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EXPERIENCES IN THE INTERNATIONAL PROTECTION OF THE INDEPENDENCE OF JUDGES AND LAWYERS

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

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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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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.

Vammala 1981, Vammalan Kirjapaino Oy