is true that the salary of £5,500 awarded to High Court judges in 1825 was reduced in 1832 to £5,000. But this was, by the standards of the day, an enormous salary, equivalent in modern terms to about £250,000 and not of course subject to taxation at modern rates. By the time this salary was eventually increased in 1954, after remaining at the same level for 122 years, it had ceased to be a princely and had indeed become an inadequate salary. Since then, however, salaries have been raised at fairly regular intervals, and have been maintained at a level roughly comparable with that of the most senior public servants. Stevens points out that in 1992 Law Lords were paid appreciably more than justices of the Supreme Court of the United States.[29] This is plainly a somewhat misleading comparison, since I assume it takes no account of benefits (such as the provision of legal assistance and transport) enjoyed by Supreme Court justices but not by all Law Lords. It nonetheless suggests that maintenance of a strong and independent judiciary is recognised to depend, at least to some extent, on the payment of a reasonable salary; and I believe it to be true that British judges are on the whole more generously rewarded than their European counterparts (except in Germany). Different countries of course have different traditions. Our own tradition does, however, depend on the willingness of the most successful practitioners, at the height of their careers, to accept appointment to the judicial bench, and I gravely doubt whether that tradition can be maintained if what the New South Wales Law Society called a 'dispiriting chasm' becomes too deep.

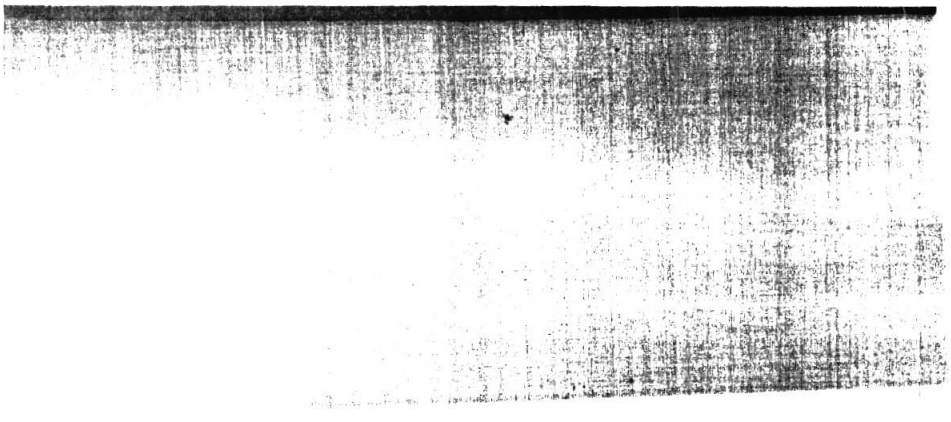
At a Conference held at Victoria Falls in August 1994, the Magistrates and Judges of the Commonwealth adopted a proclamation of which Article 3 was to the following effect:

> Provision of formal and informal instruction for judges and magistrates in the performance of their duties, in their responsibilities as independent adjudicators, and in the laws and procedures which they are required to apply is an essential element in a modern and fair legal system.[30]

[29] Stevens, op. cit. at 167.
[30] *Commonwealth Law Bulletin* (Oct. 1994), at 1365.

The Conference went on to refer to a new body, the Commonwealth Judicial Education Institute, one of whose purposes was to promote the independence of the judiciary in the Commonwealth through the provision of appropriate judicial education at all levels. There is nothing here which would, or certainly which should, provoke any reservation in the mind of an English judge and we have given our full support to the Institute, which performs an indispensable role, particularly in relation to the smaller and poorer members of the Commonwealth. But judicial education is not only for others. Although it is not very long since the need for judicial education and training in this country came to be recognized, I doubt whether anyone now questions the potential benefits to be gained. Such programmes no longer need to be disguised as 'judicial studies' to make them acceptable. Indeed, one of the most potent concerns provoked by Lord Woolf's proposals is whether adequate funds will be forthcoming to provide the training for which the new procedures will call. It is, however, as I would suggest, essential, if judicial education is to promote the end of judicial independence, that control of the content and form of such education should rest squarely in the hands of the judges themselves, and such agencies as they may employ, as it now does. It is obvious that if control of the education and training of judges did not rest in the hands of the judges themselves, but in those of the executive, it would become possible for judicial independence to be subverted and not promoted. It would, in short, become possible for the state to instruct judges how they should decide cases, a result which would be entirely unacceptable. Concerns along these lines were expressed in the debates on the Police and Magistrates' Court Act 1994, and appropriate amendments made. The Judicial Studies Board discharges an ever more important function; but it has no function more important than the protection of judicial autonomy in this field. I hope that the recent appointment of the Lord Chief Justice as patron of the Board will be seen as a small but symbolic way of recognizing that principle.

For better or worse, British judges do not control the financing and administration of the court system. If there were ever a chance of their doing so, which I doubt, it was lost when the Courts Act 1971 converted the Lord Chancellor's Department from a small secretariat into a department of state employing some 10,000 civil servants. It cannot be suggested that the relationship between the administration and the judges over the last quarter century has been in all respects an easy one. Many judges have resented what they perceived as an administration breathing down their necks, treating them as pawns on a bureaucratic chess board. Decisions directly bearing on the performance of judicial functions and the efficiency of court administration have on occasions been made without consultation and for ill-conceived reasons. While high standards of public administration are as necessary in this field as in any other, management concepts quite inappropriate to the unique function of administering justice have been wrongly allowed to intrude. There has been difficulty and dispute on the frontier, not alleviated by doubt about where the frontier is or should be. It would be utopian to suppose that



these tensions will disappear. They may even increase. But there are two hopeful signs. The first is a written instruction given by the Lord Chancellor to the Chief Executive of the Court Service Agency in November 1994 headed 'Consultation with the Judiciary'. In his second paragraph he wrote:

> I consider it particularly important that you should continue to foster good relations with all members of the judiciary. I shall require you to ensure that both you and your staff work closely with the Lord Chief Justice and the other Heads of Division, the Senior Presiding Judge, Presiding Judges and representatives of the Circuit and District Benches and other judicial officers, as appropriate, to ensure that all parties are enabled to carry out their responsibilities in the management of the courts and the administration of justice.

He went on to require the Chief Executive to discuss with the judiciary his plans for dealing with any major in-year change in resource allocation which might materially affect the performance of the Court Service before putting his plans to the Lord Chancellor. This is the second hopeful sign. The Judges' Council has established a sub-committee on resources under the chairmanship of the Senior Presiding Judge and with a membership comprising both judges and administrators (including the Chief Executive) to act as the forum for effective and continuing consultation. I very much doubt if any comparable machinery has ever before existed.

It seems on the whole unlikely that any challenge to judicial independence in this country will be by way of frontal assault. The principle is too widely accepted, too scrupulously observed, too long-established for that. The threat is more likely to be of insidious erosion, of gradual (almost imperceptible) encroachment. Such a process we must be vigilant to detect and vigorous, if need be, to resist. But my own, perhaps unduly complacent, view is that we can at present give reassurance to the United Nations' Special Rapporteur. In the country which cradled judicial independence the infant is alive, and well, and even—on occasion— kicking.