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## THE RULE OF LAW, JUDICIALISM AND DEVELOPMENT

G. W. Kanyeihamba

There is an interesting story from the last century. It concerned an argument between Bishop Philpotts of Exeter and a judge, about who had the more power. The Bishop said "You can only tell a man that he will be hanged, but I can tell him that he'll be damned forever!" "True", acknowledged the judge, "but when I tell him he'll be hanged, then he is hanged."<sup>1</sup> More recently, Lord Devlin said, "The Law is what judges say it is."<sup>2</sup> He went on to elaborate upon the statement by reasoning that if the highest judicial tribunal under English Law, the House of Lords, were to interpret a statute and give its words a meaning which no one else thought they could reasonably bear, it is the interpretation rather than the words themselves that would be law. In relation to the developing nations an eminent judge once said "I ask you to imagine what might happen if the courts of a newly emergent nation, in which the rule of law is not a settled way of life, either on the part of the Executive or the people, were by their judicial decisions to enter the political arena."<sup>3</sup> The first altercation shows the decisiveness and effect judicial pronouncements can have upon public and private rights. The exposition of a truism by Lord Devlin reflects the innovative and legislative powers of the judiciary which is increasingly coming under attack in the United Kingdom.<sup>4</sup> The last remark is indicative of the restraint and self-imposed impotence 'suffered' by judges functioning in hostile environments.<sup>5</sup>

This paper is presented as part of the continuing debate about the inter-relationships between rights, the Rule of Law, the judiciary and development. In the developing countries there is a need for the legal profession and the judiciary to participate positively in the field of development. Since the majority of the population in these nations lack adequate access to the democratic processes by which their rights and developmental priorities are determined, lawyers and especially judges may have to become activists and interventionists in disputes and arguments which emanate from the political, economic and socio/legal situations which prevail there.<sup>6</sup> However, the inherited traditions, social background and training of contemporary lawyers are such that they often fail to live up to their expected roles.<sup>7</sup>

### Human Rights

Contemporary literature acknowledges the existence of two definitions for the term human rights. For instance, Zsabo has written:

When government leaders talk about violation of human rights, some people think the main emphasis

should be on political rights like personal liberty and the freedom of speech, other people think the main emphasis should be on economic rights, like adequate food and shelter.<sup>8</sup>

The dichotomy between political rights and economic rights can be discerned within the wealthier nations of the world as well, both at the national and international levels. At the national level political parties of the right are often the advocates of the former definition while socialist associations and parties of the left champion the cause of the latter. In the countries of the European Community where riches and affluence are evident everywhere, differences in approach to the concepts of human rights can still be detected. Studies carried out in France and Germany show, for instance, that most French people tend to emphasise economic rights while placing less emphasis on political rights. In Germany the reverse is true.<sup>9</sup>

The historical perspectives in the context of human rights have not always encompassed the universality alluded to. For a long time only the first definition was accepted as legitimate.<sup>10</sup> It was the basis of the United Nations Declaration of Human Rights. This is not surprising, as it was the representatives of the Western alliance who initiated, presided over and dominated the deliberations that preceded the adoption of the declaration.<sup>11</sup> The declaration itself embraces certain rights which those representatives believed were acceptable common factors within the countries of the West. They were said to be basic rights and fundamental freedoms with which the individual was endowed. In practice, only a privileged minority enjoyed some of those rights and freedoms, often, at the expense of a greater number of fellow citizens.<sup>12</sup> It should be remembered that when in 1776, the American Declaration of Independence affirmed the Virginian Declaration of Rights that all men are created equal and are endowed by the Creator with certain inalienable rights, among which were "Life, Liberty and the Pursuit of Happiness",<sup>13</sup> many Americans were slaves and thousands more were not allowed by their system of government to enjoy those rights; nor did the solemn declaration of "the Natural, Inalienable and Sacred Rights of Man",<sup>14</sup> a decade or so later make much difference to the mass of French citizens. Nevertheless, it was boldly proclaimed that the United Nations Declaration was "a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance".<sup>15</sup> Moreover, these rights are to be insisted upon even if the whole community of which the privileged individual is a member is to suffer. It is for this reason that Rawls argues:

Each person possesses an inviolability founded on justice that even the welfare of society as a

whole cannot over-ride. For this reason justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are outweighed by the large sum of advantages enjoyed by many. Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to calculus of social interest.<sup>16</sup>

The second definition of human rights is intended to accord with the needs of modern societies in an inter-dependent world. Although popularised by the nations of the socialist bloc, the concept of human rights in the context of social needs and values is founded in traditional societies and poorer states which advocate the survival of the community and the protection of the weak even though at times this conflicts with the rights and aspirations of the well-to-do within the same community.

In the beginning, the second concept of human rights was met with scepticism and hostility from the protagonists of the first. They thought they detected a marxist plot in the notion of economic rights.<sup>17</sup> Indeed, it has always been the contention of the marxists that economic rights are the central element in the concept of human rights. The argument goes "without basic economic rights, individual political rights are meaningless; useless bourgeois rights, or worse, tools for the oppression of the working class."<sup>18</sup> However, since the Second World War, economic content in human rights has been advocated increasingly. Moreover, the developing countries have become the main champions of this concept which can no longer be said to be the exclusive domain of marxists. Indeed, it has been the developing countries rather than the countries of the Warsaw Pact that have largely dominated the debates and deliberations in this field. They have been responsible for sponsoring and securing the adoption by the United Nations Organisation and by international conferences of human rights linked to civil, political and economic aspects of internationalism.<sup>19</sup> In 1966, the General Assembly of the U.N. adopted two Multilateral Treaties on human rights, namely, the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights. In 1968, the writer was privileged to be one of the five-member Drafting Committee of the Teheran Proclamation of Human Rights in the same year. The Teheran International Conference, held under the auspices of the U.N., was attended by some two thousand delegates and observers. The conference recognised the "profound interconnection between the realization of human rights and economic development."<sup>20</sup>

The Conference Resolution XVII dealt with the question of economic development and human rights. Based on that resolution, the U.N. General Assembly adopted the following strategy:

In the elaboration of the strategy for the Second United Nations Development Decade, the final aims must be the attainment of a rapid and sustained rate of economic and social development, especially in developing countries, and also the well-being, freedom and dignity of all human beings, and the enjoyment of all the civil, political, economic, social and cultural rights recognised by the Universal Declaration of Human Rights and guaranteed by the two International Covenants on Human Rights.<sup>21</sup>

It is thus apparent that the United Nations accords a very high priority to economic and social development in the context of human rights.

### The Rule of Law

Most constitutions acknowledge the different roles played by the three organs of government - the executive, the legislature, and the judiciary. The constitution will normally spell out the functions and powers to be exercised executively, legislatively and judicially and establish relationships between the three. The principles and practices in this area are often examined under the constitutional doctrine of separation of powers. It is a doctrine that warns against the accumulation of powers of government in the same hands, as leading to tyranny.<sup>22</sup> Apparently, a government which has all the powers in its hands and wishes to act arbitrarily, will pass any laws it fancies. It will administer laws without regard to the liberties of citizens and judge corruptly any opposition to those laws.<sup>23</sup>

In order to minimise the risk of oppression, it is necessary to distribute the powers amongst the three organs and to adjust their relationships to one another so that a system of checks and balances between them is maintained. It has been observed that the essence of constitutionalism rests in the limitations which it imposes on the organs of government as well as in a certain amount of diffusion of power.<sup>24</sup> Some early advocates of the doctrine interpreted it to mean a rigid separation of powers, but nowadays it is accepted that such arrangement would lead to stalemate in government. There must be links between the organs to encourage accountability and self-criticism by those in power.<sup>25</sup>

Closely associated with the doctrine of separation of powers is the theory of the Rule of Law. The theory is a list of platitudes propagated for the so-called free societies to guide law-makers, administrators, judges and law-enforcement agencies. Dicey popularised the concepts of the Rule of Law in his book "The Law and the Constitution".<sup>26</sup> Although the Diceyan exposition is criticised for being too narrow, bourgeois and

individualistic, for a century or more his formulation of the Rule of Law has dominated this field in common law countries and guided the formulation and enforcement of law. More recently, like the idea of Human Rights, the Rule of Law, has tended to gain international recognition and flavour.<sup>27</sup> Increasingly too, it has been questioned in the developing countries where governments are wont to saying that the theory of the Rule of Law as understood and practised in the developed countries of the Western Alliance is designed to promote the interests of the more sophisticated, wealthier, and privileged members of society who are in a position to enjoy its benefits and finance opposition against its violation. It is said that the beneficiaries of the Rule of Law are the individuals who are politically, economically and socially privileged and are therefore in a position to challenge the actions of the government as infringements of the Rule of Law when those same actions are intended to benefit the majority of the people who are less privileged and therefore who need more protection. Thus, President Nyerere of Tanzania has reasoned:

I agree that in the idealistic sense of the word, it is better that 99 guilty men should go free rather than one innocent man being punished. But in the circumstances of a nation like ours, others factors have to be taken into account. Here in this Union (Tanzania), conditions may well arise in which it is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation. It would certainly be complete madness to let 99 guilty men escape in order to avoid the risk of punishing one innocent person. Our ideals must guide us, not blind us.<sup>28</sup>

Nyerere's seemingly realistic approach to the application of the Rule of Law is well accepted all over the world and practised in those countries whose constitutions and governments are said to be founded on the Rule of Law. In Britain, for instance, cases such as Elias v. Passmore,<sup>29</sup> Liversidge v. Anderson<sup>30</sup> and McFeeley v. United Kingdom<sup>31</sup> are illustrative of this view. The powers of search and detention exercised under the provisions of the Prevention of Terrorism (Temporary Provisions) Act, are a case in point.<sup>32</sup>

Modern government responsibilities have led to a tremendous growth in bureaucratic institutions, requiring extensive powers to direct and control human activities. Political and economic conflicts coupled with social upheavals and revolutions have often meant that governments everywhere have had to resort to the use of emergency and arbitrary powers to contain such situations. At the same time, it has neither been easy nor practical for legislatures to enact laws or guarantee their implementation against the abuse of power. Consequently, the Rule of Law, as a general idealistic norm, may encourage courts under the

doctrine of separation of powers to challenge public authorities when their decisions and actions appear unduly harsh and contrary to the established law. These concepts are particularly important in the developing countries where the activities of governments often appear out of step with the legal norms of the constitution. There is pressure on governments to transform their societies in the shortest possible time. There is a great temptation for some of the governments to cut corners and take shortcuts that dispense with certain notions of what is legal and democratic. At times some of these concepts, rights and freedoms are seen as hindrances to the social and economic development of the countries concerned.<sup>33</sup> The importance of the Rule of Law may in the end turn out to be the moral support and courage it gives to the courts when settling disputes between apparently defenceless citizens and the mighty bureaucracy of the government. The international community has often resorted to the Rule of Law in order to condemn despotic and fascist regimes.<sup>34</sup> The racist regime of South Africa, the dictatorships of Africa and Asia and the military despotisms of the Latin American countries have often found themselves targets of criticism on this basis.<sup>35</sup> It is contended that within the jurisdiction of municipal laws, the courts should invoke the Rule of Law at every conceivable opportunity to question and invalidate arbitrary actions of governments and other violations of the law and democratic processes.

For most people in the developing countries, an overwhelming number of the rights and freedoms supposedly guaranteed by the Bill of Rights and related covenants taken for granted in industrialised democracies, are alien modules, often projected by a small elite of the population for their own benefit or as a bargaining lever with the people who control the powers of government. On the other hand, democratic processes can be observed within systems of government adopted and practised in the developing countries just as it is possible to discover non-democratic practices within the countries of the Western alliance.<sup>36</sup> When spokespersons for the western system of government talk about democracy they mean the system as it affects the dominant and more or less homogeneous group of which they are members. But even here some social and political analysts challenge the premise on which democracy is based.<sup>37</sup>

During colonial rule peoples in dependent territories were temporarily united by their common hatred of the humiliation and servitude they suffered under the imperial powers. With the defeat and departure of the colonialists, the artificial boundaries of nationhood remained permanently fixed.<sup>38</sup> Newly independent countries could not return to the old days without turmoil and civil war. Instead, they had to look for new ways and to devise fresh methods of communicating and living together, side by side. In Africa, for instance, the idea of resuming traditional tribal discussion became impractical because each tribe, each ethnic group and all their sub-cultures were represented in the new nation and none were prepared to give way to the others or concede to them any pre-eminence in the art of government or in social

fashions. Ironically, about the only things they had in common were the relics of colonialism and its principles, concept of government, doctrines, the rule of law and democracy.<sup>39</sup>

### Development

It has been observed that repressive regimes often claim that they cannot allow certain basic civil and political rights in their country as long as the population is still underfed and economically underdeveloped.

This argument is false: it cannot be shown that the curtailment of human rights can in any way contribute to economic development. The curtailment of human rights may, however, contribute to the preservation of the repressive regime in question.<sup>40</sup>

Joining this debate, Rawls speculates that a desperately poor nation might justly sacrifice some civil liberties for some increase in economic well-being. However, "the whole discussion presupposes that a nation can purchase one at the price of the other", observes Rawls.<sup>41</sup> This raises the question of the meaning of development. Vernon Van Dyke<sup>42</sup> defined a right as an entitlement, a morally justified claim, a need or an interest justifying a presumption that it ought to be satisfied or enjoyed unless there are compelling reasons to the contrary. In my view, the definition of a right, whether civil or otherwise, must be complementary to benefits that accrue from development. There are no imminent theoretical or practical problems to be confronted by adopting policies which unite human rights with development. On the other hand, there may be some problems on timing, as to what comes first, human rights or development. But what exactly is meant by development?

In his "Notes Toward a Taxonomy of Theorizing About Law and Development", Galanter cites no less than eighteen contemporary American legal writers, each defining in their own way, the meaning of Law and Development.<sup>43</sup> The variation in terms used and the meaning given is quite considerable. At the end of this exercise the conclusion is inevitable. Law is not only an instrument of development, it is also an obstacle to all kinds of development.<sup>44</sup> The kind of development most lawyers are familiar with is town and country planning and development which is fundamentally about the way land is used and developed.<sup>45</sup> However, used in its widest sense development is capable of conveying different meanings to different people of different professions and, at different times.<sup>46</sup> But is it always useful to define development in terms of planning? Hagman has quite rightly observed that everyone plans, governments, industrial and commercial concerns, non-profit, religious, educational, cultural and political institutions, all plan for a purpose - namely development.<sup>47</sup> Sometimes, the words planning and



development are used interchangeably, for it is not always clear where planning ends and development begins. The distinction is, more often than not, one of degree rather than substance. Often planners and developers are involved in one process in which planning and development change places at almost every stage.<sup>48</sup> In one sense development is the genus and planning the species, in another, planning is the basis on which development is founded. The discussion of one implies the understanding of the other. It is possible to plan a development, just as it is feasible to develop a plan. In practice, there can be planning without development but the converse is not true. It is sometimes said that one can have development without planning. In reality this is a misnomer. What people usually mean by the statement is that the projected development is without official or recognised sanction, that it was never contemplated in the official plan or acknowledged by the relevant profession or trade and is proceeding without control or direction from both of these sources.<sup>49</sup>

Whatever definition one chooses, an activity ought to be described as a development when it indicates some benefit, value or quality or advantage accruing to those for whom it was originally or otherwise planned. The question is whether law and those who participate in its administration often advance this view.

### Judicialism

As the definition of development emerged in the previous pages, we need to relate it to the question whether this is the kind of activity that concerns lawyers and judges. On the one hand, there are lawyers who argue that every activity of human endeavour is susceptible to legal control and analysis. Development is an activity of human endeavour and is therefore sufficiently legal. Thus Chloros writes "No other branch of social activity is so intensely human as the law, for no other subject invites us to consider all aspects of human life together."<sup>50</sup> The acceptance of Chloros's observation implies an advocacy for an activist legal profession in the duality of human rights and development. On the other hand, there are those who contend that law can only be appreciated as a self-contained discipline. They wish to maintain the purity of law to the exclusion of subjects they consider to be non-legal.<sup>51</sup> We may dismiss this second school of thought as outmoded and archaic in the light of recent development but it is still well represented in the profession.<sup>52</sup> Contemporary literature probes the relationships between legal phenomena and the major social and political changes associated with development.<sup>53</sup>

An awareness of the need to change traditional legal attitudes from concentrating on mere technicalities to definitive social goals is becoming increasingly evident in many parts of the world. A decade ago, the Wisconsin Law Review highlighted this principal issue in the debate

about law and development.

Wherever a government establishes policies and guidelines for change, it spells them out in laws. Thus, the law is becoming the medium in which development occurs, and throughout the world lawyers are discovering an altered legal system. Once counsellors and adversaries, lawyers are finding new rules as draftsmen, advisers, and bureaucrats. But like any institution, the legal system does not easily adjust to new roles.<sup>54</sup>

McAuslan has given a scholarly and analytical exposition of the reasons why lawyers in England have hitherto contributed so little in the field of development and human rights.<sup>55</sup> The theme is re-echoed in the writings of other eminent and scholars.<sup>56</sup> The conclusion from this literature is that the legal profession was developed as a service to sell to the wealthier members of society. It developed forms of action and rules of procedure intended to predetermine the rights of the individual and the legality of actions and behaviour in society. The legal profession in the developing countries have inherited these traits and qualities through colonialism, education and neo-colonialism.<sup>57</sup> This writer has argued elsewhere<sup>58</sup> that most lawyers see their function in society as the ability to apply the existing law to given facts and behaviour for the purpose of determining legality, rights, duties and liability between one individual and another or individuals, institutions and public bodies. Not only must the law exist at the time of application, but the facts and behaviour to which it is to relate need to be real and in the past. The profession tends to avoid speculative and theoretical issues. On the other hand, planning and development concern themselves with what should happen in the future. Development goals speculate about the probable results of the future conduct and activity. There is thus an apparent contradiction between what many lawyers regard as their function in society and the aims of the development process. For most lawyers, the only time they ever come close to the principles of development is when they are asked to draft relevant statutes, regulations and by-laws or to assess the legal consequences of certain kinds of behaviour, policies and decisions. They are thus dealing with the law which is existing and fact situations which are past or, at most, in the present. Moreover, since the substance of such laws is initially determined by the politicians, the government and administrators - generally known as the law - and policy-makers - lawyers can only claim - and often do play the humble role of interpreting and applying the law.<sup>59</sup>

The best lawyers become those who can argue to fit cases in the previous experiences of the law rather than those who can forecast the legal consequences of future behaviour.<sup>60</sup> Even when the legislatures created new powers and vested them in public authorities to promote development, members of the legal profession continue to interpret them in the context of ancient common law principles, and what they perceive to

be just to individual litigants rather than whole communities.<sup>61</sup> Lawyers seem to be imprisoned in their profession, a cocoon which forces them to view development with indifference and at worst with hostility especially when it interferes with what is conceived as being clients' property and rights.

Judges are regarded as impartial arbiters between conflicting legal arguments. They will often confine their reasoning and decisions to the legal views expressed before them by lawyers representing opposite sides. Judicialism often means ignoring any extrinsic considerations including policy issues not argued or introduced by counsel.<sup>62</sup> Many of the judges, especially in the common law countries, will have been elevated to the bench from practice at the bar and, as one distinguished lawyer has remarked, the fact that a person has been appointed a judge does not remove him from the principles and notions of law which he has previously held.<sup>63</sup> There have been occasions when both lawyers and judges have preferred to promote the objectives and notions of development at the expense of purity and technicality of the law, but many who have done so have been castigated for abandoning their traditional 'role'.<sup>64</sup>

Although all the developing countries possess written constitutions and many do have specific provisions granting judicial power as extensive as that of the Supreme Court of the U.S.A. relatively few courts have been prepared to exercise it in the same manner and even fewer governments have been ready to concede that the judiciary can invalidate executive decisions or acts of the legislature.<sup>65</sup> Of the countries which follow the experiences of the U.S.A., only India can show some evidence of courts with the courage and foresight to found their decisions in constitutionalism.<sup>66</sup> Nevertheless, within the first decade of its existence, the Indian Supreme Court had become the target of criticism from Ministers and Parliamentarians. The court was seen as an obstacle to the building of a new society based on economic and agrarian reforms.<sup>67</sup> Basu has pointed out:

The factors which fostered the growth of judicial supremacy in the U.S. are either absent or are not much prominent in our constitutional system.<sup>68</sup>

Another commentator has remarked that it is doubly certain that for a nascent republic dedicated to a social welfare objective, an over-zealous indulgence in judicial activism would have been not merely harmful, but positively self-defeating, too.<sup>69</sup> In any event, the Indian Parliament's response to the courts' 'indulgence' was the enactment of a series of amendments to the constitution which "struck the sledge-hammer (*sic.*) on the possibility of judicial defiance of legislative policy, leaving a bitter trail of frustration for the judiciary."<sup>70</sup> Despite disappointments, the Indian Supreme Court is about the only court in the developing world which continues to show boldness in upholding the constitution against the actions of an over-zealous executive and a timid

legislature.<sup>71</sup>

Developing countries generally have had a bad record in recognising the importance of the relationship between human rights and development. Many of the policies pursued in these countries have led to an influx of refugees in neighbouring and other states.<sup>72</sup> Citizens preferring or having no choice but to remain within these states have not always been treated equally. Laws have been implemented in a discriminatory manner to reward citizens who support the rulers and to penalise those who do not.<sup>73</sup> The politics of poverty in the developing countries means that, more often than not, it is a public office which yields wealth and income.<sup>74</sup> Consequently, ministerial appointments, recruitment to the civil service, the army, the police, and parastatal bodies is big business and whoever has patronage over them is king. Change of government means change of public officials and business ownership, transfer of licences and the awarding of public contracts. Almost every change comes with its own horde of supporters demanding to be rewarded with choice land, goods and public positions. Those who supported the previous government are invariably removed from the positions they previously held, while much of what they may have acquired legitimately is confiscated and redistributed amongst the new supporters.<sup>75</sup> One of the most severe and amply justified charges against governments in developing countries is that they constantly resort to emergency powers and regulations under which citizens are arrested and detained for unascertained reasons for undetermined periods, and without access to the jurisdiction of the courts.<sup>76</sup> The repressive measures of civilian governments are often punctuated by the terrorist acts of military regimes which the population may have welcomed as the only possible method of removing corrupt governments from office.<sup>77</sup> On almost all these contentious issues there has been litigation, but the courts have not always shown the kind of activism and intervention expected of them.<sup>78</sup> It is true that in some instances, the exercise of judicial review has led to direct clashes between the executive and the judiciary, on the one hand, and the legislature and the judiciary on the other.<sup>79</sup> Legal systems such as those of the United Kingdom, U.S.A., Canada and Australia, usually will absorb the impact of such clashes without seriously damaging the equilibrium between the organs of government.<sup>80</sup> In the developing countries, the balance is often destroyed by similar conflicts.<sup>81</sup> A spate of litigation has followed violations of the constitution and fundamental freedoms in a number of countries.<sup>82</sup> Facing political reality, the courts have tended to uphold the stand of the Executive in almost every case. In considering the actual suspension or abrogation of the constitution the courts invented a new legal fiction, namely, the act of revolution and then proceeded to play the governments' poodle.<sup>83</sup> It has been said that Indian courts have consistently showed more courage than most in challenging governmental arbitrary actions intended to deprive citizens of their rights.<sup>84</sup> For instance, in G. Sadanandam v. The State of Kerala,<sup>85</sup> the petitioner was successful in moving the court to invalidate an act of the Executive under the emergency legislation of 1962. However, in the 1975 Emergency

period, even the Indian Supreme Court had to succumb to the political reality of the situation. In A.D.M. Jabalpur v. S. Shukla,<sup>86</sup> writs of habeas corpus were sought under Article 32 of the Constitution which guarantees the right of every person to move the Supreme Court of India for the issue of the writ. The contention of the petitioners was that they could not be deprived of their personal liberty except by procedure established by law. The High Courts of ten different states of India had earlier rejected the contention of the detaining authorities that since Article 21 was suspended under emergency the applicants had no locus standi.<sup>87</sup> The High Courts had held that notwithstanding the suspension of the relevant parts of the Constitution, the petitioners were entitled to show that the order of detention was not under or in compliance with law or was mala fide.<sup>88</sup> But this preponderant view of the High Courts was overruled by the Supreme Court. In what is now known as the Habeas Corpus Case,<sup>89</sup> the court held by a majority of 4 to 1, that as the Article 21, which was the sole repository of the right in question, was suspended, an order of preventive detention issued at the same time could not be challenged under the same article, either in the High Court or in the Supreme Court. The same timorous policy was upheld in different petitions by rulings that during the suspension of the relevant rights provisions of the constitution, political detainees could not complain of prison conditions or unreasonable or harsh prison rules regulation conditions of detention.<sup>90</sup> The Chief Justice justified these judgments by saying that "liberty itself is the gift of the law and may by the law be forfeited or abridged." It has been said of this period that "the voices of the High Courts which had taken a different view were silenced...the Supreme Court of India suffered severely from self-inflicted wounds."<sup>91</sup> Since the lifting of emergency, the Supreme Court of India has been making attempts to redeem itself in such cases as in Maneka Gandhi,<sup>92</sup> Pritam Nath Hoon v. Union of India<sup>93</sup> and Saleh Mohammed v. Union of India.<sup>94</sup>

In the Ghanians case of Sallah v. The Attorney-General,<sup>95</sup> the plaintiff who had been appointed under a law established by the constitutional and legitimate authorities of Ghana challenged the act of his dismissal under a military decree proclaimed after a coup d'etat had overthrown the constitutional government. In dismissing his application the court reasoned that the events leading to the successful coup d'etat had "destroyed the authority of the Constitution and with it all the laws and offices made or established under it, replacing it with a new one. This new state authority was the armed forces of Ghana." In Awoonor-Williams v. Gbedamah,<sup>96</sup> the Supreme Court of Ghana disclaimed any jurisdiction to strike down a decree of the National Liberation Council as unconstitutional. In R. v. Ndhlovu,<sup>97</sup> the Appeal Court of Southern Rhodesia gave de jure recognition to the rebel administration of that colony after it had illegally seized power, holding that proof of effective control should outweigh legality. In Kayiira v. Ruqumayo and Others,<sup>98</sup> a Uganda constitutional Court found unanimously that the removal of President Lule and his government from office had been unconstitutional and illegal, but the court, again unanimously, held that

they would not recommend implementation of their judgment. The explanation of these judgments may be found in the Pakistani case of State v. Dosso and Another<sup>99</sup> where it was said,

It sometimes happens, however, that a constitution and the national legal order under it is disrupted by an abrupt political change not within the contemplation of the constitution. Any such change is called a revolution and its legal effect is not only the destruction of the existing constitution but also the validity of the national legal order. A revolution is generally associated with public tumult, mutiny, violence and bloodshed, but from a justice point of view, the method by which and the persons by whom a revolution is brought about is wholly immaterial...<sup>100</sup>

From the examples given, it is apparent that national courts have either relied on the fiction of a revolution, or declined to contemplate any challenge against the arbitrary actions of governments or simply evaded the dispute before them. Examining some of these decisions, it is possible to conclude that, though couched in legal language, they were not juridical but political decisions. There is a series of other judicial decisions which outlawed the revolutions and granted the remedies sought, but in all these latter cases, the judges were either punished afterwards,<sup>101</sup> or they were outside the reach of the regimes concerned<sup>102</sup> or they were convinced that neither the revolution nor the incumbent leaders sustaining it, could last beyond their judgments.<sup>103</sup> Sadly, in the ultimate analysis, judicial activism has to be tinged with realism until freedom and democracy as well as economic rights are established. Nevertheless, the new era can only be ushered in if judges are more courageous and prepared, within reason, to face up to their responsibilities.

FOOTNOTES

1. N. Moss, 'Judging the Judges', Illustrated London News (Feb. 1983), 23.
2. Lord Devlin, Samples of Lawmaking, 2.
3. Newbold, 2 E.A.L.J., 127, 132. Also see, States of Emergency: Their Impact on Human Rights, (1983) I.C.J., 187.
4. See J.A.G. Griffith: Public Rights and Private Interests (1981), The Politics of the Judiciary (1977); J.P.W.B. McAuslan, Administrative Law, Collective Consumption and Judicial Policy in (1983), 48 M.L.R.; W.T. Murphy (1981), 44 M.L.R., 617 and R.W. Rawlings (1982), 45 M.L.R. 34.
5. See States of Emergency, op. cit.
6. In the developed countries where the political systems are mature and democratic processes of decision-making relatively developed, most writers advocate the opposite, see J.A.G. Griffith, Public Rights, op. cit., 152-54; H.W. Arthurs, Public Accountability of the Legal Profession, Law in the Balance, ed. P.A. Thomas, Ch.7.
7. G. Sawyer & J. Hiller, The Doctrine of Precedent in the Court of Appeal for East Africa (1971); R. B. Seidman, The State, Law and Development (1978); G.W. Kanyeihamba, Constitutional Law and Government in Uganda (1975).
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9. Ibid.
10. I. Brownlie, (ed.) Basic Documents on Human Rights, 1981, 106.
11. A. Pollis and P. Schwab, Human Rights, Cultural and Ideological Perspectives (1979), U.H.R. 1-29.
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13. D. Sandifer & L. Scheman, The Foundation of Freedom (1966); Yoram Dinstein, "Collective Human Rights of Peoples and Minorities" (1976), 1 C.L.Q., 104-105.
14. Jean-Jaques Rousseau, Social Contract.
15. Preamble. See also the International Covenant on Civil and Political Rights, Art. 1.

16. J. Rawls, Theory of Justice, Cambridge (1971).
17. See M. G. Kaladharan Nayar, "Human Rights: The United Nations and United States Foreign Policy" (1978), 19 Harvard International Law Journal (1978), 813.
18. M. G. Johnson in (1980), 2 U.H.R., 7.
19. See Ajami, Human Rights and World Order Politics, 25, 28-29, where the emphasis is on survival rather than liberty or equality.
20. U.N. Doc. A/CONF. 32/41, 14. Similarly, the Montreal Statement of the Assembly for Human Rights, March 1968, VII, recognised the linkage.
21. U.N.G.A. resolution 2586 (XXIV), GAOR 24th session 15 Dec. 1969, suppl. 30 (A/7630), 59.
22. Montesquieu, De L'Esprit des Lois, Book XI, Ch. 6; John Locke: Second Treatise of Civil Government, Ch. XII.
23. Ibid.
24. See M.J.C. Vile, Constitutionalism and the Separation of Powers.
25. Robert B. McKay, An American Constitutional Law Reader, (1958).
26. See A.B. Dicey (ed. E.C.S. Wade), An Introduction to the Study of Law of the Constitution (1979), 183.
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28. (1964), 2 Review of Contemporary Law, 11-13; J. Read, "Bills of Rights in the Third World" (1973), 1 Verfassung Und Recht in Ubersee 21.
29. [1934] 2 K.B. 164.
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31. Appl. cas. 8317/78, European Commission of Human Rights, discussed in P. Hewitt, The Abuse of Power, Ch. 6.
32. C. Scorer and P. Hewitt, The Prevention of Terrorism Act - The Case for Repeal, London (1981); Home Office statistics on the Prevention of Terrorism Acts Statistical Bulletin, July 1981.
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41. Cited in Robert E. Goodwin (1979), 1 U.H.R., 31.
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62. See M. Zander, The Law Making Process (1980), Ch. 6.
63. An interview with the late Prof. Rupert Cross, Oxford, 1973. Transcript copies with author and at Warwick Law School.
64. See the confrontation between Lord Denning and the House of Lords in Magor St. Mellons v. Newport Corporation, [1950] 2 All E.R. 1226 and [1951] 2 All E.R. 839, respectively, Seaford Court Estates Ltd. v. Asher, [1950] A.C. 508, the commentaries on the role of judges

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71. Note the various judgments in recent years of the state courts against decisions of Mrs. Gandhi's administration even under the threat of the use of emergency powers, reported in States of Emergency, op. cit., 179-191.
72. The Times, 12th April, 1981.
73. See M. L. Marasinghe and W. E. Conklin (eds.), Essays on Third World Perspectives in Jurisprudence (ed. M. L. Marasinghe and W. E. Conklin), forthcoming.
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78. See Nwabueze, op. cit., 161; G.W. Kanyeihamba and J.W. Katende, "The Supra-national Adjudicatory Bodies and the Municipal Governments, Legislatures and Courts - A Confrontation" (1972), Public Law, 107-130.
79. See footnote 80, infra, 115.

80. See G.W. Kanyeihamba, Marasinghe and Conlin, op. cit.
81. Ibid.
82. Nwabueze, op. cit.; Y.P. Ghai, "Independence and Safeguards in Kenya" (1967), 3 E.A.L.J.
83. The State v. Dosso (1958), P.L.D.S.C. 533.
84. Supra, text to footnote 66.
85. (1966), 2 S.C.J. 725.
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87. For a full discussion of the judgments, see States of Emergency, op. cit., 186-187.
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92. (1978), A.I.R., S.C. 597.
93. (1981), A.I.R., S.C. 92.
94. (1981), A.I.R., S.C. 111.
95. Const. S.C.S./70 of April 20, 1970, Ghana.
96. Const. S.C.S. 1169 of 1969, Ghana.
97. (1968), (4), S.A. 207.
98. C.A. (Uganda) No. 1 of 1979: For an earlier example of judicial compliance with the coup d'etat see Uganda v. Commissioner of Prisons, ex.p. Matovu, [1966] E.A. 514.
99. Supra, 538-9.
100. Per Muhammad Munir, C.J.
101. In Amin's Uganda, Chief Justice Ben Kiwanuka was killed, in Nkrumah's Ghana, judges were dismissed from office, but Nkrumah's successors fared no better - see States of Emergency, op. cit., 101-132.

102. Madzimbamuto v. Lardner-Burke, [1969] A.C. 645.
103. See State v. Dosso, supra and Chowdhury v. M. Abdul Haque (1963), P.L.D., S.C. 486.