

# Review Judgement in Halima Khatun Case

by Abdul Matin Khushru

**In their judgement pronounced on 4 January 1978 their Lordships stated, "the Constitution of Bangladesh, 1972, stands subordinate to the Proclamations, Regulations or Orders as may be made by the President by virtue of assumption of power and as such the Constitution is no longer the supreme law of the country." This judicial pronouncement of the apex court made the Constitution subordinate to the proclamation. So, if this judgement is not overruled by review, it will continue to stand as an obstacle towards the independence of the judiciary and democratic development.**

THE Constitution of Bangladesh came into operation in December 1972. It not only embodied the principles of constitutionalism, rule of law and human rights. It made specific provisions in articles 44 and 102 for realization and enforcement of those as well. It is undeniable that a strong judiciary is the best safeguard against violation of, and best protection for preservation of, human rights. Article 7 of the Constitution provides for the supremacy of the Constitution i.e. for constitutional governance of the state and the guardianship of the Constitution was given to the Supreme Court. It is a matter of historical fact that judiciary can flourish only in a truly democratic system of government which can succeed in an environment of civility and respect. Compromise, not confrontation; accommodation, not acrimony must be the words we should use to describe democracy which alone guarantees human rights and transparency in all spheres of administration.

Bangladesh as a member of the United Nations is committed to the Universal Declaration of Human Rights. It has become an imperative to effectively implement the Vienna Declaration and Plan of Action adopted at the world

conference of human rights held in June 1993. However, proper and effective mechanisms are yet to be evolved in this country. But due to lack of awareness, economic poverty and effective mechanisms in the legal field the conditions of enjoyment for human rights could not be achieved and in many cases stand as an impediment in the way of proper protection and upholding human rights. For achieving sustainable human development in Bangladesh and realization of a truly democratic society that the diverse forms of deprivation affecting people from all walks of life should be eliminated. The eradication of human rights violations can be possible through the strengthening of the democratic institutions in the country.

Modern civilization is, to a great extent, founded on law and justice. Access to justice is the birth right of every human being without any discrimination like other fundamental rights codified in chapter III of the Constitution.

Since the adoption of the Universal Declaration of Human Rights in December 1948, the international community has made considerable progress towards the promotion and development of transnational jurisprudence of substantive hu-

man rights embodied in a good number of international conventions, global and regional, general and specialized. Effective mechanisms for the enforcement of human rights in the national, regional and international systems of justice are a fundamental requisite as without such mechanisms human rights will remain unfulfilled injunctions in the constitutions or in the regional and international conventions. An impartial judiciary composed of competent judges is the best guarantee of proper administration of justice, and in the final analysis, of defence of human rights.

Judicial activism plays a vital role in bringing in the social transformation. It is the judicial wing of the state that injects life into law and supplies the missing links in the legislation. Thus, where the legislature falters, the judiciary corrects. Having been armed

with this power of review, the judiciary comes to acquire the status of a catalyst on change. In the field of *locus standi* also, it is again the judiciary which has enlivened the dead law by sharply deviating from the traditional rule of private interest to public interest litigation.

The question of *locus standi* is now much more liberal than ever before. In a recent case *Mohiuddin Farooque vs Government of Bangladesh* (July 96), the Appellate Division of the Supreme Court extended the meaning of 'person aggrieved'. The petitioner filed a petition challenging the Flood Action Plan (FAP-20) of the government, which was primarily rejected by the High Court Division on two grounds i.e. (a) non-maintainability and (b) that the petitioner is not a person aggrieved and therefore, had no legal right to file petition for the enforcement of his fundamental right. Finally, the Ap-

pellate Division entertained an appeal against the High Court's decision and held that the petitioner is an aggrieved person and therefore he has *locus standi*. This revolutionary decision untied the long fastened legal knot of standing to a great extent.

In the case of *State vs Deputy Commissioner, Satkhira* (Reported 1993), judicial activism of the High Court Division has been introduced in our jurisdiction for the first time where, based on a newspaper report, a Bench of the High Court Division issued a *suo moto* rule questioning the legality of the detention of a young boy Nazrul Islam, who was detained in jail for twelve years.

The judiciary, which is the last hope of the citizen, contributes vitally to the preservation of the social peace and order to settling legal disputes and thus promotes a harmo-

nious and integrated society. The quantum of its contribution, however, largely depends upon the willingness of the people to present their problems before it and to submit to its judgements. What matters most, therefore, is the extent to which people have confidence in judicial impartiality. According to Justice Frankfurter "the confidence of the people is the ultimate reliance of the Court as an institution". This point has eloquently been expressed by a distinguished Justice of the US Supreme Court.

The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgements and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly; they are the products of time and experience. But they flourish when judges are independent

and courageous." In *Anwar Hossain Chowdhury vs Bangladesh and others* 1989 BLD (Special Issue) the Supreme Court (A.D.) did not hesitate to declare amendment of Article 100 along with its consequential amendment of Article 107 of the Constitution to be *ultra vires* and invalid.

Judiciary is the guardian of law, protector of individual rights and media for balancing the social equilibrium. Unfortunately in Bangladesh, the judiciary came under pressure from the extra-judicial powers at different times. Although Article 7 of the Constitution provides for the supremacy of the Constitution and the guardianship of the Constitution was given to the Supreme Court, in the judgement of Halima Khatun (30 DLR (SC) 207) the Appellate Division of the Supreme Court categorically said that the Constitution shall not compete with the proclamation of Martial Law. In their judgement pronounced on 4 January 1978 their Lordships stated, "the Constitution of Bangladesh, 1972, stands subordinate to the Proclamations, Regulations or Orders as may be made by the President by virtue of assumption of power and as such the Constitution is no longer the supreme law of the country." This judicial pro-

nouncement of the apex court made the Constitution subordinate to the proclamation. So, if this judgement is not overruled by review, it will continue to stand as an obstacle towards the independence of the judiciary and democratic development.

Interestingly, I may refer and quote Article 136 of 1917 Mexican Constitution: "This Constitution shall not lose its force or effect, even if its observance is interrupted by rebellion. In the event that a government whose principles are contrary to those that are sanctioned herein, should become established, through any public disturbance, as soon as the people recover their liberty its observance shall be reestablished and those that have taken part in the government emanating from the rebellion shall be judged in accordance with this Constitution."

Our Parliament may consider amendment of the Constitution in the line of the Mexican Constitution.

I would most humbly like to urge upon our most respected judges of our apex court to kindly see whether the judgement given in the Halima Khatun case can be reviewed.

The author is the Minister for Law and Parliamentary Affairs, Govt of Bangladesh.

## P N Haksar — That Man of the Moment

P N Haksar is no more. He played an important role as Prime Minister Indira Gandhi's Secretary and Adviser during the crucial years for Bangladesh — 1970-72. Here are some relevant extracts from the writings of Dwarka Nath Chatterjee and Subimal Dutt, both diplomats at that time — which appeared in the collection of articles titled "P N Haksar: Our Times and the Man" brought out on the occasion of his 75th birthday in 1989 by Allied Publishers Private Limited, New Delhi.

AFTER the liberation of Bangladesh in 1971, one of the pressing problems for the Pakistanis was to secure without delay the release of about 90,000 Pakistani prisoners of war in Indian custody. Prime Minister Indira Gandhi and PNH, her close adviser in those days, displayed statesmanship of high order. India was careful not to humiliate a vanquished Pakistan in the Simla Agreement. Subsequently PNH negotiated, as the special representative of the Prime Minister, with the Pakistani minister of state for defence and foreign affairs, Mr Aziz Ahmed, the repatriation of the prisoners of war. I happen to know of the hard and proud character of the Pakistani minister, who must have been particularly bitter and touchy after the Pakistani debacle. To my pleasant surprise PNH concluded the talks in Rawalpindi and Delhi with a satisfactory accord, without offending Aziz Ahmed and his team in any way. I have seen some photographs in this connection, showing both Aziz Ahmed and PNH in a highly jubilant and fraternal mood.

Discretion is one of the indispensable qualities a diplomat must have. PNH was a professional diplomat in the Foreign Service, and though later he rose virtually to cabinet rank with other responsibilities, some particularly delicate diplomatic tasks continued to be entrusted to him. Negotiations with Aziz Ahmed and PNH to a defeated Pakistan with their grim, resolute mood, once they had realised that the extent and rigour of West Pakistani repression in what now is Bangladesh, was not only barbaric *per se*, but that it also posed a grave threat to the security and stability of India. The Revolutionary China of Mao Tse-tung and Chou En-lai remained unmoved by the atrocious military dictatorship of Pakistan committed against the Bengalis. The Great Capitalist Democracy of America, guided by President Nixon and the future Nobel laureate for Peace, Kissinger, remained an understanding patron of the Pakistani dictator. Other major

countries were interested observers, but they found no reason to intervene. Some Muslim countries had more sympathy for the marauding West Pakistani than for their Muslim Bengali victims. Meanwhile millions of refugees streamed into Calcutta in an endless flow. After the partition of India in 1947, countless thousands of refugees had been coming from East Pakistan and Calcutta has never recovered from the strain they imposed on an overpopulated, volatile city. This new massive exodus from East Pakistan in 1971 generated great anxiety and anger. India had to do something. There was clamour for immediate military action. I remember that even Jayaprakash Narayan, who was my guest in Paris in that tense summer of 1971, was in favour of invasion. Unofficial reports from Delhi indicated that even some of our generals — with the notable exception of General (later Field Marshal) Manekshaw — wanted to march into East Pakistan without delay. The political pressure on the Prime Minister for a muscular intervention was mounting dangerously.

However, our Prime Minister had a tight little circle of cool-headed advisers in which, to the best of my knowledge, Haksar was particularly influential. They appraised the situation realistically. At the superpower level, China was inimical; America under Nixon was hostile; even though Kissinger did his best to mislead our Foreign Office. In July 1971 I had learnt, for instance, that Kissinger had assured Foreign Secretary T N Kaul that he would "talk Nixon out of supporting Yahya Khan" adding that Pakistan was of "marginal interest to the USA". He had also stated that not only was India a stable democracy, but it was also a power capable of taking on single-handedly not only Pakistan but also China. All these remarks, statements, made to beguile India as a prelude to Nixon's diplomatic coup vis-a-vis China, damaged Kissinger's credibility, without deceiving PNH and his colleagues.

China and America were in the hostile camp and the European powers were non-committal, even if they deplored the massacres in East Pakistan. On 14 July, 1971 President Pompidou had said to me: "France is for peace", while talking about the situation in East Pakistan. I had responded with disarming candour: "France is also for justice". He did not disagree. It was obvious that Pakistan was sheltered by legality and that an Indian invasion of East Pak-

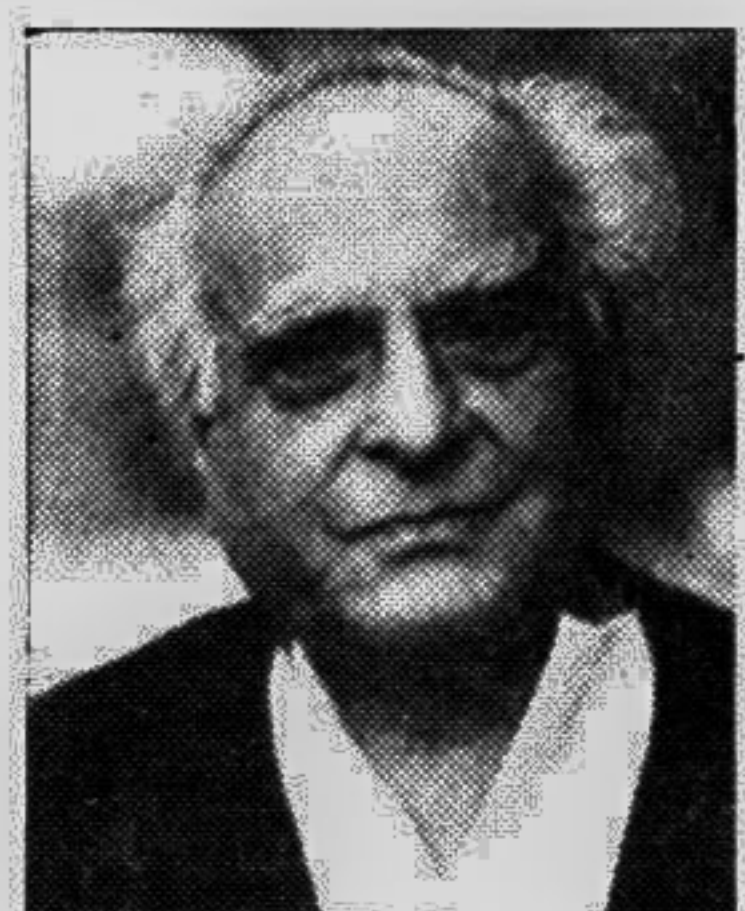
istan would invite international condemnation. Besides, military operations in East Pakistan were likely to bog down unless undertaken in the dry season. As it became increasingly clear that eventually India would have to resort to force, PNH took the lead in helping the Prime Minister to resist pressure for premature military action, while fortifying the diplomatic position of India in the event of war. The first act was to reinforce our links with the Soviet Union (the 20-year Friendship Treaty of August 1971) — and then followed the visits of Prime Minister Indira Gandhi, accompanied by PNH and Foreign Secretary T N Kaul, to the major European countries and Washington. Nixon was not won over, but the international climate was not hostile when India marched into East Pakistan in December 1971, to make it the independent State of Bangladesh. One may say that in this case PNH had evoked both Clausewitz and Rousseau!

*Haksar and India's Foreign Policy* by Dwarka Nath Chatterjee

THEN came the liberation war in East Pakistan in 1971. It was no secret that during those troubled days Haksar and D P Dhar were two of Mrs Gandhi's close advisers, but I had no personal knowledge of their activities. When the war ended in December 1971, those of us whose original homes were in Bangladesh were discussed by the Indian and Pakistani representatives at many sittings held alternately in New Delhi and Islamabad. Haksar represented India at all these discussions; he did so even after he had ceased to have any official connection with the government in Delhi.

His was by no means an easy task. Since Pakistan had not recognised Bangladesh, the latter did not participate in the talks and the Indian representative had to put the views of Bangladesh to the other side. He had, therefore, to keep in touch with the government in Dacca while discussions were in progress in New Delhi or Islamabad. Fortunately, during that crucial period the Foreign Minister of Bangladesh was Kamal Hossain, a highly educated and brilliant advocate who enjoyed Mujib's full confidence. He made himself available to me at all hours of the day whenever an urgent message arrived from Haksar at the other end to ascertain Bangladesh's views on any point. Although Bangladesh was an absent party at these discussions, its views were well represented.

— *Diplomat and Administrator* by Subimal Dutt



ence the Muslim countries of West Asia withheld their recognition. So did China.

It was just as well that by then D P Dhar had been relieved of the responsibility of dealing with Bangladesh and his place was taken by Haksar. Dhar's flamboyant ways ill accorded with the changed atmosphere in Dacca. Haksar visited Dacca soon after the conclusion of the Simla Agreement. This was to be the first of many such visits during the following 18 months. As High Commissioner I used to accompany him whenever he called on Prime Minister Mujib. He was objective, frank and persuasive and made no attempt to slur over any sensitive issue. He might not have convinced the other side on all points but they recognised his sincerity. And his sense of humour would occasionally relieve the tension that occasionally developed during discussion.

The two issues which were of intimate concern to Bangladesh were the future of the Pakistani prisoners of war and the Bhari refugees numbering several lakhs, most had collaborated with the Pakistan army during the liberation war. These issues were discussed by the Indian and Pakistani representatives at many sittings held alternately in New Delhi and Islamabad. Haksar represented India at all these discussions; he did so even after he had ceased to have any official connection with the government in Delhi.

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## How to Understand and Respect People with Disabilities

by Julian Francis

ALL over the world, December 3rd is observed as the International Day of Disabled Persons, and it is only right to ask ourselves if we ever take time to understand the problems, the challenges, the feelings and the aspirations of those people who live among us who, as a result of a disability or disabilities, find their lives more difficult to handle than most of us. When we meet people with disabilities, due to our lack of knowledge, we often feel awkward and embarrassed as we do not know how to react, what to do, or what to say. I am writing down some practical advice which may help in the understanding of how people with disabilities feel. I draw on my own personal experience of growing up with a brother with a severe learning disability and later in life having a son with a similar disability. This experience has enriched my life and my work.

Having been responsible in 1991 for putting together the first draft of Bangladesh's National Disability Policy, and having seen how slowly it has made progress, I am well aware of how officialdom looks at the problems of the disabled. The rights of the disabled are always at the bottom of most government budgets, and so, I can only stress that much more work has to be done. I have worked with many friends in Bangladesh and elsewhere who have disabilities, and all the time I try to focus on the person and not on the disability and hopefully what I write below will help government ministers and officials better understand what they have to do and how to relate to persons with disabilities. The best advice, however, is that if you do not know how to handle your relationship with a person with a disability, ask him or her for advice. I hope these Do's and Don'ts will enrich the lives of those who read them and some of the millions of people with disabilities in Bangladesh.

Don't treat a person with one disability as if she/he is disabled in other ways. People tend to talk in simple single syllable words to people who use wheelchairs, they shout at the deaf, and often address a blind person through someone else.

Do ask if you can help—and how to help—if it looks as if help might be needed. You may be shy about offering help. The disabled person may also be shy about asking for it. And don't be offended if your help is not needed—persons with disabilities usually like to be as independent as possible. And don't be put off from offering your help at another time.

Don't say, "I wouldn't try that if I were you"—a disabled person is likely to be the best judge of what she/he can or cannot do.

Don't show pity and say, "I don't know how you manage, I'd die if I couldn't walk." It is often hurtful and, under the guise of praise, reinforces the sense of being different.

Do treat children with disabilities as normally as possible—including not allowing them to misbehave. Disabled children need to learn the boundaries of acceptable behaviour, in their own society, just as other children do.

Do identify yourself straightaway. A blind person can't always place you by a 'hello'. It's hard for her/him to reply warmly, 'hello', if she/he doesn't know who you are. So, give a name and context: 'Hello, it's Tasneem. We met last week at Farida's house.'

Do make a special effort to remember the name of a person who is blind. Beginning with her/his name is the only way of letting him know that you are talking to her/him.

Don't feel shy about saying things like 'nice to see you' to a blind person. She/he may even say it back. It's impossible to avoid words connected with seeing—blind people aren't self-conscious about it and needn't be.

Don't grab a blind person's arm unexpectedly. You'll startle her/him. In fact don't hold a blind person's arm at all! Allow her/him to hold yours. She/he is then safely half a step behind you and so is forewarned of what your next move will be by the change in your position.

Don't say 'here's a step'—say, 'step up' or 'step down.' It's dangerous as well as embarrassing to be waving your foot in mid-air when the step actually leads down. Also if the step is exceptionally deep or shallow—do mention it.

Don't leave doors half open. Shut them all the way or open them flat against the wall.

Don't exclude a blind person from television. It gives her/him access to a world far

miliar to her/his sighted friends.

Don't exclude a blind friend from outdoor activities. Ask if she/he would like to shop with you instead of your doing it for her/him.

Don't chase a child away from a person with a learning disability (often, wrongly, referred to as 'mentally retarded') who might approach her/him. It only perpetuates the feeling that there is something to be afraid and ashamed of. If she/he reaches out to touch a child, take her/his hand and turn it into a friendly handshake—deflecting the attention away from the child and onto yourself.

Don't be afraid of a person with a learning disability. Very few are violent—and if they are among people, you can assume that they are not violent. Avoidance and rejection are among the most commonly upsetting things to people with learning disabilities.

Do be honest and keep promises. Don't assume that a person with a learning disability doesn't understand or remember what you've said. As an example, my son Neil, now 23 years old, who has a severe learning disability, has a phenomenal memory.

Do take time to listen to someone who is mentally ill—and don't assume that she/he has no knowledge or opinions of value.

Don't express pity for parents of 'retarded' children—their child is just as precious to them as any child is to any parent.

Don't give advice, except to point someone in the direction of professional help if none is being given and some help seems necessary.

Do remember that any practical help you offer may need to be given for a long period.

Don't tell a person who is mentally ill to "pull themselves together". If they could, they would. —Don't grab hold of a

**Who is Disabled?** who has the mental handicap?

If you fail to see the person, but only the disability, then, who is blind? If you cannot hear your brother's cry for justice, who is deaf?

If you do not communicate with your sister but separate her from you, who is disabled?

If your heart and mind do not reach out to your neighbour,

If you do not stand up for the rights of all persons, who is the cripple?

Your attitude towards persons with disabilities may be our biggest handicap. And yours too.

—Tony Wong  
Executive Director, "Combined Disabilities", Jamaica, 1981.

CHIEF Joseph Gosnell is sitting in the lobby of a London hotel room only steps away from Parliament, half a world away from the Nass Valley, home to his tribe, the Nisga'a First Nation.

Despite the distance between the busy metropolis and the densely forested remote valley near the southern tip of Alaska, there's a connection between the Nisga'a and the British Parliament.

The Nisga'a once sent a petition to the Privy Council "claiming to hold a tribal title to the whole of the said territory", a territory where their people had lived for 10,000 years before it was taken from them by the federal government of Canada and the provincial government of British Columbia (BC).

That petition was sent in 1913. "Unfortunately, it was never heard by the Privy Council," Gosnell said. "They came back empty-handed."

But on this trip to London, 85 years later, Nisga'a hands are no longer empty.

The federal government of Canada and the provincial government of British Columbia have finally agreed to a treaty with Gosnell's people, giving

## Landmark Treaty Gives Self-government to Canadian Tribe

The Nisga'a First Nation is an aboriginal tribe on Canada's west coast that has finally, after a century of struggle, reached a land-claims agreement with the federal and provincial governments. Gemini News Service reports on a treaty that is being hailed as the start of greater power and better economic opportunity for Canada's aboriginal people. Mike Crawley writes from London

them C\$190 million in cash, ownership of 2,000 sq km of land and control over the justice system, education, culture and social services on their lands. The deal was signed in August, the Nisga'a ratified it in a referendum in early November and all that remains is for the provincial legislature and federal Parliament to ratify the deal, which is expected to happen in the next few weeks.

"We still carry that vision forward today, that vision of sharing clearly expressed in the 1913 petition," says Gosnell. "The journey that began a long time ago now seems to be coming to a close."

Gosnell is in Europe to tell academics, journalists, business people and politicians about the treaty's importance. It's important because it is the first treaty to be settled this

century in BC, a province rich with natural resources and riddled with outstanding land claims by aboriginal groups.

Given the economic stakes, and the sense that the Nisga'a treaty would form the template for the deals currently being negotiated with 50 other aboriginal groups, the battle over it was monumental.

The land claim process has been the most controversial political issue in BC this decade. The government's desire to settle the claims brought forth a deluge of anger and thinly veiled racism from opposition politicians, business interests and conservative rural residents.

Opponents complain that the native population sucks up welfare money, but also complain that treaties will let natives steal their jobs. They

complain that treaties give "special status" based on race, but ignore that race is what shoved natives onto their tiny reserves in the first place. They complain that treaties would hurt the economy, yet the BC government was dragged reluctantly to the negotiating table once it realised that millions in investment was bypassing the province, specifically because the claims were not being settled.

The opponents tried to rally support round their cause with the cry that too much was being given away to the Indians, an ironic criticism since what was being "given away" was far less than what was stolen from them by previous generations of white settlers.

Those that represent that point of view feel threatened, threatened that we're going to

take a fair chunk of their livelihood," says Gosnell. "I don't think they're representative of the vast majority of British Columbians."

Alec Rose, an advisor to the Nisga'a, says the opponents represent an old-order 19th-century pioneering worldview of people who don't want to give up their control over the economy. "No one relinquishes this power willingly," says Rose.

Treaties have the potential to provide a sorely-needed economic base for aboriginal people. Unemployment runs rampant on BC native reserves and the lack of job opportunities makes aboriginal people dependent on government hand-

Drive through a reserve, witness the poverty, and you'll wonder how Canada has managed to rank first in the UN

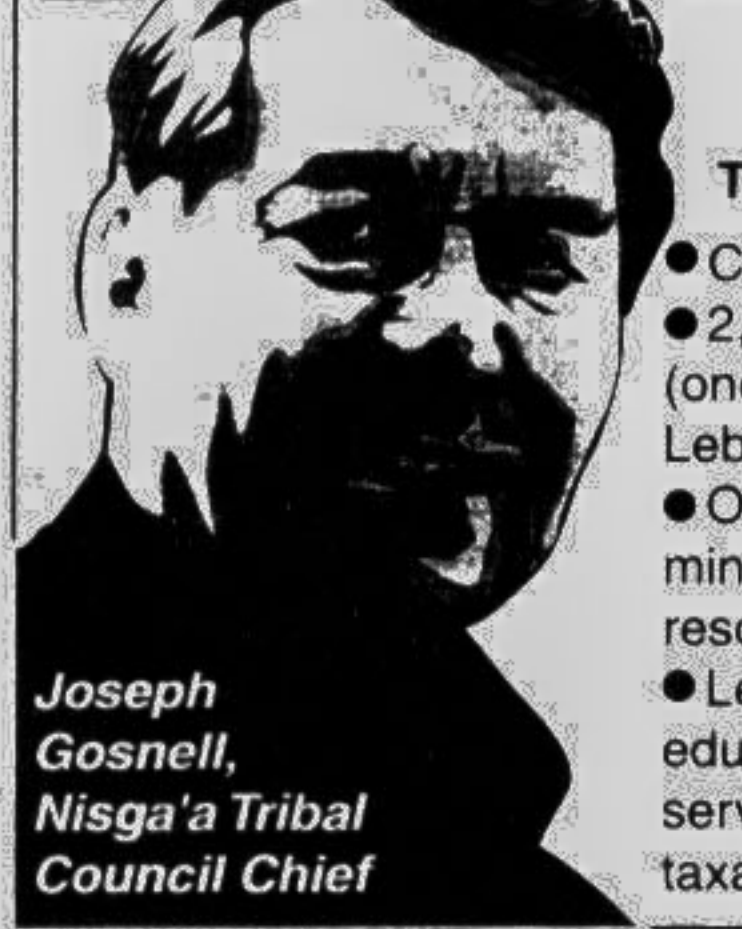
## A landmark treaty



The Nisga'a First Nation is about to conclude a land-claim deal with the federal government of Canada and provincial government of British Columbia.

### The treaty offers

- C\$190 million
- 2,000 sq km of land (one fifth the size of Lebanon)
- Ownership of all mineral and forest resources on the land
- Legal control over education, social services, police, and taxation



Joseph Gosnell, Nisga'a Tribal Council Chief

Human Development Index for five years running.

Job creation will be at the top of the Nisga'a agenda. The land base — a vast increase from the 62 sq km of scattered reserves on which the Nisga'a have been living — gives them the potential to develop their own forestry and mining industries, but Gosnell also wants to diversify from the resource sectors.

Despite the gains, the treaty didn't win over all of the 2,200 Nisga'a people. Although the majority voted in favour in the referendum, there was significant opposition by those who felt the deal did not include enough cash and enough land. Gosnell responded to the internal criticism by pointing out that the treaty is not just about land and money, but also about governance. Ultimately, it's about the ability of the Nisga'a to chart their own destiny.

There's one final hurdle for the treaty. The BC Liberal Party has launched a court challenge, arguing that the treaty changes the province's constitutional status. It has little chance of success, given that the Supreme Court of Canada has ruled that the Constitution requires governments to recognise aboriginal rights.