Yksilön oikeusturva — Individens rättsskydd

THE FINNISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS

Reports of the Symposium on

THE INDEPENDENCE OF JUDGES AND LAWYERS

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Opening Words

By LAURI LEHTIMAJA, Executive Secretary,
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Our ambitions were relatively modest when we started the planning of this symposium. We hoped to arrange a public meeting in order to prove to ourselves as well as to the Finnish legal community that the Finnish section of the ICJ still exists and is capable of functioning.

The Finnish national group was established in 1956. Unfortunately there has been no activity in the course of the last 13 years. As a result, the work and the role of the ICJ has remained rather unknown to Finnish jurists. Thanks to the active encouragement of Mr. *Hans Thoolen,* we managed to re-activate the Finnish section in the spring of 1980. Since both the President and the Vice-President of the Finnish section had died during the years of non-activity, a whole new board was elected with Prof. *Tore Modeen* as President, Prof. *Mikael Hidén* as Vice-President and Mr. *Christian Reims,* Mr. *Gustaf Möller* and myself as members.

There are two main reasons that prompted the need for this re-activation. *Firstly,* the fact that Finland has ratified the International Covenant on Civil and Political Rights means that the individual's protection under the rule of law must be seen as an imperative imposed by a legally binding international commitment, not merely as an ideal goal of domestic legal policy. It is our intention to keep an eye on our legal development with this new obligation in mind. *Secondly,* we feel it is important for Finnish jurists to initiate more contacts with our colleagues

abroad and create a feeling of affinity with the international legal community. This is the only feasible way to put an end to the isolation arising from the geographic, political and — last but not least — linguistic barriers.

We feel it is our pleasant duty to assist and support the ICJ in its efforts to promote the human rights under the rule of law all over the world. This is why we have chosen the Independence of Judges and Lawyers as the topic of our symposium — a topic which we know to be very close to the heart of what the ICJ is doing today. We hope to concentrate on the requirement of independence as a safeguard for the individual's protection under the rule of law, even though we are aware of the fact that this is just one aspect of a larger topic. Furthermore, we wish to point out the close interdependence between the judge's independence, on the one hand, and that of the practising lawyer's on the other hand. These must not be viewed as separate issues but rather as two sides of the same problem.

I would like to extend a word of thanks to the Finnish Bar Association that has kindly granted us financial assistance for the purpose of organizing this symposium. We hope this occasion will mark a beginning of a long and fruitful co-operation.

The Independence of the Judiciary

By Dr. GUSTAF PETRÉN,
Judge of the Supreme Administrative Court, Sweden

The independence of judges and lawyers is part of the Montesquian theory of division of power. The tripartition of the public decision-makers into the Executive, the Legislative and the Judiciary is based on the idea that each of these three acting parts should have a certain independence in relation to each other. We all know that this is not true in a modern democracy. Very often the Executive is, in principle, dependent on the Legislative. In a parliamentary system, this is the rule. But even when the partition of power is functioning well, it is often difficult for the Judiciary to maintain an independent position in relation to the Parliament and the Government. An important problem is usually who is to appoint and promote judges. The power to elect the persons who are going to be judges gives immediately an influence on the Judiciary.

In the American system, where the people elect at the same time a Governor for the Executive, a Congress for the Legislative and judges for the Judiciary, everybody derives his power from the people. All proper consideration seems to have been taken. But how independent is the judge who has to seek re-election every fourth year? Some doubts may arise. It is probably impossible to find a system which avoids all the weaknesses that may turn up. Every country which wants really an independent judiciary has to find its own ways to reach this goal.

It may be interesting at this stage to present the Swedish tradition, which, in the beginning, was also the Finnish one until

1809, even if we can note later changes and differences. We have to go back to the original Germanic society where the king in his hand united the executive and the judicial power. Sweden has never really abandoned this concept, even if the powers have been transferred from the king to other governing bodies of the society. In the old Swedish system there was no difference of a principal nature between executive measures and judgements of the courts. Public actions could be sorted out, along a gliding scale, from a very simple administrative decision to an elaborate judicial judgement. It was looked upon as a practical question how much judiciality should be used in different kinds of matters. Even if the liberal idea of the judicial independence exercised a great influence during the 19th century and also during the present century, the judicial and the administrative activities were seen as being branches of the same tree.

This principle has become very obvious in the new Swedish constitution of 1974. There the courts and the administration are treated in the same chapter as two parallelly functioning state organisms. Thus very litte development has taken place, in this respect, from the Medieval age when e.g. in the cities the council of the city — *borgmästare och råd* — performed both administrative and judicial functions. The courts and the administrative authorities are governed by common rules. The Government is at the top of the administration and the two supreme courts make up the head of the court system. Each side still is given its tasks; one side cannot interfere into the domain of the other one. A court is not allowed to quash an administrative decision.

The constitutions of Denmark and Norway have placed these two countries in an opposite position of this parallell system, i.e. into the traditional European pattern where the courts have the right to control the administration and, in the last instance, quash any administrative decision. On the outside there is much similarity between the Scandinavian countries, but the differences in principle must be observed.

The first question to be answered is, of course, whether the independence of the judges is weaker in Sweden than in the two neighbouring countries. In some way I think the answer may be yes. In Norway the tripartition of the state functions is also

observed in the protocol. Under the king, the president of the *Storting,* the Prime Minister and the Chief Justice are the most prominent, representing each of them one segment of society. The judges are in this way always reminded of their position as holding a specific part of the public power. In Sweden the presidents of the two Supreme Courts have no similar position.

In all Scandinavian countries, the judges are appointed by the Government, but the Judiciary itself usually has, in different ways, some influence on the recruitment of judges. In Sweden, the appellate courts, in reality, decide who are going to be judges, but the promotion of the judges is in the hands of the Government. In Denmark, the judges of the Supreme Court exercise a decisive influence on the recruitment of the Court, a kind of co-optation. In Finland the Supreme Court appoints the district-judges.

More important from a practical point of view is how the judges themselves look upon their task. The Anglo-Saxon viewpoint is that the Judiciary has a constitutional responsibility for the rule of law in the country. This idea has some influence on the Danish and the Norwegian judges. Feelings of this kind, however, are rather far from the mind of a Swedish judge. He is carefully administrating justice according to the national laws. He is content to do so and has no further ambition. He will not accept any personal responsibility for the state of justice in the country. To uphold it is a matter for the politicians in Parliament and in the Government.

In Sweden this mental state of the judges is a pre-condition for their independence. As long as the courts do not interfere into the sphere of the politicians, they will in their turn leave the judges alone with their problems. In the constitutional debate in Sweden, the representatives of the Legislator have always firmly opposed the idea of giving any power or influence to the courts as institutions for control of the legality of political actions. The politically dominated powers prefer to stay free of judicial control. As long as the Judiciary has no aspirations to control the legality of the political decision-makers, the courts will keep their independence inside their own domain. Local government makes an exception: the decisions of the locally

elected bodies are, on the request of a citizen, controlled by the courts and, where found illegal, quashed.

The same debate has not occurred in Denmark and Norway. The Constitutions of these countries undoubtedly give a controlling function to the courts. This fact is generally accepted in Denmark and Norway, as far as I understand, also by the politicians and creates no practical difficulties.

The new Swedish constitution of 1974 is based on the idea of the sovereignty of the people. Further more, the fundamental theory of the constitution is that the will of the people can only be materialized at general elections. And with an election once held, the power of the people is transferred to Parliament. So the consequence is that all public power stems from Parliament. And Parliament, as the sovereign, cannot be controlled by any other body. The Judiciary must be subordinated to Parliament. Yet the system has two exceptions.

First we have the possibility and also the duty of any authority not to apply an illegal statute or decree in a given case (chapt 11, art 14 of the constitution). This power is given to all kinds of public authorities, not only the courts. But a decision emanating from Parliament or from the Government could only be set aside, according to this rule, in a case where it is obvious that the decision is not in conformity with a higher overruling norm, in the last case the constitution. Such an obvious mistake is very rare, so this general duty to control the legality of norms has a very small practical impact.

The other possibility is the right given to the Supreme Administrative Court to review an illegal administrative decision, even a decision of the Government. This power is used from time to time but rarely. Up to now its use has not created any practical problems in the relations between the Supreme Courts and the Government.

Another side of the independence of the courts relates to the economic side. In all the Scandinavian countries the budget of the courts is a part of the ordinary state budget for the country. Parliament can, in its capacity of being the exclusive decision-maker as concerns the expenditures of the state, diminish the allowances of the courts and thus, in reality, prevent them from

functioning. It would be a revolutionary step to do so. But in between a full stop and a small cut in the allowances there are many nuances. Parliament makes every year decisions on how to cover the courts' needs. Sometimes there may be a temptation to cut down the allowances of a court acting in a way that does not please Parliament. In some countries, to avoid this kind of situations, the courts have a direct access to the money they need for their necessary expenditures. In this respect Sweden is in an extraordinary position. By a political decision of Parliament some years ago all Swedish courts are, as far as their administration is concerned, placed under the command of an administrative agency called *Domstolsverket.* It is not allowed to interfere in the judging activities of the courts, but it does have the task of co-ordinating all administrative respects. Controversies with the courts cannot be avoided. What is pure administration and where does the judging activities start in a court?

Until now the Scandinavian Governments have not conscientiously used their power to appoint judges in a way seeking to influence the future judgments of the courts. There is a silent understanding. If the courts should try to use their power for political purposes, the Government would answer with political appointments of the judges.

Some years ago the Swedish Government started to prepare a reform for new principles for the recruitment of judges, based on the assumption that up till now the judges had not been modern enough; they had not been in contact with real life. The proposal was to change the social structure of the Judiciary by also appointing to the Bench lawyers that would have been picked up from circles outside the present relatively closed courts system. The proposal of the commission was never enacted. The general conclusion was that Sweden had no need for a reform of this kind.

My summing up would be that in all western democracies the independence of the courts is a basic feature of constitutional life. It is generally accepted that the parties in power should not try to influence the courts in special cases. The politicians, however, can use their political power to change the legal system. In this way they can make the courts follow the will of the people

as represented in the Legislature. On the other hand, there is also a channel of influence in the opposite direction between the Judiciary and the Legislature, in the sense that the courts are the first to see the deficiencies in the laws. They convey their experience to the Legislator, which is useful to him.

Important is: the courts do not represent any special political system. Their task is to maintain the Rule of Law.

The Independence of Judges and Lawyers under German Law and under the European Convention on Human Rights

By professor HANS von MANGOLDT

A 1. Section 97 of the Basic Law of the Federal Republic of Germany contains the following rules regarding the independence of judges, which are legally valid for all federal courts and courts in the »Länder»:

(1) The judges shall be independent and subject only to the law.

(2) Judges appointed permanently on a full-time basis to an established post cannot, against their will, be dismissed, or permanently or temporarily suspended from office, or transferred to another post, or retired before the expiration of their term of office except by virtue of a judicial decision and only on the grounds and in the form provided by law. Legislation may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of the courts or the areas of jurisdiction, judges may be transferred to another court or removed from their office, provided they retain their full salary.

In addition, section 20 § 2 clause 2 of the Basic Law provides that state authority »shall be exercised ... by separate ... judicial organs.»

These provisions of the Basic Law are in accordance with the German constitutional tradition, in particular with that of the Weimar constitution. Section 102 of the latter contains an identical provision concerning *objective* independence and section

104 concerning *personal* independence, at least, is similar. In some respects, however, it is more severe and in others less so. The Weimar constitution, however, did not contain any provision for the *(structural)* independence of the judge as part of a power separate from the Executive and Legislature.

These forms of judicial independence represent different aspects of the judge's freedom from *state interference.* It is on *this part* of the judge's independence that I would like to concentrate, and I would like to emphasize the constitutional foundations of this independence, whilst leaving aside its numerous legal ramifications. As well as being independent of the state a judge is also to be *free* from the *influence of the interested parties* and *free from social pressure.* The latter is guaranteed e.g. by the provision of the criminal code concerning the bribery of judges, whereas the judge's impartiality is reinforced by the fundamental principle of the rule of law: nemo iudex in propria sua causa (BVerfGE 3, 381). This impartiality is further guaranteed by the terms of the laws of procedure concerning the exclusion and challenging of the judge, and reinforced by the principle of the separation of powers in cases in which the state is an interested party.

Ultimately all three modes of judicial independence serve the same purpose: to facilitate and to protect the freedom of the person entrusted with the office of judge in the fulfilment of his judicial functions. However, this is all I wish to say about those aspects of the judge's independence which go beyond the independence of the state as mentioned at the beginning.

Under the terms of the Basic Law, *freedom from state interference* (in the different forms conceivable) is attributed *to the judge,* in whom, as part of the judiciary, »judicial authority shall be vested» (Sect. 92). Yet it is not quite clear what kind of activity judicial authority involves. Leaving aside the indications given by the constitution itself with regard to particular subject matters traditionally under judicial control, at various points (section IX: civil and criminal jurisdiction as it has developed up to the present, federal constitutional jurisdiction; section 19 § 4 Basic Law: judicial control of the executive in the case of infringement of individual rights), judicial authority has to be

defined as the application of the law by a third party unconcerned with particular objectives of the state and only interested in the rule of law (BVerfGE 4, 346); this opposes the judicial function to that of other state organs which are entrusted with the pursuit of *particular* public objectives, such as the general maintenance of law and order, to be enforced by the Executive. Yet judges are also entrusted with tasks which are not part of the administration of justice, e.g. in the field of the Law of Non-Contentious Jurisdiction (Freiwillige Gerichtsbarkeit). However, »if the Legislature has decided to determine a judicial competence, the proceedings have to be provided with all constitutional guarantees accorded to legal proceedings», in particular with the guarantee of the judge's independence (BVerfGE 22, 78). The only exception is in the case of the purely administrative functions entrusted to the judge; the internal distribution of cases, to be sure, must not be included in this exception, in this respect, complete freedom from any outside interference is guaranteed (see BVerfGE 17, 260).

a) *Principal item* of the judicial independence is the *objective* freedom of the judge. The Federal Constitutional Court has decided in numerous cases that this objective freedom protects the judicial activities from interference by the *Legislature* and the *Executive*. Hence, it is only concerned with the relationship of the judges to the administrators of non-judicial power. All legislative and executive orders in relation to the fulfilment of a judicial office are prohibited, regardless of whether it be in questions of procedural or non-procedural law.

However, the fact that the judge is bound by the law means that he is also bound by the legal norms of the Executive (decrees). This further entails that he has to observe norms enacted for an individual case in so far as these norms are not unconstitutional for reasons of the rule of law or for reasons of protection of individual rights (section 19 § 1 clause 1). Furthermore, I wish to mention that judges are bound by valid administrative decisions in so far as these decisions are not the subject of the particular case before the court. As well as being free from interference by the Legislature and the Executive, the judge has no personal responsibility for his decisions, that is to say, he

cannot be called to account by either of these powers except in cases of maladministration of justice. This applies to professional as well as to layjudges (BVerfGE 26, 201).

Within the Judiciary, however, the judge's decision in a particular case may be dependent on a variety of factors, e.g. the judge is bound by the res iudicata-effect of previous decisions; — he is bound by the decisions of the Federal Constitutional Court which are generally binding or even have the binding force of law, — he is bound by the construction of the law made by a superior Court in a matter of appeal, and he is bound by preliminary rulings in particular cases (e.g. Section 177 EEC Treaty). However, all these are limitations which derive from the fact that judicial competence is traditionally vested in different branches of the Judiciary and in courts of different levels. Limitations on the freedom of the judge not deriving from this assignment of competence should be regarded as unconstitutional. The Federal Constitutional Court has not yet had the opportunity to decide a case of this kind.

The other two forms of the judge's independence from state interference secure his objective independence, by guaranteeing certain factual preconditions.

b) *Structural independence* means, first of all, that the Judiciary is organized in bodies which are separate from those established to perform the other functions of government. An administrative body cannot be termed a judicial body for reasons of expedience (Baden-Württembergische Friedensgerichtsbarkeit, BVerfGE 10, 217 f.). Yet, it is not completely prohibited for one person to hold office in both the Judiciary and the Executive or Legislature (BVerfGE 4, 346 f.; 10, 217 f.; 14, 68). In addition, the rule valid cut across the division of powers, the neutrality of the judge, however, has to be preserved, as it is for this purpose that the independence of the judicial bodies has been established. This requirement is not fulfilled if a judicial body is made up of civil servants responsible to a higher authority, who work in the same field. Once and again, conflicts of duties would occur, even if a civil servant had not yet been involved in a particular case and, therefore, was not barred from holding the office of judge (BVerfGe 4, 346 f.; 10, 217 f.; 14, 68). In addition, the rule valid

for all courts, that only the deciding judges and post graduate law students (Referendare) are allowed to be present during the secret deliberation of the case and when a vote is taken, is an explicit legal safeguard for this structural independence (§ 193 GVG, § 61 SGG, § 52 FGO).

c) German law does not fully protect *personal* independence in particular there is no guarantee of tenure for life. Yet the model laid down by the Basic Law seems to be that of the judge who is »appointed permanently on a full-time basis to an established post» and who cannot be dismissed against his will except by way of a judicial decision (Section 97 § 2, Section 98). In cases where there is no such permanent appointment, all judges — professional and lay-judges — must at least be guaranteed a minimum level of personal independence to secure their objective independence. Essential features of personal independence are, on the one hand, a guaranteed minimum period of office (four years are sufficient for technically special judges, BVerfGE 18, 255; the legal period of office for federal constitutional court judges is twelve years) and, on the other hand, premature dismissal can only be effected by way of judicial decision according to the law (BVerfGE 14, 70; 26, 198 f.; 27, 322). Therefore, it is unconstitutional to expect a person who leaves an administrative position to give up a judicial post which he also may hold (BVerfGE 14, 71 f.). Exceptions of these safeguards only apply where there are compelling reasons, as in recruitment matters. There are special provisions for probational judges and commissioned judges (§§ 22, 23 DRiG) which allow for the dismissal of these judges without a judicial decision.

These provisions are not inadmissible from the point of view of constitutional law. However, the Constitution requires that only a small number of those judges be employed whose personal independence is considerably limited. Furthermore, they have to be distributed among the different courts to diminish their otherwise undue influence on the objectively independent judiciary (BVerfGE 4, 345; 14, 70, 162 ff.).

d) The guarantee of an independent judge is not only legally enforcible by the interested parties, whose right to their lawful judge may be infringed, but also the administrator of the judicial

office himself can demand that the Courts protect his independence (see VGH Baden-Württemberg, DÖV 1980, 573). In response to a judge's individual complaint the Federal Constitutional Court (E 17, 260) even held that the plea of de facto-exclusion from judicial function was admissible and justified (Section 97 § 2 Basic Law), although the Court did not even examine whether a particular individual right had been infringed.

A 2. Compared to this, the degree of judicial independence guaranteed by the European Convention on Human Rights seems to be modest, although in the practice of the Commission and the Court of Human Rights one cannot fail to recognize a tendency towards maximum *possible* protection. The decisive provision, Art. 6 § 1 of the Human Rights Convention provides that »in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing by an *independent* and impartial *tribunal* . . .«. In the Vagrancy judgement, the European Court construed the term 'tribunal' (as well as the word »court« used in articles 2 § 1, 5 § 1 (a), 5 § 4 of the Convention) to denote »bodies which exhibit not only common fundamental features, of which the most important is *independence of the executive* and of the parties to the case, but also the guarantees of judicial procedure« (Series A 12, § 78). The European Court of Human Rights has not developed any additional criteria in its jurisprudence to define what it means by a »court«. Hence, the elements mentioned appear to be conclusive in the matter (see also Neumeister-Case, Serie A 8, § 24; Ringeisen-Case, Serie A 13, § 95).

This definition of a court brings about an extension of the guarantee of the independence of the judge, beyond the field encompassed by Art. 6 § 1, into the area of pre-trial criminal procedure (especially habeas corpus), which is dealt with in the articles already mentioned. Nevertheless, the range of application of the judge's independence remains limited: the wording of Art. 6 § 1 »determination of ... civil rights and obligations« only covers proceedings, the result of which is decisive for *private* rights and obligations (Ringeisen-Case, Serie A 13, § 94), it does not cover e.g. questions of administrative law unrelated to the exercise of private rights or performance of private obligations.

However, in the König-Case (EuGRZ 1978, 416 § 91 ff.) the Court decided that there was such a relation if a business licence for a private hospital was denied.

In the European legal context — as in the German — judicial independence means primarily *objective independence,* i.e. the judge who is performing a judicial function »may not be subjected to external interferences» and shall not be obliged to consult another authority (Schiesser-Case, EuGRZ 1980, 202 ff. § 35; Ringeisen-Case, loc.cit. § 95; ECHR, Ensslin et al. v. Fed. Rep. of Germany, Dec. and Rep. 14, 113).

This guarantee is valid for professional *and* lay judges (X v. Sweden, ECHR, Coll. of Dec. 43, 73, 79; X.v. Austria, Coll. 44, 127).

Structural independence does not seem to be guaranteed quite so rigorously. In the Ringeisen-Case, the Court not only holds an agency to be a court, which according to Austrian law would be a collegial administrative authority (§§ 19, 95). But under the heading impartiality, the Court does not regard it to be prejudicial that, by reason of law in that agency there exists a »mixed membership comprising, under the presidency of a judge, civil servants and representatives of interested bodies» (§ 97). And in the Delcourt-Case (Series A 11, § 35) the Court does not find the independence of the Belgian Cour de Cassation itself to be adversely affected by the presence of a member of the Procureur Général's department at its deliberations as it had been established, that the Procureur Général himself was de facto independent from the Executive. With this, the postulate that separate organs for the Judiciary should be established has not in fact been abandoned. Rather, it seems to be unobjectionably permitted to link offices on the personal level, much more than would be constitutionally proper in the German legal order. This should not mean, however, that according to the European Court of Human Rights, it would be permitted for a civil servant who has already been occupied with the case in that function, to appear as a judge in the same case.

The least developed guarantee is the guarantee of *personal* independence. The guarantees that tenure is for life and that dismissal from office can only be effected through a court order

are completely missing. Yet, the Court does examine whether a fixed period of tenure has been determined (Ringeisen-Case, § 95: five years are sufficient). In the Zand case the Commission finds (§ 80): »That according to the principles of the rule of law in democratic states which is the common heritage of the European countries, the irremovability of judges during their term of office, whether it be for a limited period of time or for lifetime, is a necessary corollary of their independence from the administration and thus included in the guarantees of Art. 6 § 1 of the convention». The fact that it lies within the legal discretion of a minister to create or dissolve courts according to need, is not supposed to contradict this guarantee however. Moreover, the Commission does not consider the independence of assistant judges to be endangered either. In their view it is sufficient »that assistant judges belong to the judicial profession and when given assignments as a judge ... act in full independence. In exceptional cases they may, like ordinary civil servants, be dismissed from their employment by decision of the Court of Appeal, but the appeal then lies with the Supreme Administrative Court» (X.v. Sweden, ECHR, Coll. 43, 71, 79). This reasoning ought to be considered with regard to the special legal situation in one of the original member states, the United Kingdom, which became party to the convention without any reservation and where judges in lower courts can be dismissed by the Crown because of inability or misbehaviour, although such judges do have recourse to the courts.

B. Now a few remarks concerning the principle of the independence of the lawyer.

B 1. In the Federal Republic of Germany this independence has a dual basis and is guaranteed by inter-connected norms of the Basic Law and of statutory as well as customary law. One root of the lawyer's independence lies in the guarantee of a fair trial, a fundamental principle derived from the rule of law in favour of the interested parties (section 2 § 1 of the Basic Law in connection with the rule of law, BVerfGE 39, 243; 34, 302). The other lies in the lawyer's own civil right of freedom of trade and profession (section 12). According to the German conception of law a lawyer is considered to practice privately (§ 2 BRAO), how-

ever, he is at the same time an independent organ of the administration of justice (§ 1 BRAO). According to the jurisprudence of the Federal Constitutional Court the practice of the lawyer's profession may be regulated, and his independence thereby restricted, in so far as this is held to be justified by objective and reasonable consideration of the common good; in addition any such infringement has to be in accordance with the principle of proportionality.

Often called upon to adjudicate in questions of criminal procedure, the Federal Constitutional Court has developed from these guarantees the following principles:

a) Control of or advice to the defending counsel by the state is absolutely prohibited (BVerfGE 34, 302) — there is absolute *independence from state interference.* It is also absolutely inadmissable to impede in any fundamental way the activity of the lawyer in or with regard to a specific trial. The lawyer's activity, however, is not considered to be impeded if his contact with his client is restricted to communication by letter for reasons of security (BVerfGE 49, 48 — Kontaksperre).

It is just as admissable to issue a general order to search the defending counsel before he contacts his client, if the search does not lead to an investigation into the contents of his brief (BVerfGE 38, 30; 48, 122—24).

b) In order to fulfil his function properly, the lawyer must not only be independent of the court, but must also remain relatively *independent with respect to his client,* and in criminal proceedings with respect to the crime of the accused. This independence from influence by the interested parties appears to be endangered, if, in the fulfilment of his duties as defending counsel, the lawyer is placed in a position of conflict by virtue of his relation to the subject of the case (the crime of the accused) (BVerfGE 16, 217). In such cases reasonable consideration of the common good may allow the exclusion of the lawyer even by the court in which the trial is being held. This is particularly important in criminal cases where the lawyer is either accused of, or deeply suspected of, complicity (BVerfGE 34, 302 ff., 306 f., now sections 138 a—g Code of Criminal Procedure). The lawyer may also be excluded if he is required to give evidence as a

witness (especially on behalf of prosecution). However, it is essential here to observe the principle of proportionality: the severe encroachment upon the lawyer's independence entailed by his exclusion from the trial is not admissible, if the lawyer has only committed a minor offence (BVerfGE 15, 234). Rather, the circumstances of the particular trial must make it absolutely essential that a higher legal interest be safeguarded (BVerfGE 22, 123).

c) The lawyer's independence is, however, not affected, if he is obliged to represent a client in legal aid procedures or to provide assistance to the poor. This is not forced labour but at most compulsory execution of the lawyer's functions (see BVerfGE 39, 242). The independence of the lawyer is not affected either, *if* a brief *cannot be taken on* because the court has limited the number of defending lawyers as a means to prevent the unnecessary prolonging of the trial (BVerfGE, NJW 1975, 1013).

d) The lawyer's independence does not mean that he should not be *subject to special disciplinary* law: even because of his conduct in a particular case he can be disciplined and in certain circumstances be struck off the list. The lawyer does not only represent private interests, but he is also an independent organ of the administration of justice; he must not consciously promote injustice or impede that justice be done. Rational consideration of the common good results in his having to submit to certain professional ethics (BVerfGE, 26, 194, 204 f.).

If a lawyer's licence to appear in court is withdrawn by an *administrative* decision in accordance with sections 14 and 15 BRAO, the lawyer always has recourse to the courts (section 19 § 4 Basic Law, section 16 § 4 BRAO).

B 2. As is the case with the independence of the judge, the guarantee of the independence of the lawyer laid down in the *European* Convention of Human Rights is not as developed as in German law. There is no civil right related to the freedom of profession. The independence of the lawyer is but an implication of the right of any party »to a fair ... hearing« under Art. 6 § 1 of the European Convention and of the right of the person charged with criminal offence to defend himself through legal assistance under § 3 clause (c) of the article beforementioned.

As far as these guarantees apply ratione materiae, however, the lawyer must also, according to the Commission's opinion, be independent in order to fulfil his »role as 'the watchdog of procedural regularity'» (Ensslin et al. v. Federal Republic of Germany, Dec. and Rep. 14, 64 ff., 113, 114). Yet, this approach, to the displeasure of many commentators, did not determine the European institutions for the protection of human rights to develop general principles to safeguard the independence of the lawyer. They concentrate rather on examining whether, in the specific case, the procedural rights of the affected party have been infringed by the procedure chosen. The guarantees extended to a *particular* lawyer, thereby, appear to be considerably reduced.

Accordingly, the European Commission shows a very liberal approach regarding the exclusion of lawyers. States have — in the opinion of the Commission — full discretion to exclude lawyers from appearing before the court (Ensslin v. Germany, loc.cit., 114; see also YB 5, 106); it should, however, be added (Fawcett, 170), that this discretion must be exercised in good faith. Nor does it affect the independence of the lawyer in any way if his contact with his client is restricted to communication by letter (YB 6, 194). Even severe criticism of a lawyer's conduct by the court, which from the perspective of the accused, if directed to him, would appear as an infringement of the principle of fair trial, does not violate the lawyer's independence.

Thus the Commission was unable to find any infringement of fair trial in a case, where the judge, who later in complete fairness instructed the jury, asked the lawyer how long this farce should go on, suggesting that the case for the defence had not the slightest change of success. The only thing which is absolutly excluded appears to be the lawyer's *immediate dependence upon orders* from state authorities regarding a specific case.

Neither the limitation on the number of defending lawyers and on the lawyer's freedom to take on a brief, nor the requirement to take on a compulsory brief is considered to be an infringment of the lawyer's independence. The latter is not regarded to be forced labour (Art. 4 § 2 European Convention on Human Rights). Yet, if the lawyer is obliged to take on a brief pro deo,

his possible lack of interest may jeopardize the right of the party to a fair hearing.

With regard to the lawyer's independence from undue involvement in his client's case, there is only little comment by the competent European institutions for the protection of human rights concerning the guarantee of the lawyer's independence with respect to his client and the case before the court. Once, the Commission did not find it objectionable that certain barristers were excluded from the defence because they were strongly suspected of supporting the criminal association of the accused. In addition, the Commission pointed to the obligation of the defence counsel not to transgress certain principles of professional ethics (Ensslin v. Federal Republic of Germany, loc. cit., 114).

C. There is one general conclusion that should be drawn: the independence of both the judge and the lawyer is much less protected under the European system than under German constitutional law. Obviously, on the international level notice has to be taken of different legal traditions and practices in the state parties to the European Convention. Accordingly, it would be unrealistic to expect that a higher degree of international protection be established than on the lowest common denominator acceptable to all states which are principally ready to conclude the Convention.

BVerfGE = Entscheidungssammlung des Bundesverfassungsgerichts (official reporter of the decisions of the Federal Constitutional Court)
GVG = Gerichtsverfassungsgesetz
SGG = Sozialgerichtsgesetz
FGO = Finanzgerichtsordnung
DRiG = Deutsches Richtergesetz
BRAO = Bundesrechtsanwaltsordnung
VGH = Verwaltungsgerichtshof
DÖV = Die Öffentliche Verwaltung (law journal)
NJW = Neue Juristische Wochenschrift

Independence from the Judge's Point of View

By CURT OLSSON, President of the Supreme Court, Finland

The source of social control is the state. In the beginning of a state, the courts usually have little independent significance; they are quite subordinate to the ruling power. Consequently, the protection of the individual is mainly weak. In a state with a concentration of power, even if the citizens sometimes enjoy a large amount of freedom, this freedom can at any time be limited or eliminated.

Therefore, I think, a condition for the guaranteed freedom of the individual is a state system with a separation of powers; it may be a strict separation of the Montesquian type, where the separate powers are strictly forbidden to interfere with each other, or a system of checks and balances, where the powers supervise each other. Such a system is characterized by independent courts and independent judges for the protection of civil rights and freedoms; in a state where human rights have no real protection, democracy cannot survive in the long run.

Thus it is my starting point that we need independent courts and judges, and I will try to say something about what independence in this respect means and what the conditions for such independence are.

Let me first point out that the supreme power in a democracy belongs to the Diet, i.e. Parliament. If there is a conflict between the courts and Parliament, the latter has the last word, because the main role of legislation belongs to Parliament.

Should the conflict concern the Constitution, it is true in many states that Parliament has no power to change the Constitution without elections, but even then one could say that the political powers represented in Parliament, provided they are not split, have the last word. Of course, the courts, too, are law-makers, though they do not legislate. There is no strict border between pure interpretation and law -making, especially in Supreme Courts. But the courts cannot, at least not in the civil law countries, assume any leading role in changing society or the main course of the legislation. I agree with the English Justice *Lord Devlin,* who once said that the courts should not go further than to keep pace with the change in the community's consensus. In my opinion, this is the rule, even if there are exceptions to it. I am aware of the fact that the situation is not exactly the same all over the world. In the United States, for instance, and in many countries of the Third World, the judges have a more active attitude, representing what sometimes is called judicial activism. But in Finland, I am convinced, such activism would not be accepted. There is a special provision in the Finnish Constitutional Act, art. 58, indicating certain limits for law-making by the courts. It runs as follows: »The Supreme Court and the Supreme Administrative Court, when they deem an amendment or explanation of a statute or decree necessary, shall address a request for a necessary legislative measure to the President of the Republic».

I do not intend, in this connection, to discuss the question of whether the courts have the power to override statutes passed by Parliament on the ground that the statutes are unconstitutional, because I believe there are other speakers who will deal with this special subject. This question has not been of great practical importance in Finland.

The main feature of the courts protecting human rights appears in the relation of the Judiciary to the Executive, i.e. the government and the administration. Here the independence of the judges is a *conditio sine qua non.* It may be pointed out, even if it is a simple truth, that the independence of judges is a fundamental interest of the citizens and that the independence is established and upheld in the interest of the people and the

individuals, *not* in the interest of the judges themselves. Thus it should be a common interest for all people and all the political parties in a country to strengthen this independence.

If we are to have independent judges, we have to appoint people who not only know the law but also are impartial, possess full personal integrity and who are strong enough to keep up the rule of law even in critical situations. Therefore, the system of judicial appointments is of vital interest and importance. The system differs from country to country, even if the ultimate goal is the same. I think one of the aims in the Western world is to avoid political appointments. It cannot and should not be accepted in a democracy of our type that a judge be appointed because of his membership in a certain political party. It is obvious that in such a situation, the independence of the appointee would be jeopardized and his impartiality endangered in cases where his own party or party members are involved, because he would be indebted to the people who appointed him. It is even worse, of course, if the judge does not have tenure but is only appointed for a fixed term or, as it is said, »at pleasure». It is not a political appointment in itself, in the sense mentioned above, to appoint a politician to a judge's office. The appointee may be the person best qualified for the job. It only becomes a political appointment if he is appointed mainly because of his party membership as well as his political views and merits.

The Finnish Parliamentary Act, art. 9, prevents the members of the Supreme Courts from holding membership in Parliament at the same time, but the article does not concern other judges. The article indicates, it is said, that the members of the Supreme Courts should not take part in any form of political activity, even though they are not forbidden to be passive members of political parties.

In Finland the independence of the Judiciary is protected by virtue of the right of the Judiciary to participate in the appointment of judges. Thus a large number of the circuit court judges are appointed by the Supreme Court on the advice of the Court of Appeal in that area. The appellate judges, again, are appointed on the recommendation of the Court of Appeal itself. The Supreme Court will consider any possible complaint concerning

the recommendation and will then present its own opinion to the President of the Republic, who will make the final decision on the matter on the advice of the Minister of Justice. Judicial appointments as well as some other administrative matters are dealt with in plenary sessions of the Supreme Court. These matters are prepared in the Ministry of Justice and the Minister of Justice will participate in the making of the decision in the Supreme Court.

The President and the Judges of the Supreme Courts are appointed by the President of the Republic upon the advice of the Minister of Justice. As far as the Judges are concerned, the Supreme Courts themselves enter recommendations, which, however, are not binding on the President of the Republic. As a rule (but not always) the President of the Republic will appoint the person suggested by the Court. Appointments to the Judiciary in Finland are thus characterized by a co-operation between the Judiciary and the Executive, in which process, however, the Executive power prevails, with the exception of the lower judges. The Legislature takes no part in the appointment of judges other than the members of the High Court of Impeachment *(valtakunnanoikeus, riksrätt)*. Of course, the Legislature has the power to enact laws governing the appointment of judges. Most of these laws, however, are bound by the Constitution.

I already mentioned the importance of tenure for the independence of judges. This is, I think, obvious. Our history demonstrates the drawbacks in appointing judges for short periods only. Today it is a rule that a judge cannot be deprived of his office unless found guilty of criminal offence before a court of law. At the age of 70, a judge must retire, or even before, in case a court should decide that he has permanently become incapable of carrying out his duties. In exceptional cases, e.g. in regard to temporary (assistant) judges or judges in special courts, the appointment is only for a fixed term; yet these appointments concern persons who almost invariably already hold another permanent appointment.

Security of tenure is not enough, of course, to guarantee the independence of the judges. For instance in England, tenure is expressly combined with the security of salary. Although

this issue is of foremost importance, it is not easy to protect a guaranteed level of the judicial salaries in times of inflation, especially so in countries like Finland, where the salaries are agreed upon in negotiations between the state and salaried employees' organizations.

In conclusion, I wish to point out that also the administrative freedom of the courts is important for the independence of the judges. There is hardly a question of an absolute freedom but rather of a large amount of freedom, e.g. in regard to the Court's budget. It is unfortunate, if the courts should not be able, to a reasonable extent, to decide by themselves on what to do and what not to do in regard to their administration and e.g. in their relation to the public.

It would be difficult to exhaust the subject of the judge's independence. Most of the rules concerning the courts somehow also relate to the question of the judicial independence.

Nevertheless, even though the independence of the judges is necessary for the protection of human rights, it is not enough. Unlike the legislative as well as the administrative processes, the judicial procedure is not initiated by the court *ex officio*. It needs a claimant, a plaintiff, an *action* to be initiated and to be carried on further: *nemo judex sine actore*. Here we have the connection between judges and the rest of the legal profession.

Independence from the Lawyer's Point of View

By ERKKI-JUHANI TAIPALE, Advocate,
President of the Finnish Bar Association

The principle of judicial independence means that the organs administrating justice can only be subordinate to the law and that only the law can influence the contents of the decisions made by these organs. No other state authority, not even the highest, is allowed to influence the decisions made by the judicial organs. This judicial independence is a guarantee for the fulfilment of the legal security of the individual.

Does the legal security of the individual imply that this requirement of independence is also extended to the body of practising lawyers (the Bar) and its members?

A lawyer very often works in a situation where the individual's legal security and status are menaced. A person usually turns to a lawyer when he himself is unable to look after his legal rights. This can be caused by insufficient legal knowledge or restricted possibilities for the person to act himself, e.g. because of arrest or imprisonment. When the lawyer's most important duty, the protection of a client's legal security, is regarded in the light of the above, it is clear that the handling of a legal matter necessarily requires an acknowledgement of the independence of the legal profession as well as that of the individual Bar members. The answer to my question is thus principally clear. It is therefore more the question of examining what is meant by independence in such cases, where it is considered fundamentally attached to the individual's legal security.

It has generally been accepted in the democratie world that a practising lawyer has to be free and independent. He should be free in his relations to the law courts and to the authorities, free in his relations to the client and free in his relations to any pressure groups that could be expected to restrict his possibilities to act in accordance with his duties. Fr. *Stang Lund,* a Norwegian, has in his book *The Lawyer's Work* accurately commented on the lawyer's independence:

> »The lawyer must be able to act independently. Unless being allowed to act freely, he cannot work towards the objectives mentioned above. Freedom of speech behind the lawyer's bar is the most important condition for the work of the lawyer. He must be able freely to express what he has to say, if it is necessary for the promoting of his client's legal claim. He must be allowed unprevented to fight against injustice, without having to care whom his words are affecting.»

The lawyer's independence from various external obligations and influences has not been at all obvious in the past, neither is it always so even now. The Bar has often been the object of fierce attacks and its existence has been questioned or even tried to oppress. Well-known are e.g. the actions taken by *Frederik the Great* of Prussia, who forced aside the independent lawyers and replaced them by assistant counsellors and legal commissioners. *Napoleon* thought the lawyers were a bunch of idealists, gabblers, agitators and grumblers, and the attitude to the lawyers was thus according to this. In the Soviet Union the independent lawyers were dissolved after the October Revolution.

All the examples mentioned above have involved forcible actions by the political groups in power, reactions of despotic rulers and perhaps also fear for criticism and too liberal ideas. Political absolutism and authoritative system of administration do not seem to fit together with a free and independent Bar. As an example of this, I can mention the changes in the position of the lawyers in Germany and Austria in the 1930's and the overthrow of the principles of so-called free pleading by ordering that only those who have been accepted by the country's highest judicial authority could act as lawyers.

In Finland there is no reason to talk about goverment actions taken against the freedom or independence of the lawyers. Earlier the number of the lawyers was insignificant and the influence of these lawyers was so unimportant that they were of no interest to the rulers. Until the middle of this century, the legislators, in fact, did not pay any noticeable attention to the lawyers. However, there have been regulations for lawyers as early as in the 17th century and the General Code of 1734 included a rule about the qualifications of an attorney: good reputation, respectability, honesty and intelligence. Another rule included in the law prescribed that the practise of the profession required a permission, the acceptance of a court of justice. During the time 1898—1917 an examination qualifying for a judge's profession was required of those who »wanted to speak for others in the higher courts». This rule, however, was abolished by one of the first legislative reforms brought by the Finnish independence. As the highest authority in the state, Parliament passed the law on 14 December, 1917.

It is known that the Finnish Bar Association got its statute and organisation only in 1958 in connection with the Advocate Act. The first initiatives for this law were already made in the 1870's. This act has provided a base for the development of the legal profession in accordance with the requirements of today's society. Actually the law only gives a few advantages to the lawyer, whilst in a far-reaching way obliging him to take care of the legal matters in society, yet at the same time allowing him to pay attention to his own and his colleagues' professional interests. However, it is remarkable that the law gives the lawyers who are admitted to became members of the Finnish Bar Association an exclusive privilege to use the professional title of *advocate* (in Finnish: *asianajaja,* in Swedish: *advokat*). This is something, confirmed by legislation, by which a Bar Member can indicate his position to the public and thus communicate the fact that he has the necessary qualifications required by the law for this profession. It is essential to point out, however, that the »advocates», i.e. the Bar members, do not have a sole right of appearance in our courts of justice. In

principle, the client is free to choose any »honest» citizen for this job.

Principally it is to be held very significant that the right to use the title of advocate has only been given to the free and independent lawyers. This fact can be seen in the 3 section 2 sub-section of the Advocate Act. This section contains two prohibitions complementing each other: An advocate is not usually allowed to possess a municipal or state office. He must not make his living or carry out services for somebody in a way that could harmfully affect his independence as a lawyer. If the lawyer loses his independence he must immediately resign from the Bar Association, whereby he also loses his right to use the title. If he should fail to resign he will be expelled and removed from the official list of advocates.

The principle of lawyers' independence has been acknowledged in all countries with a democratic constitution. The position of the lawyer has been characterized, for example, as the lawyer's being the independent organ of the administration of justice. In the codes for lawyers' professional ethics, he is obliged to avoid anything that could endanger his professional independence. According to a generally prevailing opinion the lawyer has to refuse to take a case, if it should imply something that would prevent him from handling the case independently. The independence is also shown by the fact that an agreement between a lawyer and his client is never to be regarded as a contract of employment, where the lawyer is obliged to work under the supervision of his client.

The lawyer's independence is a requirement of the work itself. A lawyer could not attend to and defend his client's rights and interests without being independent. A lawyer could not win his client's confidence if he would have to pay attention to interests other than those of his client. A lawyer, subordinate to his client, could not appraise his client's legal status in a calm and objective manner or give him appropriate advice in legal matters.

The freedom and independence of the lawyer are basically founded on general civil rights. The citizens' freedom of action usually determines the lawyers working conditions. Nevertheless, they are often protected by special regulations too. Such

regulations are e.g. the rules of the criminal law protecting privileged communications and the rules by which a lawyer is forbidden to testify on what he has been told in connection with the solving of the case.

Nowadays the lawyers' freedom and independence are not so much threatened by development of legislation as by the present trend in the economic and social development. This leads to a state of affairs where an ever increasing number of social activities, in some way or another, are brought under public supervision. This trend also embraces the administration of justice. In many countries there are law offices, where public servants work as lawyers and give legal aid to the citizens. In Sweden there are 30 so-called public law offices employing almost 300 lawyers. In Finland there are about 160 public municipal law offices employing nearly 200 lawyers. These lawyers give legal aid to their clients free or at reduced fees.

However, recently there has been a change of opinion, showing more understanding for the work of the free and independent lawyer. This is, for example, shown by the new law on legal assistance in Germany, coming into force on 1 January, 1981. According to this law, every citizen — also those of small means — is free to choose any lawyer without having to confine his choice to public law offices. The same trend can be seen in a similar law proposal in Norway.

The fact that the faculties of law have produced more lawyers than needed has in many countries formed a potential threat to the independence of the Bar and a successful practise of the legal profession. The surplus lawyers have been trying to seek their way to various legal appointments, for which they have not always had the right qualifications. This overproduction of lawyers has also led to deterioration in the lawyers' economic position. This shows that the prerequisites for a successful practise of the legal profession and the factual independence of the lawyer, without which the profession can hardly be carried out, require attention. It is, clear however, that the development cannot be turned backwards and that the lawyer's profession cannot be regulated in isolation from the development of the rest of the society.

On the other hand, it is quite clear that most of the necessary legal reforms also require the co-operation of a competent and independent Bar. For example, I can mention the modernization of the legal proceedings and the minor reforms already carried out in recent years. It is evident that the citizens' expectations of legal assistance in order to secure their rights are increasing both here and elsewhere. This is shown by the growing importance of the legal aid insurance schemes in Finland and many other countries.

The lawyers of a country are willing to do what they can to develop and maintain such rules as would secure the independence that the lawyer needs in his work. Among the lawyers it is felt that a lawyer can only be of assistance to the citizens and safeguard the legal security of the individual, if he or she can operate in such independent conditions that enable him to give his assistance in accordance with the law and professional ethics. In the same way as the law courts require an independent status in order to solve legal conflicts and maintain a successful legal peace, the lawyers also need a similar independence. Moreover, the independence of the lawyers is also important for the independence of the law courts. The independence of these two organs is closely interrelated and nowadays there is hardly to be found a legal system, where either the law courts *or* the lawyers would be free and independent.

A suitable way of ending a speech on the independence of the lawyers could be to cite the words of the former President of the Danish Supreme Court, Mr. *Troels G. Jørgensen,* at the 300th anniversary of the Danish Bar Association. He said: »In order to maintain an independent exercise of the law, which we all agree is of vital importance, not only the judges have to be free, but the attitude and standard of all lawyers must be such as to secure their independence, so that a citizen who wants his case solved in a court of justice should not fail to get legal assistance because of a lack of those prerequisities mentioned above».

Experiences in the International Protection of the Independence of Judges and Lawyers*

By HANS THOOLEN, Executive Secretary, International Commission of Jurists

1. *Introduction*

At the 25th Anniversary Commission Meeting of the International Commission of Jurists in 1977 it was agreed that it was urgently necessary to organise a Centre to give protection to lawyers and judges who were being harassed or persecuted for carrying out their professional duties. The object of the Centre would be to collect reliable information about individual cases which would serve as the basis for various activities on behalf of the victims. One of our objects was to try to involve the professional lawyers' associations in the international defence of human rights. We felt that we might be able to appeal to them, on grounds of professional solidarity, to come to the assistance of their colleagues in other countries who were being harassed, menaced or persecuted for carrying out their duties in a manner which lawyers would expect of every judge or advocate. Accordingly, we formed the Centre for the Independence of Judges and Lawyers. On the whole the response from bar associations and other lawyers' organisations has been very encouraging.

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* This presentation given at the Helsinki Symposium on the Independence of Judges and Lawyers, 28 november 1980, is largely based on a paper prepared by Mr. *Niall MacDermot*, Secretary-General of the ICJ.

As lawyers, we believe that the fundamental rights and liberties of the individual can only be preserved in a society where the legal profession and judiciary enjoy complete independence, free from political interference or pressure.

Citizens will never obtain justice in a court which is committed to the policies of the executive or a particular social group, nor secure adequate legal representation if the legal profession is unable or unwilling to defend them for fear of persecution. Indeed, the notion of an independent judiciary and legal profession is of such importance that many countries have seen fit to entrench the principle in their constitutions, and in most democratic nations lawyers are duty-bound to accept any brief, regardless of the personal circumstances of the defendant.

2. *Independence of Judges*

By an independent judiciary we mean one which is free from external pressures or influences, whether from the executive or from political or other organisations, which is free from corruption, and which gives its decisions according to law and conscience. Among the conditions for ensuring this independence are:

— a system of appointment and training designed to provide judges with the requisite qualities of learning, humanity, integrity and moral courage;
— a system of appointment, transfer and promotion of judges which is based upon their professional competence and excludes as far as possible political influence;
— security of tenure for the judges;
— a reasonable and adequate level of remuneration;
— immunity from process for anything done in their judicial capacity;
— physical protection where necessary; and protection from harassment.

I will elaborate on some of these conditions.

There is no infallible system which will ensure that all judges have the requisite qualities and are appointed without political influence, and a powerful government which does not respect the spirit of the country's laws and institutions, can always exert pressures which distort and frustrate the best designed safeguards. Nevertheless, the best prospect of appointing the right men and women to the bench lies, we believe, in appointment by an independent commission on which the judiciary itself is strongly represented.

The common law system of appointing judges from the practising advocates does, I believe, help to ensure their independence of mind when they sit as judges. In countries where the judiciary are a separate legal profession, an inculcation of the spirit of fearless independence must be given prominence in the training of the magistrates.

The procedures for the promotion and transfer of judges are almost as important as those for their appointment. In many authoritarian countries judges who dare to give judgments which displease the authorities are transferred to less important post, usually in some very remote areas. Again, I think that the posting and promotion of judges is best carried out by an independent Judicial Commission. The only country I know of, which has carried the independence of the judiciary to its final logical conclusion, is *Colombia*. There all appointments, transfers and promotions are made by a commission appointed by the judges themselves. I am told that this tends to produce a rather conservative judiciary, but a reasonably independent one. The system is, however under attack in political circles and may soon be replaced.

Security of tenure means, of course, that a judge cannot be removed from office before the established retiring age except in case of physical or mental incompetence, and then only following a decision by a judicial commission or other impartial body which will ensure the judge's right to be heard in his own defence.

This principle is sometimes undermined directly. For example, the new Constitution of *Sierra Leone* provides that »Judges of the Superior Court of Judicature may be required by the Presi-

dent to retire at any time after attaining the age of 55». (There is a separate provision for removal on grounds of incompetence.) In some cases, under Emergency Decrees, the security of tenure of all judges is just suspended as was done in *Argentina* in March 1976 (and still continues). They can all be dismissed at will. This has also been done in *Uruguay* and in many other countries. Some years ago, the President of the Supreme Court of *Zaïre* was dismissed by President Mobutu simply because he had the courage to tell the President that there was insufficient evidence to charge certain of his opponents whom he wanted tried for high treason.

Another more ingenuous way of evading a constitutional right of security of tenure has been practiced by both the present government in *Sri Lanka* and by its predecessors under Mrs Bandaranaike. The expedient was to change the Constitution by abolishing the existing highest court of the land and replacing it by another court with a different name. Only some of the existing judges were appointed to the new court or courts.

The need for physical protection of judges is obvious in countries where they are liable to be attacked or even murdered by para-military bodies, as has happened to judges thought to be too liberal under the present regime in *Argentina.* In none of these cases, incidentally, have the offenders ever been brought to justice. In *Uruguay,* the alleged successful threats made by the Tupamaros to the judges, leading to the acquittal of, or lenient sentences for, Tupamaro 'defendants, was one of the justifications put forward for the military take-over. Rather than give adequate protection to the judges and their families, the army decided to transfer all political and security cases to military tribunals.

Before leaving the question of the independence of the judicary, I would like to refer to an important but very difficult issue, namely the role of the judiciary in a rapidly changing society.

In many countries of the Third World, immense social changes are taking place, requiring legislation which alters fundamentally the institutions of the country, the sources of power and property rights. Such situations are fertile sources of conflict between the

executive and legislature on the one hand and the judiciary on the other. Sometimes the judiciary, who have been appointed by a previous regime, may be out of touch or out of sympathy with the objects of this legislation. Judges must, of course, decide their cases in accordance with the law, but we all know that there is a wide margin for judicial construction. If the judiciary show themselves continually in opposition to the objectives and purposes of the legislation, conflict is inevitable. I think this factor played some part in Mrs. Ghandi's emergency in *India*, and in the constitutional changes she made when she last had a 2/3rds majority in Parliament.

In cases where the government is one which has not been freely elected, there may be occasions when judicial frustration of revolutionary legislation may be a mark of courageous judicial independence, but where, as is often the case, the government is making these social changes with the clear support of a substantial majority of the people, it behoves the judiciary to understand the objectives of the society, and to interpret the legislation, as far as it can, in the light of those objectives.

3. Independence of Lawyers

Turning from the judges to the lawyers, what do we mean by the independence of lawyers, and why is it important? First and foremost we mean a subjective quality in the lawyer, that he will have the independence of mind and the courage to defend the interests of his clients fearlessly, to press all proper arguments on his behalf and fight for his rights tenaciously.

What are the conditions favourable to this independence and what are the ways in which it is sometimes undermined? The first requirement is that the organisation of the profession itself should be independent. Bar associations and other lawyers' organisations should be autonomous, setting their own standards and maintaining them by their own disciplinary procedures. In many countries these procedures are subject to control by the Judiciary or even, in some cases, by the Executive or the Party. I have no objection to an appeal procedure from a professional

disciplinary body to a court of law, but the primary responsibility for enforcing the profession's standards should, I believe, rest with the profession. This is particularly important where clashes arise, as they sometimes do, between the bar and the judiciary. For example, at a well known mass trial of trade unionists in *Tunisia* about two years ago, all 25 defence counsel withdrew from the case when the judge, in their opinion, failed to conduct the trial fairly. The lawyers appointed by the Court to replace them also refused to conduct the defence. I think the propriety of such action is better adjudicated upon by a body of the profession itself.

Most harassment and persecution of lawyers arises out of the identification of the lawyer with his client in political cases. This becomes something of a vicious circle. The identification leads many lawyers to refuse to defend in such cases. It is only lawyers who share the political sympathies of the defendants who will be prepared to represent them, or to do so forcefully and courageously. When this happens, the clients in turn have no confidence in any lawyers except those who are politically sympathetic to them. In such a situation the defence lawyers become a small clique of suspect lawyers open to harassment and attack and often unsupported by the Bar Council or other leadership of their profession.

Let me give some examples.

In *Yugoslavia* an advocate called Saja Popovic, was defending a client charged with insulting the regime. The lawyer's plea in short was that, in so far as his client made statements of fact, they were true, 'as everyone knew', and in so far as they were opinions they were protected by the freedom of opinion clause in the Constitution. After the case was over, the lawyer was himself prosecuted for the same offence, by reason of having said in open court that his client's statements were true. He received no support from his own bar association and was sentenced to one year's imprisonment, but following massive international pressures, he was given a suspended sentence on appeal.

In *South Korea,* it was an offence under President Park's Emergency Laws to criticise the Constitution. In 1974 a lawyer called Kang Shin-Ok, when defending some students who had

made protest demonstrations against the government, argued that the emergency regulations under which they were tried were undemocratic and in violation of the principle of free speech. He was immediately charged himself under the Emergency Regulations and given a 15 years sentence, later reduced to 10 years. Pending hearing of his appeal to the Supreme Court he has been released on bail. He is allowed to continue his practice, but it is understood that his appeal will proceed if he defends any political prisoners. The Korean Central Intelligence Agency has warned him that if he takes any such cases, he will suffer seriously.

The persecution of lawyers is often carried out by paramilitary organisations, linked with the security authorities, rather than by those authorities directly. Reports we have published on *Argentina* and *Uruguay* give many dozens of cases of this kind.

In Argentina alone nearly 200 cases of disappeared, murdered or detained lawyers and judges have been brought to our attention. One example is that of Dr Silvo Frondizi, who was defending some guerilla fighters. In a press statement he reported the tortures to which his clients had been subjected, supported by an examination of his clients by seven doctors appointed by the local medical association. He also denounced the »interference and all types of intimidation to which counsel undertaking to defend those arrested were subjected». The follwing month he was kidnapped in the street in Buenos Aires and shortly after he was found dead. The notorious AAA (Argentina Anti-communist Association) claimed responsibility for the act.

I have said that lawyers should be able to look for protection to their bar association, but if the Bar Association to which the lawyer belongs is politically controlled by those in power, it can itself become an instrument of repression rather than protection of its members.

In March 1979 another *Czech* lawyer, Josef Danisz, who had defended in a number of Charter 77 cases was disbarred by his Bar Association because he had »acted in a manner which conflicts with the rights and duties of a lawyer». The specific complaints were:

1. that in his concluding address at the trial of Jiri Chmel before district court in Most, he mentioned the trials of the 1950's;
2. that in dealing with the results of the investigations in the case of Dr Jaroslav Sabata, he mentioned the case of a signatory of Charter 77 who was alleged to have been brutally attacked by security officers.

Dr Danisz was also asked during the inquiry whether he identified with his client's political views (members of the Charter 77 Human Rights Movement). He replied that insofar as he defended many political dissidents, he did so because other attorneys were unwilling or unable to defend them and often referred them to him.

His political position was evident from the fact that he had simply fulfilled his duty consistently in accordance with the code governing the conduct of the legal profession and had used all legal means to defend his clients.

He believed that socialism was inseparably linked to the maintenance of socialist legality and that insofar as some of his clients had been treated like second-class citizens, he has voiced his objection because such practices had nothing in common with socialism.

But these arguments were of no avail and he was disbarred for five year. He received also a prison sentence, but was freed as a result of a May 1980 Presidential Amnesty.

I could go on all day giving examples of harrassment, intimidation and persecution of lawyers, drawn from the Bulletin of our Centre for the Independence of Judges and Lawyers, of which the sixth issue has just been published.

It describes, *inter alia,* the situation in *Guatemala* where twenty-three lawyers and one judge are now known to have been assassinated during 1980. It contains case reports on *Argentina, Bolivia, Brazil, Pakistan, South Africa* and *Syria.* It also describes the ways in which lawyers' associations are increasingly taking a stand against continuing infringements of their security and independence. Finally it contains a ten page preliminary report by Dr L. M. Singhvi from *India,* who has been authorised by the U.N. Sub-Commission on the Prevention of Discrimina-

tion and Protection of Minorities to prepare a special report on the independence of judges and lawyers. This renewed interest by the United Nations in the question of the independence of judges and lawyers is at least in part due to the activities of the Centre.

4. *Co-operation of Jurists' Organizations*

There are several ways in which the cooperation of jurists' associations is sought.

First, by providing regularly information within the mandate of the C.I.J.L., regarding violations in their own country or violations of which they have knowledge through contacts with colleagues abroad;

Second, by making known the existence and activities of the Centre for the Independence of Judges and Lawyers to their membership;

Third, by taking part in campaigns on behalf of individual lawyers whose case is documented in circular letters which are issued by the Centre, and

Finally, by providing financial support essential to the survival of the Centre.

Here I may take the liberty of noting that at present financial support is coming from the Association of Arab Jurists, the Netherlands Association of Jurists, the Netherlands Bar Association and three Nordic Bar Associations, which have made contributions of $ 1.000 or substantially more. We would be most honoured and grateful if in the future we could say that *all* Nordic Bar Associations support the work of the Centre for the Independence of Judges and Lawyers on behalf of their persecuted and harassed colleagues around the world.

LIST OF PARTICIPANTS:

Chairman:

Mr. Tore Modeen,	Professor, University of Helsinki, Law School, President of the Finnish Section of ICJ

Secretary:

Mr. Lauri Lehtimaja,	Legislative Counsellor, Finnish Ministry of Justice, Secretary of the Finnish Section of ICJ

Main Speakers:

Mr. Hans von Mangoldt,	Professor, University of Tübingen, Law School
Mr. Curt Olsson,	President of the Finnish Supreme Court
Mr. Gustaf B. E. Petrén,	Member of the Supreme Administrative Court of Sweden, Member of ICJ
Mr. Erkki-Juhani Taipale,	Attorney, President of the Finnish Bar Association
Mr. Hans Thoolen,	Executive Secretary of ICJ

Other Participants:

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Ms. Inkeri Anttila,	Professor (emeritus), University of Helsinki, Law School, Former Minister of Justice, Former Director of the Research Institute for Legal Policy in Finland
Ms. Eva-Brita Björklund,	Senior Secretary for the Chancellor of Justice in Finland
Mr. Per E. von Bonsdorff,	Legislative Counsellor, Finnish Ministry of Justice, Editor-in-Chief of JFT (Law Journal published by the Juridical Society in Finland)

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Mr. Lars D. Eriksson,	Acting Associate Professor, University of Helsinki, Law School
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Mr. Toivo Holopainen,	Professor, Dean, University of Helsinki, Law School, President of the Society for Finnish Jurists
Mr. Lars W. Johansson,	Member of the Supreme Administrative Court of Finland, Council Chairman of the Union of Finnish Jurists
Mr. Paavo Kastari,	Professor (emeritus), University of Helsinki, Law School, Former Parliamentary Ombudsman
Ms. Anja-Riitta Ketokoski,	Chief of Section, Finnish Ministry of Foreign Affairs
Mr. Antti Kivivuori,	Director of Legislative Affairs, Finnish Ministry of Justice
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Mr. Gustaf Möller,	Legislative Counsellor, Finnish Ministry of Justice
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Ms. Riitta-Leena Paunio,	Senior Secretary for the Finnish Parliamentary Ombudsman

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Mr. Voitto Saario,	President, Court of Appeals of Helsinki, Former President of the Association of Finnish Judges
Mr. Tom Sargant,	Secretary of JUSTICE, the British Section of ICJ
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Mr. Matti Savolainen,	Legislative Counsellor, Finnish Ministry of Justice
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