The Independence of Judges and Lawyers in the COMMONWEALTH CARIBBEAN

Report of a Seminar
held in Tobago from 12 to 13 September 1988

convened by the

Centre for the Independence of Judges and Lawyers
International Commission of Jurists

and the
UWI/USAID Caribbean Justice
Improvement Project

THE CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS (CIJL)

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to counter serious inroads into the independence of the judiciary and the legal profession by:

- promoting world-wide the basic need for an independent judiciary and legal profession;
- organising support for judges and lawyers who are being harassed or persecuted.

The work of the Centre is supported by contributions from lawyers' organisations and private foundations. There remains a substantial deficit to be met. We hope that bar associations and other lawyers' organisations concerned with the fate of their colleagues around the world will provide the financial support essential to the survival of the Centre.

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Preface

Since its creation in 1978 by the International Commission of Jurists, the Centre for the Independence of Judges and Lawyers (CIJL) has taken a leading role in efforts to protect and promote the independence of the judiciary and the legal profession as a cornerstone of the Rule of Law.

Its major activities consist of:

- working at the United Nations and with non-governmental organisations to develop international standards to protect the independence of judges and lawyers. The CIJL was instrumental in the elaboration and the adoption by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985 of "Basic Principles on the Independence of the Judiciary". The Congress' resolutions were subsequently "endorsed" by the UN General Assembly (A/RES/40/32) which then specifically invited governments to "respect" the Basic Principles and "to take them into account within the framework of their national legislation and practice" (A/RES/40/146). The CIJL is currently working with the UN Committee on Crime Prevention and Control on a set of "Basic Principles on the Role of Lawyers" which, we hope, will be adopted by the Eighth UN Crime Congress in 1990. At the same time, the CIJL is working at the UN Commission on Human Rights on a more detailed declaration on the independence and impartiality of judges, jurors and assessors and the independence of lawyers;
- organising regional seminars to bring together judges, lawyers, governmental officials, human rights activists and academics to analyse the international norms, examine the obstacles to their local im-

plementation and seek ways of overcoming those obstacles. Seminars have been held in April 1986 in Costa Rica (for Central America), November 1986 in Zambia (for English-speaking East Africa), April 1987 in Gambia (for English-speaking West Africa), September 1987 in Nepal (for South Asia), March 1988 in Argentina (for Argentina, Brazil, Paraguay and Uraguay) and in June 1988 in the Philippines (for South-East Asia);

- intervening with governments and, if necessary, organising campaigns on behalf of judges and lawyers who are harassed or persecuted, as well as calling attention to situations where the independence of the judiciary or the bar is under attack.

As part of its seminar series, the ICJ and the CIJL, together with the Caribbean Justice Improvement Project of the University of the West Indies, sponsored a siminar on the independence of judges and lawyers in the Commonwealth Caribbean in Tobago on 12 and 13 September 1988. As testimony to the importance which the subject is given in the region, six Attorneys General and six Chief Justices participated in the meeting, together with leaders of the bar and academics.

The seminar was opened by the Honourable Selwyn Richardson, Acting Prime Minister of Trinidad and Tobago, who spoke of the Caribbean "tradition of respect for law buttressed by the independence of individual judges and the judiciary as a body". The Honourable Anthony Smart, Acting Attorney General of Trinidad and Tobago also addressed the opening session, as did Dr. N.J.O. Liverpool, Director of the Caribbean Justice Improvement Project, and Reed Brody, Director of the CIJL. The siminar then held sessions on:

- "The UN Basic Principles on the Independence of the Judiciary and their Implementation";
- "The Need for Independence, the Pressures upon the Judiciary", introduced by Sir Denys Williams, Chief Justice of Barbados; and
- "The Independence of the Legal Profession" introduced by Dr. Lloyd Barnett, President of the Organisation of Commonwealth Caribbean Bar Associations.

The debates were frank and lively and, while the participants joined in the Acting Prime Minister's assessment of the Caribbean tradition of judicial independence, they also identified several threats to that independence.

Thus, for instance, the participants recognised that the widespread practice of appointing magistrates on renewable contracts "has the potential of undermining their independence" and called for discontinuance or re-

duction of the practice. Similarly, the jurists noted that provisions giving the Executive discretion to renew judges' contracts beyond a mandatory retirement age can undermine a judge's independence by making him dependent on an outside authority.

Looking at the role of lawyers, the participants called on the profession to become more active in promoting legal literacy among the public, including an awareness of constitutional rights and available remedies.

The participants also called on the governments of the region to support the adoption by the 1990 UN Crime Congress of the draft "Basic Principles on the Role of Lawyers".

This report contains the conclusions and recommendations reached by the siminar, together with excerpts of the opening addresses and the working papers as well as the text of the UN Basic Principles on the Independence of the Judiciary and the draft UN Basic Principles on the Role of Lawyers.

The ICJ and the CIJL are deeply grateful to the Honourable Selwyn Richardson, Acting Prime Minister of Trinidad and Tobago for honouring us by opening the seminar. We are also indebted to our friend Dr. N.J.O. Liverpool, who was responsible for bringing together so many outstanding participants and who, together with his able assistant Julia St. John, worked tirelessly to organise the seminar.

Finally, we are once again grateful to the Swedish International Development Authority for its generous funding of the seminar.

October 1988

Reed Brody
Director, CIJL

Niall MacDermot
Secretary-General, ICJ

Introduction

by
N.J.O. Liverpool
Project Director
UWI/USAID Caribbean Justice Improvement Project

The occasion of this seminar on the Independence of the Judiciary and the Legal Profession was an opportunity to bring together some of the finest legal minds of the Commonwealth Caribbean to discuss a subject of great interest and mutual concern. With that in mind there is no better occasion to do so than at a meeting of the Council of Legal Education, where one starts off with a formidable though captive audience which comprises the Heads of the Judiciary, the Attorneys General and the Heads of the practicing Bar.

The organisers of the seminar, however, sought wider participation, since it was felt that the addition of a selected number of other members of the profession, both local and overseas, would tend to add some variety and stimulation to the discussions by members of a Council who may have become so used to each other that criticism and frank discussion could possibly be stifled.

The independence of both the judiciary and the legal profession in the Commonwealth Caribbean is taken for granted. And strange as it may seem, where criticisms are levelled it is not as much at the odd member of the executive who may seek to affect the workings of the judiciary albeit in its administrative function; but more persistently at individual judges who would seek to undermine the independence of the profession by purporting to deliver decisions which they perceive may please the executive; to attempt to obtain extra privileges to be attached to their individual conditions of service, to seek extra unwarranted remuneration, and to attempt to use

members of the executive to influence their professional opportunities.

The seminar was a resounding success. The fear of tribalism was quickly dispelled, as participants dispassionately supported or opposed particular points of view, and unity prevailed on their most treasured prize, that of an independent judiciary. In so far as the disapproval centered around the higher judiciary, their impartiality and independence was once more acknowledged. But the position of the Magistracy created a dilemma for the participants.

The recent preference by Magistrates for renewable three-year contracts was frowned upon, but this cannot by any imaginable means be regarded as a making of the executive. Yet there lies within this practice a serious gap, which leaves itself open to exploitation by an uncaring executive.

In so far as the independence of the Legal Profession is concerned, the seminar revealed strong differences concerning the right of a litigant to employ Counsel from another territory, even where local Counsel was also engaged. This is a grave cause for concern especially in the Eastern Caribbean States which share one common court structure, with judges who may be freely transferred from State to State. It may therefore be that the desirability of one Bar Association within this sub-regional grouping is the way towards solving this problem as far as those territories are concerned. But transferability of judges and the acceptability of practitioners from other countries lies within the province of executive action, which could, if not closely watched, be executed in such a manner as to undermine the very independence which the profession strives to uphold.

The UWI-USAID Caribbean Justice Improvement Project is proud to be associated with the International Commission of Jurists and its Centre for the Independence of Judges and Lawyers in hosting this seminar, and to publish the results of the proceedings.

For reasons of space, the papers have been edited.

Welcome

by

Hon. Anthony Smart
Acting Attorney General
Trinidad and Tobago

It is my simple and very pleasant task this morning to welcome you to Trinidad and Tobago (and in particular Tobago – this very beautiful, unspoilt part of the world) and to welcome you to this seminar on the "Independence of Judges and Lawyers in the Caribbean" hosted by the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists in conjunction with the UWI/USAID Caribbean Justice Improvement Project.

It is significant that Trinidad and Tobago has been chosen as the venue for this very important seminar because we will be conducting our deliverations in a climate and environment where freedom reigns. In Trinidad and Tobago fundamental human rights and freedoms are guaranteed under our Constitution and we have a strong and independent judiciary which properly administers law as between citizen and citizen and between citizen and state, which promotes the observance of human rights and which ensures that all people are able to live securely under the rule of law.

We have a government which has inherited a democratic tradition which it is committed to broaden and deepen. The visitors to our shores have only to read yesterday's newspapers to get incontrovertible evidence that democracy is flourishing in our land. You will read a broad spectrum of public opinion expressed therein, some informed, some not so well informed, some biased and some objective. My government is happy over this development because it is riveted to democratic principles and freedoms and it understands that a society must be free if it is to grow and develop

and, in our particular case, if it is to overcome the temporary hardships which we face.

We have a legal profession which through its Law Association has come to life in the last twenty-one months or so. The Law Association has been vocal on matters of interest to it and society generally. Its new life is, no doubt, attributable to the passage of the Legal Profession Act, 1986 which fused the profession and introduced comprehensive provisions that have made for a more streamlined profession.

In this atmosphere of freedom I invite you all to speak freely on the many issues relating to the independence of judges and lawyers that will engage your attention over the next two days.

I make bold to state that if all societies were like Trinidad and Tobago there would be no need for the Centre for the Independence of Judges and Lawyers, a body established by the International Commission of Jurists, in 1978 and the work of which is mainly to collect and distribute information about harassment, repression, persecution and other attacks on the independence of judges and lawyers, to mobilize international support for particular individuals or groups who are the victims of such treatment, and to promote and elaborate the concept of the independence of the judiciary and the legal profession.

Unfortunately, there are still many societies which are not as free as Trinidad and Tobago: where lawyers working for the rural poor and with trade union organisations have been attacked and in some cases assassinated or made to disappear; where lawyers are banned from representing certain classes of clients; where legislation has made it impossible for an independent Bar Association to exist; where judges are harassed and even assassinated for giving decisions unpopular with the government of the country. The sad fact is that the existence of the International Commission of Jurists is very necessary and vital if we are to develop to the point where all societies in the world are free. I wish to congratulate the CIJL and the ICJ for the very important work that they have been doing in establishing principles and procedures to safeguard the independence of the judiciary and the legal profession. They must take great and well-deserved pride in having seen their principles used as a basis of the United Nations Basic Principles on the Independence of the Judiciary adopted in 1985. I wish them similar success with respect to the UN Draft Basic Principles on the Role of Lawyers.

I wish you all a stimulating and fruitful seminar. Having perused the documents that have been circulated, I have no doubt that the deliberations will be very interesting. For instance, Article 3.16 of the Montreal "Universal Declaration on the Independence of Justice" which deals with the matter of contempt by lawyers will no doubt evoke interesting discussion; so too will Article 3.28 which states "Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar

Association shall co-operate in assisting the foreign lawyer to obtain the necessary right of audience".

In closing I wish to thank the CIJL, the ICJ and the University of the West Indies for choosing Trinidad and Tobago as the venue for this seminar. If you do get the chance to travel around the island you will find it to be a true tropical paradise. You will find the Tobagonians to be particularly friendly and helpful. And finally you must savour the taste of a good Tobagonian crab and dumpling.

Feature Address

by

Hon. Selwyn Richardson
Acting Prime Minister
Trinidad and Tobago

It is my greatest pleasure to join in the welcome extended to all of you here today by the Honourable Attorney General. That such a distinguished gathering of jurists could be in Trinidad and Tobago at this time is heartwarming and it is with immense feeling of pride that I stand to address you. We offer you surroundings here in Trinidad and Tobago which, I guarantee, will provide an atmosphere conducive to your deliberations, relieving you of the pressures for the next few days of life in a big city, and at the same time introducing you to that part of our twin island state which in time you will discover to be the eighth wonder of the world.

Mr. Chairman, ladies and gentlemen, the theme of this Seminar is the "Independence of Judges and Lawyers". This theme is particularly relevant to our times. It focuses on the administration of justice and the role to be adopted by both judges and legal practitioners at a time when turmoil seems to be the order of the day.

We in Trinidad and Tobago, and I believe I can speak for the Commonwealth Caribbean, have grown up in a tradition of respect for law buttressed by the independence of individual judges and the judiciary as a body. We have come almost to accept as the norm, the independence of the judiciary. Thus we tend to forget that the judiciary in the legal system which we follow was not always independent.

We tend to forget the historical conflicts between the Crown and its judges – and I say "its" judges because of the control which the Crown exercised over the judges. A control which was exercised through the purse

string, since the King paid their salaries; by way of the right of transfer from one judicial office to another; by consultation on the legality of proposed action; by suspension; and, ultimately, by dismissal without cause. In fact, ladies and gentlemen, in the 17th century the power of removal was frequently exercised by the King to ensure that those who did not submit to the Royal wish would no longer remain on the bench. Such was the fate of Chief Justice Coke in 1616. Coke stood up to the King, he refused to obey the King's order not to proceed further with certain cases, and he failed to revise his Reports which contained decisions which the King found objectionable. A list of those decisions was drawn up by Francis Bacon and the King used it as grounds for dismissing Coke.

Parliament, too, sought to control the judiciary in England during the 17th century. Lord Chief Justice William Scroggs was impeached by the Commons in 1680 for alleged arbitrary behaviour in court. And Chief Justice Holt was summoned by the Lords to give reasons for his decision in *R v. Knollys* (1695), a case which is reported in Volume 91 of the English Reports at page 904.

We have come a long way since then. Benefitting from the experience of our colonial past, we have enshrined in our Constitution, as indeed have the other states in the region, the concept of a judiciary which is independent of control and influence of the Executive and the Parliament. I won't burden you with quotations from our Constitution. The point is that devices for the protection of the independence of the judiciary have been codified in that document, which is readily available for scrutiny. But what in simple terms is meant by the Independence of the Judiciary? The term "Independence of the Judiciary" is used to refer to a doctrine that judges, in the exercise of their judicial functions ought to be free from external pressure. In determing matters which are brought before him a judge ought not to feel pressured to decide in a particular way on account of:–

- fear of the government in power;
- fear of resulting prejudice to his livelihood;
- a desire to please the government in power;
- ideological, religious or sectarian interests; or
- public opinion.

Some light is shed on the meaning of the doctrine by the draft Principles on the Independence of the Judiciary formulated by a committee of experts organised in Siracusa, Italy by the International Association of Penal Law, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers (May 25 to 29 1981) (Commonwealth Law Bulletin Vol.8 No.2 at page 715.) In the draft, "Independence of the Judiciary" is defined as follows:

(1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements or pressures direct or indirect from any quarter or for any reason; and

(2) that the judiciary is independent of the executive and legislature and has jurisdiction, directly or by way of review over all issues of a judicial nature".

The question may be asked – "Why an Independent Judiciary?" The doctrine of the Independence of the Judiciary is generally built on commonly recognised principles. The late Dennis Boucaud, a Solicitor of the Supreme Court of Trinidad and Tobago in a paper presented at the First Law Conference of Trinidad and Tobago in July, 1973 summed it up in this way:–

> "It is a recognised fact that the judiciary of any country should be above politics and entirely divorced therefrom. By this I do not mean that its members must not be subject to the laws of the land but that in the administration of the laws, justice must be the paramount objective and they must administer the law without fear or favour, with goodwill towards all and ill-will towards none . . ."

(1) The effective administration of justice depends on the impartial dispensation of justice by the individual judicial officer. This is not possible if the individual judicial officer is in some way dependent for his livelihood or well-being on some person or group of persons who have an interest in the way in which the judicial officer determines matters before him.

(2) Public confidence in the judiciary: If the judiciary is preceived to be controlled by some person or group of persons, the public loses confidence in the system and this would inevitably threaten the stability and in due course the existence of the society.

(3) Separation of Powers: One of the means by which the government is kept from abusing its power is by the separation of power between the different arms of State namely executive, judiciary and legislature. The judiciary is independent in that:–

  (i) judicial functions are not performed by persons who also perform legislature and executive functions;

  (ii) the persons who perform judicial functions are not subject to arbitrary dismissal at the whims of members of the executive or legislature as was the plight of both Lord Chief Justice Coke and Lord Chief Justice Scroggs.

An important consequence of this separation of powers which is particularly important in the context of our written constitution is the judiciary's duty to protect and uphold enshrined human rights against violation and abuses by the executive and the legislature".

I have spent a great deal of time on the independence of the judges and I must now remind myself of the full ambit of the theme of the Seminar and that is the independence of, not only judges but lawyers as well and I take lawyers in this context to mean the practitioners before the courts.

It is fitting, ladies and gentlemen, to note two rules of the Code of Ethics contained in the 3rd Schedule of the Legal Profession Act 1986 of the Republic of Trinidad and Tobago (Act 21 of 1986 Rule 3(1) and Rule 36(4)). Rule 3(1) reads as follows:–

3(1) An Attorney-at-law shall scrupulously preserve his independence in the discharge of his professional duties.

Rule 36(4) reads:–

36(4) Where there is ground for complaint against a judge or magistrate, an Attorney-at-law may make representations to the proper authorities and in such cases, the Attorney-at-law shall be protected.

The significance of this is that, in our jurisdiction, a practicing Attorney is now required as a matter of law to preserve scrupulously his independence in the discharge of his professional duties and this independence enjoys the protection of the law.

It is my view, ladies and gentlemen, that the independence of any lawyer is his commitment to present the case for his client fearlessly and honestly. My concept of fearlessness is not by any means contemptuousness. When a practitioner's instructions are clear he must allow no obstacle, and not stand aside nor shirk from the pursuit of his client's case.

Happily the courts here in Trinidad and Tobago have recognised the independence of lawyers who in turn guard their independence jealously.

Here in Trinidad and Tobago we have become so accustomed to the independence of our judges and lawyers we seldom stop to examine the reasons for its existence; what protects it; what nourishes it. We would find if we stopped to think that, quite apart from a parliamentary opposition which breathes down the back of the government, we have been blessed with some eminently forceful legal practitioners from whose ranks our judges have largely been recruited. We have been blessed with a population whose desire for freedom, would not permit them to tolerate any attempt

by the Executive to interfere with the independence of our judiciary. In a way that can be described as the collective spirit of our people.

We have in this country, Mr. Chairman, ladies and gentlemen, a judiciary and a bar whose membership inspires confidence. In this country the executive will do nothing to undermine that confidence. In fact we have a public which will allow us to do nothing to undermine that confidence. And, Mr. Chairman, ladies and gentlemen, we would have it no other way.

Mr. Chairman, ladies and gentlemen, I thank you for your kind invitation to address you and I wish your deliberations every success.

Introduction to the Seminar

by

Reed Brody

Director, CIJL

It is a great honour for me, on behalf of the International Commission of Jurists and its Centre for the Independence of Judges and Lawyers, to address this seminar on the Independence of Judges and Lawyers in the Caribbean region. I am particularly pleased to see that, in addition to the distinguished judges and jurists here with us, so many Attorneys General consider the issue to be of such importance that they have found time in their busy schedules to participate in the seminar.

I do not need to explain to you that without an independent judiciary, free to decide matters impartially without any restrictions, pressures, threats or interference, the Rule of Law cannot prevail. Or that the existence of a fearless and independent legal profession at the service of the general public constitutes an essential guarantee for the promotion and protection of human rights.

This seminar is one in a series of regional meetings which the CIJL is organising to bring together judges, attorneys general, lawyers, academics and human rights activists to discuss the problems faced in their regions and to study ways to improve the independence of judges and lawyers. Another aim is to make the participants and, through them, their communities, aware of the achievements reached at the international level and the existence of international instruments protecting the independence of judges and lawyers.

The most important of these instruments are the Basic Principles on the Independence of the Judiciary adopted by consensus at the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders in 1985.

The principles were subsequently endorsed by consensus at the UN General Assembly which invited governments to respect them and to take them into account in their national legislation and practice. They set forth principles concerning the independence of the judiciary, and the freedom of expression and association of judges as well as rules regarding the qualification, selection, training, conditions of service, tenure, immunity, discipline, suspension and removal of judges. These principles will be the subject of our session on Tuesday morning.

The CIJL is currently working with the UN Committee on Crime Prevention and Control on the formulation of similar principles for lawyers to be submitted to the 1990 Crime Congress. These draft principles, which will be discussed on Tuesday afternoon, provide, for example, that it is the duty of governments to assure that those detained are promptly informed of their right to a lawyer and that they have prompt and effective access to a lawyer. They provide for the confidentiality of lawyer-client communications, and that lawyers shall not suffer sanctions for carrying out their duties and shall not be identified by the authorities with their client or their client's cause.

We are also working with the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities which, just two weeks ago, approved in principle, a Draft Declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers and sent it on to the Commission on Human Rights. This Declaration, prepared by Special Rapporteur L.M. Singhvi of India on the basis of a series of expert meetings hosted or co-sponsored by the ICJ and CIJL including the Siracusa meeting to which the Honourable Prime Minister has referred, is far more detailed than the 2 sets of Basic Principles. For this reason, it will need much more work to ensure that it is truly universal. Still, we hope that it will form the basis for a future General Assembly declaration.

In the Caribbean, you are lucky to have preserved a strong tradition of an independent judiciary.

Nevertheless, this tradition must be jealously guarded, for when a government wishes to undermine the rule of law, the first thing it must do is muzzle the judiciary.

This is, unfortunately, the case today in Malaysia, a commonwealth country which until recently boasted one of the most fearless and independent judiciaries in the world. After the judiciary handed down several decisions unfavourable to a government increasingly bent on tightening control over the country, the government reacted. First, it pushed through a Constitutional amendment stripping the judiciary of the constitutional underpinning of its jurisdiction. This was accompanied by a barrage of criticism by the Prime Minister against the courts. When the Lord President of the Supreme Court wrote a private letter to the King, on behalf of the judges,

protesting against the Prime Minister's statements, the King suspended the Lord President and, pursuant to the constitution, convoked a special tribunal to hear charges of misbehaviour against him. When 5 judges of the Supreme Court granted the Lord President a writ to block operation of the special tribunal, they in turn were suspended by the King.

I am sad to report that in another Commonwealth country, Kenya, the President has just pushed through a bill giving him the discretion to suspend judges whom he deems guilty of misbehaviour.

So, the independence of the judiciary is something we must carefully nurture. And, while we will be discussing constitutions, laws and UN principles, in the long run it is public opinion which will best defend the independence of the judiciary and that will depend on how judges and lawyers discharge their duties.

The public will support the courts if they are seen as an effective forum for the enforcement of rights rather than a slow, corrupt mechanism for protecting entrenched interests. While judges must insulate themselves from improper pressures, they cannot isolate themselves from the society they serve. The same is true of the legal profession – its independence can neither be promoted nor protected in the absence of public faith and support. In addition to providing legal services of quality with utmost honesty and integrity, the profession must collectively be involved in public interest issues, including legal aid for the poor and the defense of human rights.

A major concern in many countries is the selection criteria used for members of the bench. There is a need for a balance in the appointment of judges, including a fair mix of social classes and of the sexes if public confidence in the judiciary is to be maintained.

A judiciary which does not reflect the composition of society can easily be attacked by unscrupulous members of the executive who view independent judges as a threat to their power. We have all read accounts of members of the executive who have tried to rally the public against the judiciary on the ground that judges were elitists, protecting the interests of the privileged, and that their decisions stood in the way of progress.

A related issue, which we are addressing in the UN principles concerning lawyers, is the need to ensure that all sectors of society have access to legal education and that in accepting students, due regard is paid to having a legal profession which is representative of the society which it serves.

The independence of the judiciary also requires that the executive should not interfere in the functioning of the judiciary, that the judiciary have an adequate budget, that it be competent to hear all matters of a judicial nature, that the remuneration of its members is not reduced while they hold office, that special courts not be set up to displace its jurisdiction and that its decisions are obeyed. I could go on and on. The independence of the legal profession is similarly multifaceted. I urge you therefore to re-read the Principles which have been distributed to you.

These and other issues will be discussed today and tomorrow when we look first, at the independence of, and the pressures on, the judiciary and then on the independence of lawyers. These discussions should be based on your own experiences and should lead to an identification of the obstacles which exist in the region to the full independence of judges and lawyers.

Once the major problems have been identified in the first three sessions, on Wednesday will come the hardest task of all, developing a realistic plan of action for overcoming those problems.

Another point which we hope that the siminar would take up in its last session is how we can all work together to protect our colleagues in other countries.

I have already discussed the sad cases of Malaysia and Kenya. As the Honourable Acting Attorney General has noted, in some countries, when courageous judges stand up to those in power, they risk their very lives. This is the case of Judge Rene Garcia Villegas in Chile, whose investigations into torture by the security police has caused him to receive numerous death threats, and of Jorge Alberto Serrano of El Salvador, who was assassinated as he was about to rule that military officers involved in a kidnapping ring were not subject to an amnesty law.

Lawyers often face even greater danger. In the past 8 months, for instance, 5 lawyers working to uphold the rule of law have been killed in the Philippines. One of the murdered lawyers was Alfonso Surigao, a friend of the International Commission of Jurists – a friend of mine – and one of the most respected and dedicated human rights lawyers in the Philippines. As a lawyer of unions and political detainees, he was constantly being harassed by the authorities. Unlike most other lawyers who were originally willing to take unpopular cases, he did not let the threats stop him. But on 24 June, just days before a major case he had filed against the local military intelligence unit was to go to trial, Al Surigao was shot dead. The man who pulled the trigger has stated that he did so on the orders of a Major in the Philippines Armed Forces.

Many of you here knew Maitre Lafontant Joseph, founder of the Haitian League for Human Rights, who was brutally murdered on 11 July. Since then, lawyers have also been assassinated in Guatemala and Peru.

The Honourable Acting Attorney General has referred to the work of the CIJL in organising campaigns on behalf of judges and lawyers who are being harassed or persecuted. We hope that each of you, and the associations of lawyers or judges which you represent, or to which you belong, will be able to join with the CIJL, in a non-political way, to come to the defense of your colleagues who are in danger in other countries.

Most importantly, however, this seminar must come up with concrete recommendations on how to defend and strengthen the independence of judges and lawyers here in the Caribbean region. I wish you luck in this important task.

Judicial Independence in the Post-Independence Commonwealth Caribbean: Ethic or Mere Principle?

by
Maurice O. Glinton
Attorney at Law
Bahamas

The independence of the Judiciary as a value of exceptional importance in itself, and no less essential to the integrity and well-being of a liberal-democratic polity, so continues to excite discussions among members of the legal profession and other interested and informed observers of independent African and Caribbean countries of the Commonwealth, that it has, with some justification, taken on the syndrome of a post-independence phenomenon.

In the ensuing pages it is endeavoured to excite some further discussions on the topic and, without derogating from the notion of judicial independence as a principle in itself, to invite a reassessment of its ethic in light of the constitutional and other realities reflected in the status of political independence.

It is only exceptionally that a discussion of the independence of the Judiciary has as the focus a context other than those legal standards and safeguards which are thought to guarantee judges security of tenure and insulation from political interference. Indeed, all too often the notion of judicial independence is treated as descriptive of the plethora of problems

confronting the Judiciary. However, once it is conceded that "true judicial independence must ... proceed from the resolve of individual judges",[1] and, perhaps, precisely because the various safeguards and guarantees, however elaborate and sophisticated, are prone to political (and not always clearly illegal) means of circumvention[2] so as to render them innocuous and meaningless, then the real challenge facing those who would advocate judicial independence as a paramount value becomes more clearly focused.

Firstly, it ought to be patently obvious that the collection of legal safeguards and guarantees are not in themselves self-executing; so it must follow that judicial independence as a value which those artifices are meant to enhance can no more of itself be a self-actualizing state.

Secondly, given the limits to the efficacy of legal safeguards ever achieving and sustaining the status of a cherished ethic, it is therefore inevitable if the principle is to obtain as an essential value, that it also be safeguarded externally by measures other than those afforded by legal processes alone. Of course, such measures must themselves in the end be constitutionally palatable.

Thirdly, the over-emphasis of legal safeguards as indicative of judicial independence has unfortunately obscured from critical debate that principle's more subjective requirements; for, as Professor Patchett has so interestingly asserted,[3] the independence of the Judge derives in part from his sense of security in his appointment.

One could begin by questioning the very presumption against which the issue of the independence of the judiciary is invariably measured and debated, and that is, whether it is really any more the responsibility or even within the capability of governments to secure and guarantee an independent judiciary? Is the principle one which governments might reasonably be expected to be pre-occupied with?

First of all it has to be appreciated that Constitutions of the type common to many of the English speaking Commonwealth countries do not as a matter of either an underlying philosophy or their substantive provisions presume such a possibility. Indeed, they undoubtedly proceed on the premise inherent in the Lockean notion that it would be foolhardy to give to those who make the law the power to execute the law, because in the process they might exempt themselves from obedience by fashioning the law (both in its making and its execution) to their individual interests.[4] To the French jurist, Montesquieu, without a separation of the powers, it makes for an abuse of power which can only result in the eclipse of liberty.

The doctrine of separation of powers has in more modern times come to be justified equally on principles of construction. Thus, for example, in **Attorney General for Australia v. The Queen**, The Privy Council expressed their profound doubt in respect of the Australian Constitution "...whether, had Locke and Montesquieu never lived nor the Constitution of the United

States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached."[5] Indeed, as Lord Diplock (speaking for the Privy Council) conceded in **Hinds v. The Queen**, the principle does not even depend on express words used in the particular Constitution, but rather on what, "though not expressed, is none the less a necessary implication from the subject matter and structure of the Constitution."[6]

But as has been so astutely pointed out,[7] for African Commonwealth countries (and, I would add, by and large those of the Caribbean) the doctrine of separation of powers means little more than an independent judiciary, a principle the importance of which has in recent times been periodically underscored by a number of judicial decisions.[8] But the important question is, how is this principle of the independence of the judiciary translated into a practical value? Does it differ in a meaningful way from the principle of the separation of powers?

The answer to a large extent depends on whether or not the requisite "outward and recognisable guarantees" of judicial independence are sufficiently met in those provisions of the Constitution which spell out the qualifications for the office of a judge, the method of appointment, the safeguards against removal from office and abolition of the Office while it is occupied – all provisions which are said to provide security of tenure.

The province and concern of the Judiciary under a constitutional scheme in which legislative, executive and judicial powers are defined, though expressed in general undetailed terms, are that of policing the Constitution and pronouncing on the legitimacy of the exercise of power by other constitutionally based institutions and instrumentalities which otherwise, are left alone from time to time, to adopt their own means to effectuate legitimate objects, as their wisdom, and the public interests, should require. Viewed in this light, the principle of separation of powers and its attendant considerations provide a basis for the notion of the independence of the judiciary, as a necessary corollary.

So in setting out the methods of appointment to office and providing for tenure of office, the Constitution (again by necessary implications) must be taken to have established as a principle the independence of the judiciary, i.e. freedom from political, legislative and executive control. But should the Courts fail to duly and faithfully perform their constitutional role the entire scheme of a limited government is derailed, and those intended restraints upon government like the entrenched rights and freedoms provisions, for instance, would be of little more than symbolic value in the absence of such essential adjuncts of limited government.

Another and no less important aspect of the Constitutions of the Commonwealth jurisdictions concerned is that they invariably reflect the occasion and circumstances of their making. They were meant to symbolize

as well as actualize the success of independence movements which invariably claims as their prize political emancipation without revolutionary social change. Farrell, in his discussion of the Irish Constitutional experience, observed that "the political, constitution and legal underpinnings were nurtured as carefully, perhaps more carefully, than the demands and occasional local claims of fighting men in the field."[9]

Notably also, in the experiences of African and Caribbean Commonwealth countries the inclusion of entrenched provisions declarative of the fundamental rights and freedoms of the individual (and only at the insistence of the British in many instances) was not only out of keeping with British traditions, but it must be taken to mark the extent to which governments were prepared to accept restraints upon themselves. Beyond this the Constitution did not appear to afford room for either judicial ambition or innovation, two important expedients of constitutionalism. Absent by and large from among the provisions of these Constitutions were any positive principles by which the fundamental rights provisions could be augmented and which would be promotive of generally defined social aims respecting the ownership and control of resources, and overall socio-economic development, for example. Such Constitutions did not appear to admit of change and growth and, consequently, of a future.

The explanation for this latter deficiency might well be that, like those close definitions or statements of fundamentals which are abhorrent to the British tradition, positive social principles have only fairly recently achieved universal justification and recognition, even in the British Commonwealth. But its real importance to this discussion lies in the fact that then, as now, it reflects the prevalent view (even among judges) that 'social justice', in as much as that concept might involve questions of ethics, economics and sociology, is beyond the determination of a court of law. Such matters are within the province of the legislature, as representing the people, when making laws.[10] Among politicians the view has crystallized into a suspicion that the Courts, oriented as they are towards British traditions, have neither the inclination nor the ability to function over a constituency for which legislatures claim a natural responsibility.

Not surprisingly Courts of these jurisdictions generally have exhibited a certain ambivalence when faced with controversies involving the exercise of the authority in the legislature to make laws for the "peace, order and good government" of the country;[11] notwithstanding that the grant is expressly made subject to the provisions of the Constitution. In this regard Courts of Commonwealth Caribbean territories have been consistent in their approach, and as a result have proved themselves exceptions to even a tendency within other Commonwealth jurisdictions to carefully scrutinize the exercise of legislative and executive power, purportedly, 'in the interest' of peace, order and good government, once it is being alleged that the

exercise amounts to an incursion into the executive sphere and an attempted usurpation by the judicial power.[12]

Such provisions which expressly condition the legitimate exercise of legislative (essentially governmental) authority, surely import an objective standards test, as they clearly must do if they are to operate as the constitutional restraints they are intended to be. Yet invariably Courts in Commonwealth Caribbean jurisdictions when forced to have approached these provisions in such a cavalier and ambivalent fashion as to render them devoid of all effective significance. The net result is too often the application of these provisions in the subjective, thereby enabling governments to determine for themselves both the manner and limits of their authority.[13] The tendency has been to approach such provisions not as a principle of limitation, but rather as an aid to or rule of construction.[14]

It is submitted however here that at best this approach is permissive of a misuse of the Constitution, and, at worse, an abuse. For it could mean that a Legislature (and for that matter, the executive or any other authority) can effectively place its own interpretation upon the Constitution and thereby be able to extend its powers indefinitely. That such should not be the case however, has been confirmed by the highest authority.[15] At most, the exercise of the legislative authority of Parliament should entitle it to the benefit of a presumption of the necessity and desirability of making a law; because, as Chief Justice Marshall stated in **M'Culloch v. Maryland**, "Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the Government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground".[16]

A related tendency in the Courts which serves to demonstrate their ability to be at least as inventive as an enterprising executive government, has been to resort to an unwritten rule that would have the government (especially in constitutional adjudication) deserving of the benefit of the doubt in cases which do not readily lend themselves to resolution; perhaps because of a lack of clear (preferably, Privy Council or Commonwealth) authority on the point or issue involved, but more often than not in circumstances where they are faced with a crisis of 'emergency' not (in their view) contemplated by the Constitution. Thus the 'doctrine of necessity' has, rather conveniently, become an integral adjunct to the Courts' arsenal of interpretive modes and techniques.

As a number of cases from the various jurisdictions illustrate, the doctrine of necessity has often found application as a presumption in favour of legislative and executive competence, even so as to effect validation, ex post facto, of unconstitutional and otherwise unlawful behaviour. Unhappily, neither the limits of the doctrine, nor the basis upon which it is to be established have ever been determined.[17]

In addition, and perhaps not surprisingly, the doctrine is not often logically applied, and just as often admits of inconsistencies and contradictions. No clearer examples of this are provided than by **Lakanmi's** case.[18] The Supreme Court of Nigeria found it necessary on the one hand to distinguish between a mere rebellion which in its view was incapable of distrupting the Constitution and the national legal order, and a revolution which would effect a new law creating fact, by a passionate embrace of the doctrine of necessity so as to establish (indeed presume) the legitimacy and competence of the Federal Military Government (FMG) of 1966 to enact laws for the duration of the emergency which supposedly justified the necessity in the first place. Yet on the other hand the Court failed to apply the doctrine so as to uphold an enactment by the FMG as a measure of necessity in that state of emergency, the pre-1966 Constitution having arguably been displaced.[19]

The extent to which the doctrine of necessity subsumes or equates with the contractual doctrine of 'executive necessity' is also a source of confusion. Perhaps the decision of a Caribbean Commonwealth court which best exemplifies the point is that of the Supreme Court of Jamaica in **Revere Jamaica Aluminia, Ltd. v. Attorney General.**[20] The decision is somewhat doubtful having been reached admittedly on the principle established in the much discredited decision in **Rederiaktiebolaget Amphitrite v. R.**[21], the only case up to that point to have decided that the Crown may plead 'executive necessity' as a defence to an action for breach of contract.

One unfortunate aspect of **Revere**, which is apparent through the judgment, was the readiness of the court to import wholesale and indiscriminately this "exceedingly vague and far-reaching"[22] doctrine and others of decidedly English Common law application, into a constitutional context in which the protection of individual rights and freedoms against governmental action are accentuated and expressions of the authority of government (i.e., legislative and executive) are restrained within limits. One finds the court making such assertions as: "There is no doubt that this principle called the doctrine of executive necessity, is still valid today...";[23] "It is also clear on the authorities that when the principle applies it overrides existing, and conflicting, contractual rights and renders them unenforceable in an action against the government for their breach";[24] "The power of Parliament to impose taxes is unlimited in extent";[25] and "The 'pith and substance' principle is inapplicable in a case where, as here, the legislative power which is challenged is unrestricted."[26]

But perhaps the one feature of **Revere's** case which reflects rather uneasily upon the ethic of judicial independence is that which finds the court going to what seems to be unnecessarily extreme lengths to maintain the integrity of governmental action against liability and culpability for simple breach of contract, by the assertion of fine distinctions which, it is

submitted, are more apparent than real (e.g., between Parliament and the Executive government in respect of lawmaking functions; and between the Executive and the Minister "acting on its behalf" with respect to the competence to bind the Government contractually in the instant circumstances).

It is submitted that the Court in **Revere's** case not only missed an opportunity to engage in a bit of judicial statesmanship by abandoning its expected parochial position in favour of one that would better advance Jamaica's long term needs, but it also failed to show the necessity for nullifying the Plaintiff's rights under the contract, and how nullification was in the circumstances of the particular case essential for the general welfare of the Jamaican community. One cannot help but conclude that the principles obtaining in that case were overlain by non-legal considerations, in the sense that the decision does not reflect a close adherence to legal reasoning. A decision which recognized the inviolability of contract and the right of property whilst at the same time preserving freedom of action in the Government in relation to its essential responsibilities[27] would have reassured the private sector (both at home and abroad) of the Government's reliability and creditworthiness. In the end, however, the Court opted for a route that resulted in the wholesale sacrifice of all other values to the one principle.

What the cases demonstrate, is the attraction the doctrine of executive necessity holds as a rectifying solution for "all the different forms of phenomena which may beset a nation" but which a Constitution might appear not to have anticipated. Whilst this approach to constitutional interpretation raises the further issue of whether or not a Constitution is susceptible to blind spots or lacunae, it also points to a rather more serious disability (of our Judges particularly and among the legal profession generally) namely, an unwillingness and or the inability to appreciate and anticipate the need for a general theory of constitutional law, as well as the role of the Courts under the Constitution in a liberal democratic society.

Such deficiencies, admittedly, are historically based and, unfortunately, to a significant degree they have (with noted exceptions) become institutionalized within the tradition of the general body of the legal professions which has been less than adept at "appreciating the significance of having a written Constitution with a charter of rights and judicial review of legislation..."[28] Perhaps, this is natural enough for lawyers trained and indoctrinated in the British tradition with its emphasis on the common law, on Parliamentary sovereignty and judicial precedent, "all doctrines to make a conservative judiciary exceedingly chary of putting to creative use the new powers suddenly bestowed upon them, let alone of adopting 'a policy-oriented approach' in the manner of American Judges".[29]

Unfortunately this brand of conservatism and accompanying reticence within the legal profession which cannot now be justified on any relevant grounds are impediments to the orderly development of constitutionalism.

Indeed, it is very doubtful whether they conduce to anything other than uncertainty and unsafeness in constitutional adjudication; but most certainly not to confidence in the legal system and the administration of justice. Regretfully, and against the wisdom of actual experiences, our judges and lawyers have not been careful "not to read the provisions of the Constitution like a last will and testament",[30] which, alas, it has fast become.

NOTES

1. Justice C.H. Graham-Perkins: *Some Problems Confronting the Judiciary in the Commonwealth Caribbean* (an unpublished speech delivered at the Third Pakistan Jurists' Conference, 1977).
2. See Patchett, K.W. – *Safeguards for Judicial Independence in Law and in Practice*, (1975).
3. Patchett, K.W. op. cit.
4. *John Locke, Two Treatises of Government*, Book II, chaps. XII and XII (Dent – Everyman's Library 1977).
5. [1957] A.C. 288, at p. 314.
6. [1977] A.C. 195, at p. 211.
7. E.g., Aihe, D.O., and Oluyede, P.A., *Cases and Materials on Constitutional Law in Nigeria* (Oxford United Press, 1979) p. 20.
8. E.g., Att. Gen. for Australia v. The Queen, supra. (Australian); Liyanage v. The Queen [1967] A.C. 259 (Ceylonese); Buckley v. Attorney General of Eire [1950] I.R. 67 (Irish); Hinds v. R. [1977] A.C. 195 (Jamaican).
9. Farrell, B., *The Founding of Dail Eireann: Parliament and Nation-Building* (Dublin, 1971) p. 78.
10. E.g., the views of Hanna, J. in Pigs Marketing Board v. Donnelly (Dublin) Ltd. [1939] I.R. 413, at p. 418.
11. E.g., The Bahamas Constitution, Art. 52; The Barbados Constitutions, Section 48; The Jamaican Constitution, Section 48; The Republic of Trinidad & Tobago Constitution, Section 36.
12. See for example, Liyanage v. The Queen op. cit. (Ceylonese); Buckley v. Att. General of Eire [1950] I.R. 67 (Irish); Lakanmi & others v. Att. General (Western State) & others [1971] I U.I.L.R. 201 (Nigerian).
13. E.g., See the treatment of this provision under Section 36 of the Trinidad and Tobago Constitution in Collymore's case where Wooding, C.J., at p. 8 said: "In my Judgment, the section means what is says. And what it says, and says very clearly, is that the power and authority of Parliament to make laws are subject to its provisions."
14. E.g., in Smith v. Minister of Housing & National Insurance and The Attorney-General of The Bahamas, where Georges, C.J., citing the opinion of Lord Wilberforce in the Privy Council in Minister of Home Affairs v. Fisher [1979] 3 All E.R. 21 at 26 in favour of one preferred approach to the process of

Constitutional interpretation, straightway concluded that "It seems indubitable that the power vested in Parliament under Article 52 of the Constitution to make laws for the peace, order and good government of The Bahamas (subject to the provisions of the Constitution) would empower the Legislature to pass appropriate laws to compel persons to provide insurance for themselves against the potentially disruptive impact of certain events."

15. E.g., Liyanage v. The Queen [1967] A.C. 259, at p. 289.
16. (1819) 4 Wheat. 316, at p. 423; see also Jumbunna Coal Mine v. Victoria Coal Miners' Assoc. (1908) 6 C. L. R. 309, at p. 345 (per Barton, J.).
17. In Lakanmi v. Attorney General (Western State) the Supreme Court of Nigeria spoke in somewhat nebulous terms of, 'the exigencies of the necessity of the occasion', and 'the actual demand or exigencies of the necessity of the occasion.'
18. Likewise, see the decision of the Court of Appeal of Grenada in Mitchell & others v. Director of Public Prosecutions [1986] L.R.C. 35. Liverpool, J.A. refused to apply the doctrine.
19. The Court's application of the doctrine raises serious doubts as to the continued existence of the pre-1966 Constitution even in its judicially accepted abrogated form. The decision in this case which was itself overruled by an enactment of the FMG has been severely criticized elsewhere. See the comments of Aihe D.O. and Oluyede P.A. – *Cases and Materials on Constitutional Law in Nigeria* (1979), p. 64.
20. [1977] 26 W.I.R. 486.
21. (The Amphitrite) [1921] 3 K.B. 500.
22. See the critical discussion of the doctrine of executive necessity in the particular circumstances of the case of (The Amphitrite) by Hogg, P.W., *Liability of the Crown* (1971), p. 129 - 140.
23. [1977] 26 W.I.R. 490.
24. Ibid., p. 490.
25. Ibid., p. 496.
26. Ibid., p. 496.
27. Professor Hogg, in *Liability of the Crown*, op. cit., suggests rather convincingly that it is possible to recognize that governments occasionally have to break contracts in the public interest; however, when they must do so, they ought to be prepared to pay damages to the injured party, assessed in the ordinary way. The only immunity required is from the remedies of specific performance and injunction, which would truly fetter future executive action.
28. Barrington, B. – *'Private Property under the Irish Constitution'* (The Irish Jurist, Vol. VIII, new series (1973) p. 6).
29. Chubb, B. – *'The Constitution and Constitutional Change in Ireland'* (1978), p. 74.
30. Freund, P., *'The Supreme Court of the United States'* (1951), 29 Can. Bar. Rev. 1080, at p. 1087.

The Need for Independence and Pressures Upon the Judiciary

by
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What does independence of the judiciary mean? Traditionally, as a constitutional concept, it referred to the proper role of the judiciary in the scheme of government, highlighting provisions for securing judges' salaries and pensions and for preventing the summary or arbitrary removal of judges from office. The legislature makes the laws, the executive gives effect to them while the function of the judiciary is to adjudicate in disputes between one person, individual or corporate, and another and between any such person, and the State or the Crown, as the case may be. In the exercise of this function the judges act independently of the legislature and the executive.

In recent years some effort has been devoted to the analysis of the concept in order to determine its essence and characteristics. The following passage by Mr. S. Shetreet in *Judicial Independence: The Contemporary Debate,* 1984, at pages 598 and 599 provides an illustration:*

> "At the end of the inquiry into the meaning of independence of the judiciary one could briefly summarise the essential elements which are imperative for a truly independent judiciary.

***The purpose of this volume was to present discussions on judicial independence in an international and comparative perspective.**

In the enumeration of the essential elements of judicial independence a distinction must be made between two aspects of the concept of the independence of the judiciary: the independence of the individual judges and the collective independence of the judiciary as a body. The independence of the individual judge is comprised of two essential elements: substantive independence and personal independence. Substantive independence means that in the making of judicial decisions and exercising other official duties individual judges are subject to no other authority but the law. Personal independence means that the judicial terms of office and tenure are adequately secured. Personal independence is secured by judicial appointment during good behaviour terminated at retirement age and by safeguarding judicial remuneration. Thus executive control over terms of service of the judges such as remuneration, pensions or travel allowance is inconsistent with the concept of judicial independence. Still much less acceptable is any executive control over case assignments, court scheduling or moving judges from one court to another or from one locality to another."

The writer went on to say that the concepts of personal independence and substantive independence of the judiciary are universally recognised by law and by legal writers but that the concept of collective independence of the judiciary had not received adequate scholarly attention. The concept of collective judicial independence is concerned with the development of the judiciary as a significant social institution with an important constitutional role. It looks to the administrative independence of the judiciary with supervision and control over administrative personnel, preparation of court budget, maintenance of court buildings and such matters.

This paper is concerned with the independence which should exist when a judge is making his decisions and which should enable him to be guided by the law and by due and proper considerations and to ignore and reject improper influences and pressures from whatever source they may originate. Whether it is called substantive or functional or decisional independence, adequate security of a judge's terms of office and tenure – or his personal independence if you choose to call it that – is but one of the factors, albeit a very important one, that contributes to independence in the seat of judgment.

Recently the Guyana Bar Association issued a call for tax free salaries for judges not only during their tenure of office but for life. Explaining the Association's position the President, Mr. F. Ramprashad, said that for judges to function effectively they must be truly independent and free from restraining in their endeavours to do justice to all. In their freedom to adjudicate judges must also be free from any form of pressure from government or other source in the independent exercise of their free judgment.

Some years ago in Barbados, it was proposed to legislate tax free salaries for judges. The argument advanced in support of this proposal was that judges would not be independent when deciding tax appeals if they had to deal with the Commissioner of Inland Revenue in resolving their own tax affairs. A recent newspaper report stated that in Jamaica all judges, and not merely the Chief Justice, will now receive pensions based on their full retirement salaries.

Such things are of great importance. But in the last resort the real barometer of a judge's power to be independent in the seat of judgment rests in the judge himself. It is useful to quote the words of Venkataramiah J. in *S.P. Gupte and Others v. Union of India [1982] A.I.R. 149*

> "But if the judiciary should be really independent something more is necessary and that we have to seek in the judge himself and not outside. A judge should be independent of himself. A judge is a human being who is a bundle of passions and prejudices, likes and dislikes, affection and illwill, hatred and contempt and fear and recklessness. In order to be a successful judge these elements should be curbed and kept under restraint and this is possible only by education, training, continued practice and cultivation of a sense of humility and dedication to duty. These curbs can neither be bought in the market nor injected into the human system by the written or unwritten laws. If these things are there even if any of the protective measures provided by the Constitution and the laws go, the independence of the judiciary will not suffer. But with all these measures being there, still a judge may not be independent. It is the inner strength of the judges alone that can save the judiciary."

Professor Patchett in an excellent paper "Safeguards for Judicial Independence in Law and in Practice" concluded with these remarks:

> "In strict theory, of course, law is not a necessary element in the independence of the judiciary, though there can be no doubt that legal safeguards will serve the vital purpose of emphasising the importance of the concept as a central value of the legal system. But such independence could exist, even though the law was silent on the matter. For the essence of independence is that the judge in the discharge of his functions, reaches his decisions because his analysis, legal knowledge and understanding, his training and system of values, and no-one else's lead him to the particular conclusions. That independence is demonstrated in the judge's refusal to submit to any external pressures to reach conclusions different from those which, in his evaluation of the law and interpretation of the evidence, appear to be the right ones.
>
> Judicial independence at its best therefore derives from the judge's

own determination to be free to make up his own mind in the end. The purpose of such independence is to entrust to suitably equipped individuals in whom general confidence lies the resolution of conflicts, according to standards embodied in pre-existing rules of law. Such confidence derives from the assurance that those individuals are not responsible to any of the parties interested in the outcome of the decision."

A reputation for judicial independence does not come overnight or by a handful of decisions. It is an assessment made over the long term by public opinion. I cannot do better than quote the memorable words written by United States Supreme Court Justice William O. Douglas in his 1956 Tagore Law Lectures at page 345:

> "The judiciary has no army or police force to execute its mandates or compel obedience to its decrees. It has no control over the purse strings of government. Those two historical sources of power rest in other hands. The strength of the judiciary is in the command it has over the hearts and minds of men. That respect and prestige are the product of innumerable judgments and decrees, a mosaic built from the multitude of cases decided. Respect and prestige do not grow suddenly. They are the products of time and experience. But they flourish when judges are independent and courageous."

Public opinion of the judiciary is formed by a combination of factors the most important of which are the decisions and conduct of the judges. The objective view of the judges' conduct can be as vital as what they in fact do; and what they do after they leave office can affect the assessment of what they did when in office.

Thus it is felt that it is not only how judges behave during their term of office on which reputations and expectations are founded. When they demit office their conduct continues to be an important consideration; hence the question should arise whether by accepting a particular appointment the former judge may be receiving compensation for deeds performed or associations formed during his term of office.

This was the rationale for the extensive regional comment by the Bar and the press recently when the Head of the Judiciary of one of the territories, was appointed on retirement to the post of Attorney-General of that country.

It is often stated that the judiciary has the sacred responsibility of protecting the citizen against legislative and executive infringements of his legal rights, and of dispensing justice between the State and the individual. Consequently, in recognition of the essential characteristics and lofty purposes of the judiciary, there are well established ethical rules and a long

standing tradition that judges do not, after retirement, join the ranks of the political executive and in most cases are not permitted to practise in the courts over which they had hitherto presided.

Public criticism of judges is in line with the remarks made by Lord Atkin in a well known Caribbean case.

In *Andre Paul Terency Ambard v. A.G. of Trinidad and Tobago [1936] All E.R. at page 145*, he said:

> "But whether the authority and position of an individual judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising in good faith in private or public an act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motive to those taking part in the administration of justice and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer scrutiny and respectful even though outspoken comments of ordinary men."

There will be an increasing number of cases in which the court's supervisory jurisdiction over the acts or omissions of the executive will be invoked as the number of cases in which persons seek to enforce their fundamental human rights grows.

Litigation in which the Crown or the State, as the case may be, is involved will tend to generate much public discussion and debate. I quote again from Professor Patchett's article:

> "It is axiomatic that, for a Judge to practise his independence, he needs to know that any independent stand will be respected and will not be followed by vindictiveness or adverse repercussions against himself personally or on the judiciary as a whole. In so far as those consequences may flow from non-governmental agencies, such as sectional groups in the community, as a result of decisions affecting them, there is a good chance that such a stand will receive the support of the government and the community at large and, in any case, such pressures are rarely coordinated to effect the judge directly or seriously. The situation is quite different where the government is aggrieved by judicial activity. No matter what legal safeguards exist, a judge cannot feel immune from executive reaction unless the executive itself is subject to political constraints upon any interference. Such constraints will only be effective if the judiciary has the support and the confidence of the community at large and their independence

from government is not only known to exist but, more importantly, is valued. Unhappily, in some countries these conditions do not obviously obtain. If the support for the judiciary is the consequence of opposition party initiatives – and this is more than probable in countries where pressure groups are almost entirely politicised – the issue of independence can be polarised in political terms and government's actions with respect to the judiciary will be assessed on partisan grounds rather than as an important issue which transcends political commitment.

In situations of this kind the judge who is determined to withstand any constraints which government may seek to impose upon him is very vulnerable. This will be particularly the case if other judges are more fearful of confrontation, an attitude which, in itself, may provide confirmation for those who doubt whether the preservation of judicial independence is worth the effort. Yet again the judge in these circumstances may face an appalling dilemma: if he is strong and determined in fulfilling his responsibility to the constitution and the law as he sees it, will he receive the necessary public support and protection in his confrontation with government? If he is compliant and avoids conflict with the executive will he not weaken the authority of the judiciary in the public mind and fair-minded decisions involving government even less easy to reach in the future."

Judicial independence as a feature of the actual life of a community and its institutions depends on the perceived ability of the judges to isolate themselves from external pressures and influences when in the seat of judgment and to give decisions which, irrespective of the parties involved, they honestly and genuinely believe to be the right ones in the particular circumstances.

The Independence of the Judiciary in Belize

by
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Background

Belize boasts of 8864 square miles with a population estimated at 170,000 inhabitants (excluding alien refugees) of whom about one third live and work in Belize City and its environs. The Supreme Court consists of a Chief Justice and two Puisne Judges, with 4 criminal sessions every year held in Belize City and 2 to 4 in the outer Northern and Southern districts.

These outer Circuits are designed more to show the people of these areas that the law is accessible, that they are participating in the criminal process through jury service and to assure them that their remoteness from the centre of judicial power will not result in executive or administrative abuse, than to actually transact serious judicial business, which can be done more cheaply either by increasing the jurisdiction of Resident Magistrates or by dealing with the matters at the main seat of the Supreme Court. As it is, during these sessions everything has to move from Belize City: Judge, Crown Counsel, defence Counsel, deputy Registrar and three Archbolds of varied vintage to the relevant districts headquarters 85 or 100 miles distance, for the duration of the session which sometimes extends to two or three weeks.

Belize is somewhat removed from the major educational centres of the University of the West Indies, particularly the Faculty of Law. We do not have a resident Court of Appeal and our Supreme Court does not

consist entirely of nationals of the country. The Bar, as in some other countries in the region, is in the main politicised, and even if some individuals are not, the status of a Judge, though high, is not adequately rewarded. On the magisterial level, only two of our magistrates are qualified lawyers, one of them being an ex-patriate. A number of ex-patriates are also found in legal posts.

Independence

Is there, in smaller jurisdictions such as Belize, less independence of the judiciary than in large jurisdictions? Assuming that the Constitutions of the Commonwealth Caribbean countries are the same, (that of Belize has been modelled on that of Trinidad and Tobago) one will start with the proposition that in all jurisdictions the independence of the Supreme Court is enshrined in the Constitution. The Supreme Court of Belize is the guardian of the Constitution which is itself the supreme law of the land. Protection of fundamental rights and freedoms, the right to life, liberty, protection of the law etc. are contained in Chapter II which consists of 22 sections which are mostly devoted to those rights. Belize became independent on the 21st September 1981, but by Section 21 a period of five years was given to bring the existing laws into conformity with the requirements of Chapter II. Since the five year period of grace expired two years ago without a serious effort, until recently, being made to bring existing laws into conformity with the Constitution, a spate of actions are already coming up before the Supreme Court either seeking the interpretation of those provisions, or seeking declarations to nullify acts done allegedly in contravention of those provisions of the Constitution.

The Constitution establishes a Supreme Court, and a Court of Appeal, with a right of further appeal to the Privy Council: a) as of right, from final decisions of the Court of Appeal on any civil, criminal or other proceedings which involve a question as to the interpretation of the Constitution and such other cases as may be prescribed by the National Assembly, and b) with leave of the Court of Appeal from its decision in any civil proceedings when in the opinion of the Court of Appeal the question involved in the appeal is one which by reason of its general or public importance or otherwise ought to be submitted to Her Majesty in Council, together with such cases as may be prescribed by the National Assembly, and c) by special leave from Her Majesty from any decision of the Court of Appeal in any civil, criminal or other matter.

The Chief Justice is appointed by the Governor General acting in accordance with the advice of the Prime Minister given after consultation with the Leader of the Opposition. Puisne Judges are appointed by the Governor General acting in accordance with the advice of the Judicial and Legal Services Section of the Public Services Commission (of which the Chief Justice is a member ex officio) and with the concurrence of the Prime

Minister after consultation with the Leader of the Opposition. To the best of my knowledge, the advice of the Judicial and Legal section of the Public Services Commission on the appointment of Puisne Judges has never been rejected. The Chief Justice and the Puisne Judges hold office until age 62, but there is provision to extend that period for those already in office up to age 70. The qualification for appointment is five years experience as an Attorney at Law in Belize or as an advocate in a Court in another part of the Commonwealth having unlimited civil or criminal jurisdiction. The qualification for the President and Justices of Appeal is much higher. These judges must have held the office of a Judge having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a Court having jurisdiction in appeals from any such Court, or be qualified for 15 years to practice as an Attorney in a Court in Belize or an advocate in any part of the Commonwealth having unlimited jurisdiction in either civil or criminal causes of matters.

The tenure of office of the President and Justices of Appeal depends on the instrument of appointment. If the office holder is in good health and willing to continue, his term is normally renewed. We have been fortunate that in the Belize Court of Appeal, appointments since the Court's foundation in 1967, have been made of former Chief Justices, Puisne Judges and Presidents or Justices of Appeal drawn almost exclusively from the Caribbean region.

The procedure of removal of the Chief Justice of the Supreme Court and its Justices and the President of the Court of Appeal and its Justices are extremely rigid, involving a reference to the Belize Advisory Council which sits under the Chairmanship of a Member of the Council who holds or has held high Judicial office deputed so to act by the Governor General. The Council then advises the Governor General who acts in accordance with that advice.

Therefore the Belize Constitution, (and others in the Commonwealth Caribbean) conforms to the U.N. Basic Principles on the Independence of the Judiciary and the Montreal Universal Declarations on the Independence of Justice.

The theory of separation of powers is fully provided for by the Belizean Constitution and it also contains a large measure of checks and balances. Some justiciable issues are disguised as purely administrative and left to ministers or public servants. There are no discernible inroads to disturb the status quo. I will not touch upon pressures upon the Judiciary which Chief Justice Sir Denys Williams has dealt with, except to say that in smaller jurisdictions perhaps they are a little more subtle. But where in the rest of the Caribbean countries the possibility of a change from the accepted norms of judicial independence is very remote, the possibility of erosion of the supremacy of the Rule of Law in Belize as now understood may alter because of demographic changes that have begun to surface from the influx of

immigrants, some legal, but mostly refugees, escaping from wars and revolutions in some of the Central American countries near our borders. It is too early to say how the existing Anglo-Saxon Jurisprudence will develop if the influx becomes a flood. The original Spanish-speaking people of Belize are bilingual and have adopted and acceptd the English common law as have the other ethnic groups. It should be noted, however, that up to 1898 Spanish law, language and culture prevailed in the Philippines, and yet within 60 years of American occupation Spanish law was moulded with Anglo-Saxon. It is therefore difficult to make projections for Belize. There is large scale emigration of Belizeans to the U.S.A. and Canada, and the birth rate in Belize does not match the rate of legal and illegal immigration into Belize.

I am not saying that our Common law traditions in Belize are going to collapse overnight. Nor am I saying that common law traditions have prevented strife and revolution in countries that did have these traditions – as can be seen from many conflagrations in some African Commonwealth countries with long common law traditions. What I am saying is that we do need the support of the Commonwealth countries of the Caribbean, and of course continued support from donor agencies such as the Caribbean Justice Improvement Project, who have already discovered the necessity of preserving the common law traditions in this part of Central America to help us maintain the stability of our judicial institutions with the great concept of freedom under the law.

The Legal Profession and the Independent Administration of Justice

by
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[Note: In this paper, the author looks at the role of the legal profession in protecting the independence of the judiciary and the administration of justice and how that role is treated in three sets of principles: the United Nations Basic Principles on the Independence of Judiciary, the draft United Nations Basic Principles on the Role of Lawyers and the more detailed Montreal Declaration on the Independence of Justice, adopted by international and regional associations of judges and lawyers in 1983 ("Montreal Declaration").]

Introduction

In an organised society in which there are governing authorities, the interaction of human beings with each other and with the governing authorities requires not only established rules but a system by which those rules are applied and conflicts resolved. The basic axiom of the democratic system is that the differences in motivations, objectives and desires which result from the uniqueness of individuals inevitably produce conflicts which must be resolved by an essentially consensual system. Finer writes "that the quintessence of doubt, and therefore argument for freedom, toleration, and democratic government is this: that men have not the faculties for perfect and unchallengeable conviction regarding their ultimate beliefs".

Man's ingenuity has not yet devised any better scheme for the resolution of these differences and the tolerant acceptance of their resolution, than the elective process for those who make the laws and the judicial process for those who interpret it.

The preservation of these processes and the maintenance of harmony in society inevitably depends on the application of the rules. If the King is above the law then the subject has no known protection against arbitrariness and absolutism other then rebellion. It is for this reason that the independence of the administration of justice is essential to justice and liberty. As lawyers play a vital role in the administration of justice, their own independence is of critical importance.

The essentials of democracy and the rule of law are the individual's rights of access to legal advice and representation, and the freedom of the lawyer to take up and represent the case of any person irrespective of his race, religion, political beliefs or other individual characteristic. Shakespeare certainly echoed the thoughts of tyrants when he treated the elimination of lawyers as a priority. But he must also have voiced a popular cynicism towards the legal profession which has at times been seen as exploiters of the ignorant rather than defenders of the weak. The Montreal Declaration is an important document in that it gives expression to the responsibilities of the lawyer to uphold high ethical standards, to provide independent, skilled and resolute representation, to defend the rule of law and human rights and to promote social justice.

The Essence of Constitutionalism

The fundamental quality of a constitutional democratic system in which individual liberty and human rights are protected, is the existence of an independent judiciary which has the responsibility and authority to interpret and apply the law to particular cases. The judicial function attains its highest status when there is a supreme body of legal principles which it expounds and when legislative or executive organs cannot easily exercise control or give directions in its formulation or in exposition. In the Commonwealth Caribbean the Judiciary has to a large extent been invested with this authority.

The effectiveness of the judicial power and authority in the protection of democracy and the preservation of human rights depends on:–

(1) The contents and nature of the legal rules and principles it is called on to interpret, expound and apply;
(2) The composition and membership of the judicial bodies themselves;
(3) The terms and conditions under which the judicial officers are employed and in which they operate; and

(4) The support which they obtain from the community and in particular, from the legal profession.

Although the legal profession is specifically mentioned in the statement of the fourth factor only, it nevertheless has an important role with respect to all four factors. The Montreal Draft Universal Declaration on the Independence of Justice recognizes the relevance and and importance of these factors and the critical role which lawyers must play in securing the objectives. In the General Principles of the Montreal Draft it is declared that the independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights. Similarly, in the draft U.N. Basic Principles on the Role of Lawyers just approved by the Committee on Crime Prevention and Control and which will be submitted to the 1990 U.N. Congress on the Prevention of Crime and the Treatment of Offenders, the Preamble recognizes that "adequate protection of human rights and fundamental freedoms... requires that all persons have effective access to legal services provided by an independent legal profession".

The Creation of Legal Norms

The ability of the judiciary to administer justice in disputes between citizens depends in the first place on the nature and contents of the legal rules which govern their functions.

Lawyers who advise the political executive have been extremely resourceful in formulating statutory schemes which oust the jurisdiction of courts, severely limit the discretion of judges, unfairly discriminate against individuals or groups, or alter the law so as to increase executive power or abrogate individual rights. Shamefully, this astuteness descends occasionally to the amendment of Constitutions to cancel judicial decisions which expounded the hitherto established constitutional principles. In my view, it is essential that lawyers should have a deep commitment to constitutional democracy and human rights, so that their influence and expertise may be consistently applied for their furtherance and preservation rather than their negation and violation. I doubt that the Montreal Draft places sufficient emphasis on this aspect of the responsibilities of lawyers and of Bar Associations. Yet, throughout the world, members of this profession particularly when they hold political office or harbour political ambitions, have carried the stain of guilt for legislative and executive assaults on democracy, the administration of justice, and human rights.

The development of an awareness in the legal profession of a broad human rights concept will depend to a great extent on the quality of legal education both initially and continuing. The Montreal Declaration makes an important statement in Chapter III, 3.06 to the effect that:

"Legal education shall be designed to promote, in the public interest,

not only technical competence, but an awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognised by national and international law."

Public respect for the legal system can only be maintained if the law and the legal profession are regarded as sensitive to the socio-economic needs of the community and are capable of serving the objective of creating a better life for the citizen. It is noteworthy that in the Preamble to the Agreement establishing the Council of Legal Education and indigenous system of legal education for the English-speaking Caribbean, it is stated that the objectives of the scheme of legal education "should be to provide teaching in legal skills and techniques as well as to pay regard to the impact of law as an instrument of orderly social and economic change". This statement accords well with the provision in the Montreal Declaration (Chapter III, 3.07) states that:–

> ".....programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development".

Judicial Appointments

The Montreal Declaration recognizes that the Executive or Legislature may participate in the appointment of judges without compromising the independence of the judiciary, but emphasizes that appointments should be made in consultation with members of the judiciary and the legal profession or by a body in which both members of the judiciary and the legal profession participate. The fact is that unless persons who are independent participate in the appointment process the politicians are likely to seek to appoint only persons of a certain bias or to seek to gain some improper advantage from the selection. The U.N. Basic Principles on the Independence of the Judiciary provides that "any method of judicial selection shall safeguard against judicial appointments for improper motives."

The Judicial Service Commission which is a common feature of most Caribbean Constitutions institutionalise in a constitutional framework the ideals of both the Montreal Declaration and the U.N. Basic Principles.

To the extent that some appointments, (notably of the heads of the judiciary) are made by politicians in a potential threat to the principle, although it is believed that in these cases there is usually some consultation in the proper quarters. Even where the legal profession is not invited to express their views, it is my belief that they have a right and duty to make them known in an appropriate manner.

There is one area in the Caribbean in which the legal profession has failed to make a sufficient contribution to the selection process. Experienced

members of the private Bar do not generally accept appointments to the Bench. For understandable economic reasons, only a small number of eminent and successful lawyers have made themselves available for judicial appointments. As a consequence, several Benches are dominated by career officers who gain their promotion to the Bench largely through the mobility permitted by civil service procedures. While a type of career judiciary might be a necessary expedient in the Caribbean and that some appointees from this system have distinguished themselves in the past, showing commendable liberalism and sensitivity to human rights; there is in many of our countries a need to broaden the pool from which judges are appointed. It is only by this means that it will be possible to give effect to the provision in the Montreal Draft that "the process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects."

Increase in judicial recognition of law as an applied social science and sensitivity to international developments in the area of human rights can foster the strength and independence of the judiciary. These qualities can be enhanced by continued legal education which happily in recent years has become acceptable as a means of upliftment rather than a source of adverse reflection on the judiciary. The Montreal Declaration provides that continuing legal education shall be available to judges. For the maximum benefit to be derived from this source it is essential that the practising Bar should participate in and contribute to such programmes.

Terms and Conditions of Judicial Service

Our Constitutions generally give effect to principles of security of tenure and remuneration set forth in the U.N. Basic Principles and to which the Montreal Declaration subscribes. It is possible however for politicians to exert undue influence on judges by various subtle forms of manipulation of their conditions of service. The political leadership may decline to make provisions which will ensure that judicial living standards are not eroded by inflation or may grant superior benefits to other public functionaries and thus devalue the relative status of the judiciary.

In these matters the legal profession can play an important role in making representations to government on questions affecting the terms and conditions of service of judges. This is particularly important as judges are placed in a delicate position when they have themselves to negotiate with politicians regarding their own terms of service. In some cases judicial terms of service, though secured against dimunition in nominal terms by constitutional provisions, can only be improved in real terms through the regular civil service machinery. Recently the Jamaican Bar Association made representations to government to establish a mechanism which is independent of the civil service machinery. It may also be possible to establish a

system of indexation which preserves the relative values of judicial salaries and pensions.

In a general way, public respect for the judiciary and the administration of justice depends on how the public perceives that the government evaluates their importance. Delapidated court buildings and inadequate physical facilities neither earn the respect of the public nor enhance the independence of the judiciary. Bar Associations must constantly strive to secure improvements in these areas.

The Freedom of Lawyers from Undue Interference

A legal profession which is controlled or manipulated or intimidated by politicians cannot effectively carry out its duty of sustaining the independence of the administration of justice. As a corollary, despotic government usually commences with the suppression of the legal profession. Examples of these attacks on the Bar are to be found in the issues of the Bulletin of the Centre for the Independence of Judges and Lawyers. Invariably, where human rights are violated and democracy destroyed, lawyers are detained, brutalised and oppressed.

The draft U.N. Basic Principles on the Role of Lawyers recognises that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled ... requires that all persons have effective access to legal services provided by an independent legal profession," and sets our guidelines regarding access to lawyers and guarantees for the functioning of lawyers. In particular, it provides that:

> "It is the responsibility of governments to ensure that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action or defence taken in accordance with established professional duties, standards and ethics. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."

Similarly, the Montreal Declaration declares that 'no lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reasons of his having advised or represented any client or client's case.' (Ch. III, 3.13)

Our Constitutions normally provide for a right to legal representation, but do not provide for the protection of lawyers, although the former depends on the latter. Many of the rules relating to access to lawyers, confidentiality of lawyer-client relationships and to rights of audience in the courts are derivatives of the client's rights, which are frequently ill-defined and difficult to enforce. Thus, the police may contrive to delay or frustrate the client's right to consult with a lawyer on arrest, or the opportunities for the lawyer to interview the detained or arrested person. The

physical facilities for such interviews are in many cases deficient, providing neither comfort nor confidentiality.

Access to lawyers is also restricted by the rules relating to admission to Bars and the obtaining of work permits. In small jurisdictions in the Caribbean where the legal profession is often divided in opposed political camps, it is frequently necessary in politically sensitive cases for a client to obtain legal representation from outside his own country. In these types of cases the rules for admission to the Bar and the grant of work permits need to be so framed and administered as to ensure that litigants obtain adequate legal representation.

The public perception of the legal profession will influence the ability of lawyers to maintain their independence. Effective disciplinary regulations of the profession is therefore of critical importance. The legal profession should be entrusted with the responsibility of establishing and enforcing codes of professional conduct, as the Draft Basic Principles and the Montreal Declaration postulate, since the disciplinary control in the hands of other parties may be used to undermine the independence of the profession. But public respect for the system would be increased if lay persons were included in the tribunals adjudicating in disciplinary matters, so as to avoid the appearance of mutual self-protection in such cases.

Inter Dependence of Bench and Bar

A strong and independent legal profession is indispensable to a strong and independent judiciary. In a practical way the function of the lawyer begins with his duties to his client. But it does not end there. In the Jamaican Canons of Professional Ethics for example, the duties are stated as including the following:

(1) 'An attorney shall assist in maintaining the dignity and integrity of the legal profession and shall avoid even the appearance of professional impropriety'.
(2) 'An attorney shall not indulge in or assist in any unauthorised, improper and unprofessional practice'.
(3) 'An attorney owes a duty to the public to make his counsel available and a duty to the State to maintain its Constitution and its laws and shall assist in improving the legal system'.
(4) 'An attorney shall act in the best interests of his client and represent him honestly, competently and zealously within the bounds of the law. He shall preserve the confidence of his client and avoid conflicts of interests', and
(5) 'An attorney has a duty to assist in maintaining the dignity of the courts and the integrity of the administration of justice.'

While judges must be conscious of the wide responsibilities of lawyers,

and particularly of the need for the advocates' cooperation in procuring the expeditious and fair disposal of cases, they must also appreciate that in our legal system the lawyer has a primary duty to his client. Thus an advocate may put forward a weak submission or invalid submission without being guilty of misconduct unless he has deliberately sought to deceive the Court. It is the advocates' duty to take any arguable point which can honestly be put forward, and it is for the Court and not the advocate to decide whether it is good or bad.

Too frequently has the Court taken a hostile attitude towards the advocate who seeks to represent the interests of his client, particularly where this entails an attack on the establishment. In one case, a Full Court Bench in Jamaica threatened advocates in a constitutional challenge to the delayed imposition of the death penalty with an award of cost against them personally, although the same case resulted eventually in two powerful dissenting opinions in the Privy Council in favour of the advocates' submissions.

Conclusion

It is only where justice is openly administered by an independent Bench with the cooperation of a strong Bar that liberty is secure. Lawyers collectively in their Bar Associations, and individually in their daily practice, must constantly strive to enhance the prestige and strengthen the security of the judicial organ. These objectives can only be achieved by mutual respect, combined resistance to tyranny, injustice and abuse of human rights and constant cooperation in the pursuit of the ideals of the Rule of Law and constitutional democracy.

Conclusions and Recommendations adopted by the Seminar

The Judiciary

1. The independence of the judiciary is the firmest guarantee of the Rule of Law and shall be jealously protected.

2. The U.N. Basic Principles on the Independence of the Judiciary represent minimum standards of judicial independence and should be fully implemented in all countries.

3. Experience, particularly of recent events in other parts of the Commonwealth, has shown that judges cannot ultimately rely on constitutional safeguards to protect them from executive interference. Judges should recognise that the strength of the judiciary lies in their own integrity and in the respect and prestige the judiciary secures in the public mind over time.

4. In many countries, the mandatory retirement age of judges may be extended by the executive, sometimes on the recommendation of a judicial service commission. This can have the effect of making the judge dependent on an outside authority and undermining his independence. Consideration should therefore be given to abolishing such extension provisions and raising the mandatory retirement age to at least that to which the judge's term would previously have been extended. In any event, however, such extensions should be made for one time only and on the advice of a judicial service commission rather than the executive.

5. The practice in some states of appointing judicial officers on renewable contracts has the potential of undermining their independence and should be discontinued or reduced to a minimum.

6. Magistrates, as a distinct group of judges or lower courts, ought to be protected from the executive by constitutional provisions for independent and impartial judicial service commissions to determine matters of appointment, tenure of office, discipline and other matters.

7. Adequate remuneration, conditions of service and pensions for

judges, within the economic context of the country, are important in attracting suitable persons to staff an independent judiciary. In particular, pension arrangements should not be such as to discourage lawyers in private practice from accepting judicial appointment. The practice in some states of allowing to the judges tax-free salaries and pensions equivalent to their full retirement salaries might merit consideration as a further means of preserving and promoting the independence of the judiciary.

8. There should be an independent body given the responsibility of receiving representations from the judiciary with regard to amendments of terms of service and making recommendations to the executive on the matter.

9. The obligation of the state or provide adequate resources to enable the judiciary to properly perform its functions includes the duty of provide a comfortable working environment and appropriate equipment and competent staff to facilitate the recording of evidence and the production of judgments. Failure to do so produces another disincentive to the acceptance of judicial appointment by lawyers in private practice.

10. Judicial independence as a feature of the actual life of a community and its institutions depends substantially on the real and perceived ability of judges to resist all improper external pressures and influences and to give decisions which, irrespective of the parties involved, they honestly and genuinely believe on the facts presented and on the relevant law to be right. Judges should therefore be mindful of their conduct while in office; and as a matter of principle should not do anything after they leave office which can either adversely affect the assessment of what they did in office or call into question their independence when in office. There should be guidelines as to what judges should or should not professionally do after they cease to hold office.

11. Judges and former judges, when asked to preside over Commissions of Inquiry, should carefully consider the nature and terms of the inquiry before accepting appointment in order to avoid or minimise the risk of embarrassment to the individual and collective independence of the judiciary.

Lawyers

12. The existence of a free and fearless legal profession is essential for the preservation of the Rule of Law.

13. The U.N. Draft Basic Principles on the Role of Lawyers approved by the Committee on Crime Prevention and Control represent minimum guarantees for the independence and functioning of lawyers. States of the region should support their adoption by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

14. In order to retain the public's confidence, the legal profession

must be seen as acting for the common good rather than in its own pecuniary interest.

15. Lawyers and Bar associations should promote legal literacy among the public, including an awareness of constitutional rights and available remedies.

16. The question of professional ethics and the integrity of the profession should be constantly kept in mind by members of the profession who function within the administration. The relationship between the Attorney General and the practising Bar is a matter which should be kept under review in order to maintain the balance between political objectives and the maintenance of legal traditions.

17. The practice of rushing unpublished bills through Parliament without public discussion limits the ability of the practising profession to assist in preserving the rights of citizens and should be discouraged.

18. Adequate self-disciplinary procedures are essential to the continued independence of the legal profession. Consideration should be given to a uniform code of ethics and disciplinary mechanisms for the Commonwealth Caribbean.

19. Bar associations should take the lead in reviewing rules for admission to the Bar and work permits for lawyers from other Caribbean states with a view towards facilitating representation by such lawyers were there is such a need.

20. Lawyers and Bar associations should offer support to their colleagues in other countries who are harassed or persecuted for lawfully seeking to discharge their functions.

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United Nations Basic Principles on the Independence of the Judiciary

The 7th UN Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Milan, Italy, from 26 August to 6 September 1985 adopted by consensus Basic Principles on the Independence of the Judiciary.

The Congress' resolutions were "endorsed" by the UN General Assembly (A/RES/40/32, 29 November 1985) which specifically invited governments "to respect the Basic Principles and to take them into account within the framework of their national legislation and practice" (A/RES/40/146, 13 December 1985).

In its final resolution, the seminar stated that the Basic Principles "represent minimum standards of judicial independence and should be fully implemented in all countries of the region."

Below are the Basic Principles adopted by the 7th Congress:

"Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

"Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

"Whereas the International Covenants of Economic, Social and Cultural Rights and on Civil and Political Rights further guarantees the right to be tried without undue delay,

"Whereas the organisation and administration of justice in every coun-

try should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

"Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

"Whereas the Sixth United Nations Congress, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

"Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

"The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the Legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist."

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duily established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training of qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, where appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right

of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

United Nations Draft Basic Principles on the Role of Lawyers

At its tenth session from 22 - 31 August, 1988, the United Nations Committee on Crime Prevention and Control approved a set of Draft Basic Principles on the Role of Lawyers which will be submitted to the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

The seminar stated that the Draft Principles "represent minimum guarantees for the independence and functioning of lawyers" and called on states of the region to support their adoption at the 1990 Congress.

Below are the draft Principles approved by the Committee:

"Whereas the peoples of the world affirm in the Charter of the United Nations, **inter alia**, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,

"Whereas the Universal Declaration of Human Rights[1] enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

"Whereas the International Covenant on Civil and Political Rights[2] proclaims, in addition, the right to be tried without undue delay and the right to fair and public hearing by a competent, independent and impartial tribunal established by law,

"Whereas the International Covenant on Economic, Social and Cultural Rights[2] recalls the obligation of States under the Charter of the United

Nations to promote universal respect for, and observance of, human rights and freedom,

"Whereas the Standard Minimum Rules for the Treatment of Prisoners[3] recommend that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

"Whereas The Safeguards Guaranteeing Protection of Those Facing the Death Penalty[4] reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with Article 14 of the International Covenant on Civil and Political Rights,[2]

"Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

"Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from improper restrictions and infringements, providing legal services to all in need of them and cooperating with governmental and other institutions in furthering the ends of justice,

"Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in the resolution 18,[5] recommends that Member States should provide for the protection of practising lawyers against undue restrictions and pressures in the exercise of their functions, whereas the Seventh United Nations Congress requests the Secretary-General to provide interested Member States with all the technical assistance needed to attain the above objective and to encourage international collaboration in research and in the training of lawyers,

"Whereas the Economic and Social Council, in its resolution 1986/10, section XII, requests the Committee on Crime Prevention and Control and invites the United Nations regional and interregional institutes for the prevention of crime and the treatment of offenders to pay special attention in their research and training programmes to the role of lawyers, whereas the General Assembly, in its resolution 41/149, welcomes the above recommendation made by the Council,

"Having considered the work of the General Assembly on the Draft Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment[6] and of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities on the Draft Universal Declaration on the Independence of Justice,[7]

The basic principles given below, formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be taken into account and respected by Governments within the framework of their national legislation and practice and should be brought to the

attention of lawyers, judges, prosecutors, members of the executive and the legislature as well as the public in general.

Access to Lawyers and Legal Services

1. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Governments shall ensure the provision of funding and other resources for legal services to be provided to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

3. It is the responsibility of Governments and professional associations of lawyers to promote programmes aimed at informing the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms.

4. It is the duty of Governments to ensure that all persons charged with criminal offences, or arrested, detained or imprisoned, are promptly informed by the competent authority of their right to be represented and assisted by a lawyer of their own choice.

5. All such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have lawyers assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

6. Governments shall further ensure that all persons arrested, detained or imprisoned, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

7. Arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement or other officials.

8. The guarantees contained in Principle 7 may not be restricted or suspended save temporarily in exceptional circumstances to be specified by law, and without prejudice to the guarantees contained in any other Principle, provided that such measures are strictly required by the exigencies of the situation and indispensable for the maintenance of security and order. Such restrictions or suspensions shall be limited in extent and duration to those exigencies and shall be subject to prompt judicial review.

Qualifications and Training

9. Governments, educational institutions and professional associations of lawyers shall ensure that lawyers have appropriate education and training, including awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. It is the duty of Governments and professional associations of lawyers to ensure that there is no discrimination with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status.

11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments and professional associations of lawyers should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Guarantees for the Functioning of Lawyers

12. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall at all times act in accordance with the law and established professional standards and ethics.

13. Governments shall ensure that lawyers are able to perform their professional functions without hindrance or improper interference.

14. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in order to enable lawyers to provide effective legal assistance to their clients. Such access shall be provided at the earliest appropriate date and, in criminal proceedings, not later than at the beginning of the trial stage.

15. Governments shall ensure that all communications and consultations between lawyers and their clients are confidential and, in criminal proceedings, are inadmissible as evidence against the client unless they are connected with a continuing or contemplated crime. This protection of the confidentiality of lawyer-client communications shall be extended to lawyers' partners, employees, assistants and agents, as well as files and documents.

16. It is the responsibility of Governments to ensure that lawyers shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action or defence taken in accordance with established professional duties, standards and ethics. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

17. Lawyers shall not be identified to their prejudice with their clients or their clients' causes as a result of discharging their functions.

Professional Associations of Lawyers

18. Lawyers shall be free to form and join self-governing professional associations to represent their interests, to promote their continuing education and training and to protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

19. Professional associations shall establish codes or principles of professional conduct for lawyers in accordance with national law and custom and recognized international standards and norms.

20. Professional associations and lawyers shall cooperate with Governments to ensure that all persons have effective and equal access to legal services and that lawyers are able, without hindrance or improper interference, to counsel, assist and represent their clients in accordance with the law and established professional standards and ethics.

Disciplinary Proceedings

21. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing.

22. Disciplinary proceedings against lawyers shall be brought before a disciplinary body which consists of, or includes lawyers among its members, or before a court, and should be subject to judicial review.

23. All disciplinary proceedings shall be determined in accordance with law and the established standards and ethics of the legal profession.

NOTES

1. General Assembly resolution 217 A (III) of 10 December 1948.
2. General Assembly resolution 2200 A (XXI), annex, 16 December 1966.
3. *Human Rights: A Compilation of International Instruments* (United Nations publication sales No. E. 83.XIV.1), section G.29.
4. Economic and Social Council resolution 1984/50, annex.
5. Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August - 6 September, 1985: Report prepared by the Secretariat (United Nations publication, sales No. E. 86.IV.1), chapt. I, sect. E.
6. A/C.6/42/L.12.
7. E/CN.4/Sub.2/1985/18 Add.5/Rev.

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