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ADMINISTRATION OF JUSTICE, RULE OF LAW AND DEMOCRACY

**Written statement* submitted by Jammu and Kashmir Council for Human Rights
(JKCHR) – a non governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[30 June 2005]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

We live in an age where one nation is a partner of the other in a twenty four by seven by three-sixty-five supply chain discipline. Thomas Friedman's book "The World is Flat" makes sense in a 'market driven climate. On the one hand we have South Korea as a 'Hermit Kingdom' and on the other US where over 5 million Americans were barred from voting in the last presidential selection.

On the one hand we have one extreme of the judicial wisdom enunciated by five justices of the US Supreme Court in *Small v United States* Case on Tuesday 26 April 2005 in which the five justices in the majority (in dissent three justices) resolved the conflicts, and gracefully noted that "theirs might still not be the last word", admitting that the circle of wisdom is never complete. "Congress of course, remains free to change this conclusion, through statutory amendment", the justices added in their judgement. Embedded in the US administration of justice are the elements of deep denial as seen at the military prison at Guantanamo Bay in Cuba and at Abu Ghraib prison in Iraq.

On the other extreme we have the case of 'honour punishment' of women by community panchayat as in the case of Mukhtaran Mai of village Meerawala Jatoli in Multan – Pakistan. As part of a tribal justice thirty three-year-old Mukhtaran Mai was gang raped in June 2002 on the orders of a village council to punish her teenage brother who allegedly had an affair with a woman of a rival tribe.

In another bizarre order in June 2005, a community panchayat in district Muzaffarnagar in India ordered a young married woman to become the "mother" of her own husband by living as a wife with her father-in-law who had raped her. 28 year old Imrana and mother of five children, of village Charthawal in Muzaffarnagar was raped by her father-in-law. The panchayat judgment reportedly has the consent of local clerics who believe that, according to the Shariat, the wife's relations with her husband stand nullified after the rape.

Civil societies around the world bound through a partnership of twenty four by seven by three-sixty-five supply chain discipline have a duty to address the common agenda of administration of justice, rule of law and democracy. However, more important than this common cause is to understand the fact that a 'policy of one-size fits all can't work.

We know that since World War II there has been a steady growth of legal standards applicable to governmental conduct towards its own permanent residents, whether citizens or not, and a clamour by human rights organizations and by an array of international organs for their implementation.

There still persists a Statist conception of rights. Their content and character is specified by governments, and those who are targets of governmental abuse have little international recourse to relief. Governments have some shared interests in keeping certain skeletons in the closet.

Before once conceives of a legitimate government, there must be a people, a people to institute it and before there can be a people there must be a compact among persons who, by nature, are free and independent – which is to say, independent of each other.

Governments have to be instituted among men and instituted by men. Government does not exist naturally, it is an artefact, something made by man rather than provided by God. Each man must consent to be governed. Paradoxically, security of rights requires the surrender of certain rights and they are surrendered into the hands of civil society. Sense and reason roller skate the interests of a civil society.

Each country has its own systems, traditions and needs. We have to create the legal and institutional frameworks to enable a civil society to flourish and it has to be based on what fits the particular habitat. The value of exchange is to share the basic principles for active responsible civil society and learn from the successes and failures of different approaches and not from unthinking imitation.

Some of these ideas have to do with recreating public space and respect for civil society's non-commercial character and support for civic diversification of public space etc. These need acts of bold political imagination and moral transformation. The well being of civil society is the well being of its citizens. Enabling the citizens to play an active role in social issues is ever more important and difficult – in our complex globalized world. Citizen's energy is a force for good but there is a dark side as 9/11 has reminded us. Enabling citizens to contribute requires a legal and institutional framework which balances freedom with responsibility.

We need to seek a fruitful balance and partnership between the informal flexible activity of a citizen and the formal and prescriptive nature of law. It eventually necessitates that we are able to create a framework of law which enhances civil society, ensures that it keeps public credibility without being inhibited.

It may be said that law is not impartial. It reflects the political and social biases of the legislators and judges who make it. For example a revolutionary phase of law in the 1800s facilitated the industrialisation of the US and the growth of corporate power.

Rule of law demands that law should be able to control its exercise. A threshold of reasonableness, good faith and correct grounds is very important in the exercise of a power. The court thus assumes that Parliament cannot have intended to authorise unreasonable action, which is therefore ultra vires and void. Courts have to act 'in defence of the citizenry' and against abuse of power by important bodies of a governmental or quasi-governmental nature.

In this regard the role of judges, lawyers, human rights defenders and civil society advocates of various opinions (political and non political) in any habitat is principal and crucial. Each forum can contribute according to the quality, substance and strength of its member. It depends on how these forums and their constituents remain actively involved in a twenty four by seven by three-sixty-five supply chain discipline bordering all shades of our life.

As a Lawyer engaged in promoting 'public interest' and in defending 'human rights' it is my considered opinion that Lawyers should embed themselves exclusively in the institutional wisdom of 'justice' – based on rule of law and on an independence of their approach. They may contemplate to embed themselves in various other disciplines of social and political life but it should be restrained and subordinate to their principal role and interest as members of a Bar Association.

A case of misdirected wisdom under examination is the Jammu and Kashmir High Court Bar Association at Srinagar. It goes to the prestige of the legal traditions of the State that High Court was established in the State of Jammu and Kashmir in the year 1928 with two main circuits at Srinagar and Jammu.

On the one hand the legal fraternity is full of illustrious names like Justice A. S. Anand former Chief Justice of India and now the Chairman National Human Rights Commission of India, known for his judicial wisdom beyond the borders of State and India, late Chief Justice of Azad Kashmir High Court Justice M. Y. Saraf, Justice Syed Manzoor Gilani Supreme Court of Azad

Kashmir (former Chief Justice of High Court), late Barrister K. H. Khurshid, Muzaffar Hussain Beig, Dr. Riyaz Punjabi, Ashok Bhan, Mian Abdul Qayoom, Nazir Ahmad Roonga, Zafar Shah, and many others and on the other we see that the Bar has abysmally failed in its institutional wisdom to the profession and the civil society.

The second Constitution adopted on 24 April 2000 under Chapter C (3) (b) sets out to seek a 'peaceful settlement of Kashmir dispute' yet it fails to address to the jurisprudence of the distribution of the people under three administrations on either side of the Line Of Control. The Srinagar High Court Bar erroneously embedded itself as a lame constituent of All Parties Hurriet (Freedom) Conference, an alliance of political, social and religious organizations, on 13 September 1995.

It produced a 673 page "Report On Violations Of Human Rights In Kashmir" in August 1994. The report lacked in substance and its over-riding propaganda material failed to validate the authors as representatives of an institutional wisdom. The fact that it was, although in good faith, introduced with the compliments of Kashmiri-American Council in Washington, proved another Albatross round its credibility. This is a discouraging example of Lawyers making bad judgements in the name of institutions.

I would urge that United Nations, more so, Sub Commission on the Promotion and Protection of Human Rights adopts various Bar Associations, like the one at Srinagar and Jammu for a composite regime of support. Officers of the Bar Association and others identified by them and by us should be invited to UN bodies for interaction and training. They should be sponsored to various other important capitals and judicial institutions around the world.

Lawyers in Jammu and Kashmir have an important role to play in the post conflict rehabilitation and in defending the jurisprudence of the Rights Movement. Only a well focussed, independent and conscientious Bar Association can offer a reliable spread to choose good judges and can assure administration of justice, rule of law and democracy.

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