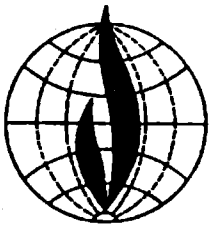
CIJL BULLETIN



N° 23

SPECIAL ISSUE

ICJ CONFERENCE ON THE INDEPENDENCE OF JUDGES AND LAWYERS

CARACAS, VENEZUELA
16-18 JANUARY 1989

UNDER THE AUSPICES OF THE UNITED NATIONS

CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS
April 1989
Editor: Reed Brody

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.

Affiliation

The affiliation of judges', lawyers' and jurists' organisations is welcomed. Interested organisations are invited to write to the Director, CIJL, at the address indicated below.

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PREFACE

This special issue of the CIJL Bulletin is the report of an international conference held in Caracas, Venezuela, from 16-18 January 1989 to mark the 10th anniversary of the CIJL.

We were greatly honoured by the conference being held under the auspices of the United Nations. This was particularly welcome in view of the approval by the UN General Assembly in 1985 of the Basic Principles on the Independence of the Judiciary, and the prospect that following the next UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990, the General Assembly will likely give approval to the Basic Principles on the Role of Lawyers. In addition, in May of 1989 the Economic and Social Council will consider Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary.

These are, or will be, the first international instruments setting forth standards for the independence of the judiciary and the legal profession. Consequently, the task which the CIJL set itself a decade ago to promote standards for the independence of judges and advocates has now been raised to the intergovernmental level. The ICJ and the CIJL are proud to have worked with the able staff of the UN Crime Branch Secretariat in Vienna – and in particular Mr. Eduardo Vetere and Mr. Kurt Neudek – in the elaboration of these documents.

The conference concluded by approving the "Caracas Plan of Action," which will set the programme of work for the Centre for several years ahead. We hope to be able to cooperate in this task with the relevant United Nations bodies, the Organisation of American States, the Organisation of African Unity, and with international and national associations of judges and of advocates, law societies and other interested organisations in all parts of the world.

This report includes some of the papers delivered at the Conference – which represent the opinions of the authors and not necessarily the views of the ICJ or the United Nations – as well as the "Plan of Action" and the basic international documents and drafts.

We express our particular thanks to the government of Venezuela for its generous assistance and support as well as to the Swedish International Development Authority for its continuing support without which the conference could not have been organised.

April 1989

Niall MacDermot
Secretary-General
International Commission of Jurists

WORDS OF WELCOME

by Ambassador Andrés Aguilar
President, International Commission of Jurists

On the initiative of the International Commission of Jurists, under the auspices of the United Nations and with the willing consent and invaluable collaboration of the Government of Venezuela, we begin this afternoon the Conference on the Independence of Judges and Lawyers, an issue that the Commission considers of the utmost importance.

The International Commission of Jurists, a non-governmental organisation with headquarters in Geneva, has as its purpose the promotion, in all countries of the world, of the Rule of Law and respect for man's freedoms and rights. To this effect, the Commission, bearing in mind the best traditions and the highest ideals of the administration of justice and the supremacy of Law, stimulates the action of jurists throughout the world, with the purpose, *inter alia*, of promoting and strengthening the independence of the judiciary and the legal profession, as well as the right to due process of law for every person charged with the commission of an offence.

To this end, the Commission edits publications in various languages, some of which appear regularly, in particular the CIJL *Bulletin* and the ICJ *Review*, prepares and sponsors programmes and organises, at its headquarters and in different regions of the world, speeches, courses, seminars and congresses.

This Conference is a good example of the International Commission of Jurists' activities, with the support and collaboration of other national and international non-governmental organizations, the United Nations and other regional and universal intergovernmental entities, as well as the governments of different states.

In the meeting which begins today, the participants include not only active and honorary members of the International Commission of Jurists, but

also representatives of national sections and affiliated organisations of the Commission. Furthermore, although all the participants are distinguished jurists, some have been especially invited as experts, not only for their knowledge and experience, but for their particular interest in the Conference's main issue.

Indeed, the underlying purpose of the Commission for the organization of this Conference is to support and assist the United Nations in its task of formulating principles and rules on the independence of judges and lawyers, and in its plan of action to make these principles effective. In this respect, it is important to bear in mind the excellent work performed by the United Nations Committee for the Prevention of Crime and the Treatment of Offenders, as well as the contribution made by Mr. Kurt Neudek and other staff members of the United Nations Centre for Social Development and Humanitarian Affairs. The Centre for the Independence of Judges and Lawyers, created by our Commission and which celebrates its tenth anniversary during this Conference, is pleased to continue its cooperation with the United Nations Vienna International Centre. I take this opportunity to say that we are very pleased that this Conference is meeting under the auspices of the United Nations.

We shall also remember that the United Nations General Assembly has approved the Basic Principles on the Independence of the Judiciary, and has invited governments to adapt these principles to their legislation and practice. This is a very important achievement that we must support. We could, undoubtedly, go further and recommend additional principles, as the ICJ has done at various seminars, and as was done at the historic Conference in Montreal, but we must bear in mind that it is easier for non-governmental organizations to agree upon this or any other issue, than it is for intergovernmental organizations, such as the United Nations, which has 159 member States. It is not, then, our purpose to modify or reform the United Nations' achievements in this field, but to design a better plan of action to implement the Basic Principles already approved, together with the principles embodied in the Draft on the Role of Lawyers.

At the outset I mentioned that the Commission's periodic plenary meeting and this Conference are held with the willing consent and collaboration of

the Government of Venezuela, presided by Dr. Jaime Lusinchi. I must express now, with pleasure, our warmest thanks to Simon Alberto Consalvi, for his encouragement and support, both during his tenure as Minister for Foreign Affairs and currently as Minister for Internal Relations, and to his successor in the former cabinet office Minister German Nava Carrillo, from whom we have also received ample cooperation and for whose presence and participation in this opening act we are most grateful. Even though it is not possible at this moment to mention all the other officers of the Government of Venezuela who have helped us so efficiently in the organization of these meetings, I want to express to each and every one of them how much we appreciate their efforts.

A word of recognition to all those who, within the International Commission of Jurists, worked with so much effort and dedication in the preparatory stages of these meetings. William Butler, President of our Executive Committee, and Niall MacDermot, our Secretary-General, who inspired and directed with their usual efficiency the work of the highly competent staff of the ICJ secretariat.

We are very pleased that most of the distinguished personalities, who at present hold, or who in the past held, high positions in the judiciary of their respective countries, or who enjoy a well-earned prestige in the practice of law, have accepted our invitation to participate in the Conference. We have quite a representative group from all the continents and from different legal systems. To all of them, our warmest welcome. We are also very honoured that these meetings should take place in the "Casa de Bello". Andres Bello was, indeed, because of his long and prolific life, and for his outstanding work, the most prominent scholar and jurist in Hispanic America during the Nineteenth Century. He drafted the Civil Code of Chile, which was a guideline for the civil legislation in other countries in the region, and was the author of the first Treatise on International Law published in Latin America. His spiritual presence is felt in this house, built in the same place where the modest home – in which he was born on 29 November 1781 – stood, and is a natural source of inspiration for a meeting like ours.

OPENING SPEECH

by Dr. German Nava Carrillo
Foreign Minister of Venezuela

Caracas today has the privilege of hosting two important international meetings, closely related to one another, organized by the International Commission of Jurists. Today, in fact, the Commission itself gathers: a prestigious non governmental organization with its headquarters in Geneva, and 37 members, presently presided by our fellow countryman, Dr. Andres Aguilar Mawdsley; simultaneously, the Conference, convened by the same Commission on the very important issue of "The Independence of Judges and Lawyers" will take place.

The International Commission of Jurists has, as its main purpose, the promotion of the Rule of Law throughout the world, which recognizes and assures the effective enjoyment of the fundamental human rights and freedoms proclaimed in the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in Paris, on 10 December 1948, and later enshrined in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and in numerous other international instruments of universal and regional scope.

The International Commission of Jurists, which enjoys consultative status with the United Nations Economic and Social Council, UNESCO and the Council of Europe, has, since its creation in 1955, carried out active and prolific work in the promotion of human rights, in recognition of which it has been awarded important prizes, such as the First European Human Rights Prize in 1980 and the Wateler Peace Prize in 1984.

This task of promotion is performed by continuously monitoring the application of the international rules on human rights throughout the world, the diffusion of these rules and the conduct of national and international organizations protecting these rights, through the publication

of periodicals and the organization of seminars or conferences like the one beginning today.

In the judiciary lies the high and extraordinary responsability for the administration of justice; and today, with the international and regional systems for the protection of human rights consolidated, it appears as indispensable and urgent for every country that the conceptions and methods of application inherent to the administration of justice, should be harmonized as much as possible with present-day international law, designed and agreed upon in order to establish the effective exercise and respect of the fundamental rights and duties of the human being.

The government of Venezuela was gratified by the decision of the International Commission of Jurists to hold these meetings in Caracas, because of the significance which we attribute to the promotion and the protection of human rights, in the national, regional and universal spheres, and for the support we have always given to non governmental organizations which, as the International Commission of Jurists, work seriously and objectively in this field.

Indeed, our interest for the International Commission of Jurists and our support for the work it performs are not new. For several years now, the Government of Venezuela has made annual albeit modest contributions in support of this noble institution which Mr. Niall MacDermot, the ICJ's Secretary-General, has now directed for 18 years under the authority of the Executive Committee and of the Commission itself, with so much success.

Venezuela, which, thank God, has enjoyed a representative democratic government for the past thirty years, has given repeated demonstrations of its adherence and support to the fundamental cause of human rights. Our country voted for the adoption of the Universal Declaration of Human Rights, signed and ratified the International Covenants on Human Rights mentioned above, as well as the Optional Protocol to the International Covenant on Civil and Political Rights, which, *inter alia*, enables the Human Rights Committee set up in the Covenant to receive and consider

communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

Venezuela is also a party to the American Covenant on Human Rights (San José Pact), and has been one of the first countries to recognize the Inter-American Court's jurisdiction established in the Convention. It is also a party to numerous other international instruments of regional and universal scope.

We are proud and pleased with the performance of distinguished Venezuelans in the Human Rights Commission of the United Nations Economic and Social Council, in the Human Rights Committee established by virtue of the International Covenant on Civil and Political Rights, and in the Inter-American Commission of Human Rights, as well as in other organizations for the protection of these established rights in the framework of specialized institutions of the United Nations system, such as the International Labour Organization and the United Nations Organization for Education, Science and Culture (UNESCO). We are pleased to recall that last week, the second of a series of meetings that are taking place between the Inter-American Commission of Human Rights and the European Commission of Human Rights was held in Caracas.

Our country is not free, however, of imperfections in the observance of human rights. In spite of clearcut policies which different administrations have followed for the past thirty years, we have not yet succeeded in overcoming certain difficulties for the effectiveness of each and every one of the rights recognized and protected by the international instruments to which Venezuela is a party, and which according to our legal system, have become part of our internal law once the Constitutional requirements are accomplished.

Certainly, a democratic regime, as the one which fortunately exists in Venezuela, has efficient means and instruments to prevent and, eventually, correct deficiencies in the enforcement of human rights. The role that the press and other mass media, as well as other representative organizations, play in this regard is well known. Without doubt, however, the task of

determining the truth of the claims of such violations, and of identifying and punishing those responsible, eventually depends on the Judiciary.

It can be said, without exaggeration, that in the domestic order, the protection of human rights depends fundamentally on the Judiciary. It was, therefore, wise to choose, as the topic for this Conference, the Independence of Judges and Lawyers, as this is a particularly important issue for the proper functioning of the Judiciary.

We are pleased to say, in this respect, that the organization and functioning of the Judiciary has been the subject of important debates in Venezuela over the past few years. Fortunately, these debates have not been limited to pointing out the imperfections and deficiencies of the administration of justice in our country, such as the exaggerated procedural delays, but also to suggest possible improvements. To give an idea of the importance that the issue has today in Venezuela, I will only say that it has not only been the subject of discussion and analysis in organizations with specific competence in these matters, such as the Supreme Court of Justice and the Judiciary Council, but also in the National Congress and the Presidential Commission for State Reform (COPRE), the latter being composed of distinguished personalities from different sections of national life.

The deliberations and conclusions of the Conference which begins today, in which such eminent and experienced jurists of different regions and countries are participating, will be a valuable additional contribution to our own ongoing task of Judicial reform.

Mr. Chairman, distinguished delegates: In the name of the Government presided over by Dr. Jaime Lusinchi and in my own name, I warmly welcome you; I am sure that the people in Caracas and, in general, the people from any other part of our country that you might have the opportunity to visit, will make you feel that you are much appreciated guests of Venezuela. To conclude, I wish each and everyone of you an enjoyable visit and I hope you will take back with you good impressions of this visit to Venezuela.

STATEMENT OF THE REPRESENTATIVE OF THE UNITED NATIONS

Mr. Kurt Neudek

I am greatly honoured to participate in this important ICJ Conference, under the auspices of the United Nations, which assembles so many eminent judges, lawyers and jurists representing different legal systems from various parts of the world. In my capacity as representative of the United Nations, I have the privilege to transmit to you the message of Miss Margaret Joan Anstee, the Director-General of the United Nations Office at Vienna and Head of the Centre for Social Development and Humanitarian Affairs. Ms. Anstee is also Co-ordinator of the United Nations Drug Control-related activities as well as Secretary-General of the forthcoming Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders. Her message reads as follows:

"It gives me pleasure to convey to you and to all participants in the ICJ Conference on the Independence of Judges and Lawyers, Caracas, 16-18 January, 1989, my warm greetings and best wishes for the success of your deliberations.

It is clear that this important meeting of eminent experts will greatly assist the Member States in translating the Basic Principles on the Independence of the Judiciary into reality and ensuring effective and equal access to lawyers and legal services for all citizens, in full conformity with the goals of the United Nations in these areas.

Thus, the meeting will also make an essential contribution to the preparations for the eleventh session of the United Nations Committee on Crime Prevention and Control and the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders in 1990.

I deeply appreciate your valuable initiative and look forward to the results of the Conference and to continuing and intensified cooperation in these matters of common interest."

Mr. Henryk Sokalski, Director of the Social Development Division, and Mr. Eduardo Vetere, Chief of the Crime Prevention and Criminal Justice Branch and Executive-Secretary of the Congress, join Ms. Anstee in sending their best wishes for the success of this Meeting.

Distinguished participants,

The present Conference provides once again tangible evidence of the vital role of the International Commission of Jurists in United Nations efforts to implement the Basic Principles on the Independence of the Judiciary and to formulate Basic Principles on the Role of Lawyers. The wealth of expertise and experience that this Organization offers, its special commitment and its ability to draw on its world-wide constituency are a vigorous resource. Thus the base of international collaboration in these fields is significantly broadened, including the valuable activities of other international non-governmental organizations, such as the International Association of Judges, the International Association of Penal Law and the International Bar Association.

On this occasion I wish to express our sincere appreciation to His Excellency Ambassador Andres Aguilar, President of the ICJ, and to its Secretary-General, Mr. Niall MacDermot, of their continuing firm support of our work. My special thanks go also to Mr. Reed Brody, the dynamic Director of the Centre for the Independence of Judges and Lawyers, which now celebrates its tenth anniversary, for his untiring and most successful endeavours in areas of mutual concern.

Ladies and gentlemen,

It is appropriate, indeed, that this Conference takes place in Caracas, the beautiful historic, and at the same time modern, capital of Venezuela, whose Government has already in the past made a major contribution to the United Nations crime prevention and criminal justice programme by

acting as generous host to the Sixth United Nations Congress in 1980. As will be recalled, this very productive Congress unanimously adopted, *inter alia*, the well-known Caracas Declaration, a landmark document which charted the course for future action of the international community in this field. The fact that His Excellency, German Nava Carillo, Minister of External Relations of the Government of Venezuela, is honouring this Conference with his presence testifies to the continuous strong commitment of this country to the United Nations goals, including those in crime prevention, criminal justice and human rights.

It is also noteworthy that the Caracas Congress was the first in United Nations history to consider in-depth the question of the independence and impartiality of the judiciary. In its resolution 16 the Congress made specific recommendations to Member States in this regard and called upon the United Nations Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines on the independence of the judiciary and the selection, professional training and status of judges.

Thus, the Caracas Congress provided the basic mandate for all further United Nations work in this area within the framework of the United Nations crime prevention and criminal justice programme. This work culminated in the adoption of the Basic Principles on the Independence of the Judiciary by the Seventh United Nations Congress, held at Milan in 1985. It was one of the outstanding achievements of this Congress that it succeeded in finding a viable common ground and global consensus in this significant and at the same time complex and politically sensitive area. This success was mainly due to the thorough and highly professional preparatory work in which the ICJ was instrumental, as well as the exemplary spirit of co-operation prevailing between all parties concerned.

In this connection I am happy to pay a well-deserved tribute to Ms. Ustinia Dolgopol, the former Director of the Centre for the Independence of Judges and Lawyers, and to Mr. Giovanni Longo, the Secretary-General of the International Association of Judges, for their active involvement in the relevant United Nations activities. I should like to acknowledge also the pioneering work accomplished in the area of independence of the judiciary by the Hon. Jules Deschenes, former Chief Justice of Quebec,

who is one of the key speakers of this Conference, as well as that of Mr. Laxmi Mall Singhvi, the former United Nations Special Rapporteur on the Impartiality and Independence of the Judiciary, Jurists and Assessors and the Independence of Lawyers.

Distinguished experts,

The same Milan Congress, just mentioned, adopted by consensus also a resolution on the role of lawyers which was the starting point for United Nations endeavours aiming at the elaboration of Basic Principles on this subject. Such Draft Principles have been formulated by the United Nations crime prevention and criminal justice programme, in close co-operation with the ICJ, the IBA and other interested parties, in particular the United Nations human rights programme, including the United Nations Human Rights Committee. It is, therefore, very fortunate that the Chairman of this Committee, Mr. Julio Prado Vallejo, is here with us today.

The Draft Basic Principles on the Role of Lawyers have now reached an advanced stage of preparation. They are before you for your kind consideration with a view to finalising them for presentation to the Eighth Congress and its regional preparatory meetings. I am confident that your expert observations and comments will further enhance the quality of the draft as well as its practical significance.

In conclusion, I wish you all success in your work towards a "Caracas Plan of Action" of 1989. There is no doubt that this Plan will effectively complement the "Caracas Declaration" of 1980. Thus, this Conference will make a crucial contribution not only to the forthcoming Eighth United Nations Congress but, above and beyond, to the maintenance of the rule of law and the legal protection and promotion of human rights around the world in the years to come.

THE PRESSURES ON AND OBSTACLES TO THE INDEPENDENCE OF THE JUDICIARY

by Justice P.N. Bhagwati[*]

There are a few institutions which are vital to the maintenance of democracy and the rule of law. They constitute the life breath of the democratic way of life and the supremacy of law. Drain away this life breath and democracy will perish, the rule of law will be at an end. Inevitably authoritarianism will take their place. History shows that the first step which a ruler takes when he assumes authoritarian power is to impair the integrity and independence of these institutions.

The judiciary is one such institution on which rests the noble edifice of democracy and the rule of law. It is to the judiciary that is entrusted the task of keeping every organ of the State within the limits of power conferred upon it by the Constitution and the laws and thereby making the rule of law meaningful and effective. Most countries have a written Constitution which provides structure allocating and regulating power relations amongst the different organs of the State. The Constitution confers power on the various organs of the State and also lays down the limits within which such power may be exercised.

Now it is not enough merely to place limitations on the power of the various organs of the State, but it is also necessary to ensure that these limitations are observed and there is no abuse or misuse or excess of power. I would use the provocative phrase "State lawlessness" to describe the situation where there is abuse or misuse or excess of power by the State or its officers, or in other words, where the State or its officers act outside the Constitution or the laws and thereby the rule of law is violated. This is fortunately not the general pathology of a modern State but sometimes aberrations do occur and there is violation by the State or its officers of the rights of the individual or the meta-collective rights of

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[*] Former Chief Justice of India.

classes of people by abuse or misuse of power or by action outside the scope of the law. This "State lawlessness" by abuse or misuse of power or excess of power or transgressions of the limits on the exercise of power has to be curbed and controlled by the judiciary. This is the essence of the rule of law and it goes to the roots of constitutionalism. It is the solemn function of the judiciary to ensure that no constitutional or legal functionary or authority acts beyond the limits of its power nor that there be any abuse or misuse of power.

This function becomes all the more important and essential in a modern welfare State, where there is a vast increase in the range and detail of Government regulation of privately owned property or enterprise. There is the direct furnishing of services by Government to individual members of the community and there is increasing Government ownership and operation of industries and businesses, which at an earlier time were or would have been operated for profit by private hands. Naturally public power becomes an instrumentality for the achievement of these purposes and inevitably, there is a vast increase in the frequency with which ordinary citizens come into relationship of direct encounter with the wielders of power. It is this dramatically increased incidence of encounter that sets the task of the rule of law in a welfare society. It should be the goal of the rule of law that these multifarious and diverse encounters are fair, just and free from arbitrariness and it is therefore necessary to structure and regulate the power of the executive so as to prevent its abuse or misuse or arbitrary application or exercise.

It is for this purpose, with a view to enabling the judiciary to carry out this important and delicate task that the power of judicial review has been conferred on the judiciary. By exercising this power of judicial review, the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse or excess of power committed by the State or its officers, or, in other words, against State lawlessness. The judiciary stands between the citizen and the State as a bulwark against executive excesses or misuse or abuse of power, or transgression of constitutional or legal limitations by the executive as well as the legislature.

There are also certain human rights which need affirmative State action for their enforcement and, where the State fails to do so, the judiciary has to step in and compel such affirmative State action in order to make these human rights effective.

It is, therefore, absolutely essential that the judiciary must be totally free from executive pressure or influence and must be fiercely independent. Independence, of course, is a quality which must come from within the heart – it must be a quality which is part of the very fabric of the judge's existence, but even so, judges must not be exposed to executive threats, inducements or blandishments and must remain absolutely independent and fearless.

It is for this reason that in almost all the countries which have adopted the democratic form of Government, great importance is attached to the independence of the judiciary. Sir Winston Churchill, while stressing the need for an independent judiciary, observed:

> "The principle of complete independence of the judiciary from the executive is the foundation of many things in our island life. ... The judge has not only to do "justice between man and man. We also – and this is one of the most important functions considered incomprehensible in some large parts of the world – has to do justice between the citizens and the State. He has to ensure that the administration confirms with the law and to adjudicate upon the legality of the exercise by the executive of its power."

I may point out that even under ancient Hindu Law, independent of character, great learning in the various branches of law and impartiality were the essential qualities which must be possessed by a person occupying judicial office. One of the verses in our ancient scriptures says that a Judge must possess the following qualities:

> "He should be learned, sagacious, eloquent, dispassionate, impartial; he should pronounce judgment only after due deliberation and enquiry; he should be a guardian to the weak, a terror to the wicked; his heart

should covet nothing, his mind be intent on nothing but equity and truth."

Pandit Nehru, while speaking about the judges of the Supreme Court in the Constituent Assembly which framed the Indian Constitution, observed:

"It is important that these judges should be not only first rate but should be acknowledged to be first rate in the country, and of the highest integrity, if necessary people who can stand up against the executive and whoever may come in their way."

If independence of the judiciary is such a basic requirement for the survival of democracy based on the rule of law, the question arises; what do we mean by independence of the judiciary? It is not easy to analyze the essentials which go to build up such independence and impartiality. The term is multi-conceptual having different ingredients and components. What may be regarded as independence of the judiciary in a socialistic State may be totally different from what be regarded as independence of the judiciary in a Western democracy. But, broadly speaking, I can safely assert that independence of the judiciary means that the judges should be independent in deciding the case before them exclusively on the basis of merit without fear or favour and no extraneous considerations should motivate their decisions. The concept has thus been explained by a distinguished writer in the following words:

"The rendering of an honest unbiased opinion, based on the law and the facts, is far from simple; it is one of the most difficult tasks which can be imposed on fallible man. It demands wisdom as well as knowledge, conscience as well as insight, a sense of balance and proportion and if not absolute freedom from bias and prejudice at least the ability to defect and discount such failings, so that they do not becloud the fairness of the judgment. It is evident that the ordinary political environment is unable to provide the proper incentive which will call for these qualities, nor will it permit these qualities to be exercised without a large measure of interference which will deprive them of the great part of their value. The judiciary in short must be given a special sphere clearly separated from that of the legislative and executive. They must, to accomplish this

separation, be given the privileges which are not vouch-safed to other branches of the Government; and they must be protected against political, economic and other influence which would disturb that detachment and impartiality which are indispensable pre-requisites for the proper performance of their function. It is those unusual factors which create the condition known as independence of the judiciary."

The definition of "Independence of the Judiciary" evolved by the International Commission of Jurists in 1981 and formulated in Article 2 of the Siracusa Draft Principles (see CIJL Bulletin 8) contains some of the essentials of the concept:

"Independence of the judiciary means... (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 influence, inducements or pressures direct or indirect, from any quarter or for any reason..."

The concept of "Independence of the Judiciary" was also discussed in the 19th Biennial Conference of the International Bar Association held in New Delhi in October 1982. In that Conference "Draft Minimum Standards of Judicial Independence" contained in Dr. Shimon Shetreet's paper were finally adopted as "Delhi Minimum Standards" of judicial independence. Dr. Shetreet stated that the modern conception of judicial independence cannot be confined to the individual judges and to their substantive and personal independence, but must also include collective independence of the judiciary as an institution.

Thus, conceptually as well as from the point of view of practical reality, "Independence of the Judiciary" comprises of two basic postulates, viz, "Independence of the Judiciary as an institutionalised organ" and "independence of the individual Judges" and no judiciary can be said to be independent unless these two essentials are present.

The power of appointment of judges to the Superior Courts is also a large power and to my mind, at least in the Third World countries, vesting it exclusively in the Executive is likely to undermine the independence of the

judiciary. It is of course true that in most of the democratic countries, this power is given to the Executive, because the Executive is accountable for its actions to the people through Parliament. But in effect and substance, this accountability has ceased to exist because in many countries, instead of the legislative controlling the executive, it is the executive which controls the legislative and the legislative check has disappeared. Moreover, accountability can be "enforced" through discussion only after the appointment is made and it is a fait accompli. Moreover, if the power of appointment is vested solely in the hands of the executive it is not unlikely that those aspiring for judicial appointments might lobby with the executive with a view to seeking favour of judicial appointment and when they are so favoured by appointment on the Bench, they would carry with them a sense of obligation to the executive and, unconsciously if not deliberately, be inclined to support the executive in the adjudicatory process.

The position would be the same where the power of giving promotion is vested exclusively in the executive for, in that event, the judge seeking promotion may be predisposed in favour of the executive which has the power to promote him. Of course, instances are not unknown where judges appointed by the executive have shown themselves to be made of sterner stuff and not hesitated to decide a case against the executive. But with ordinary mortals, which the majority of judges are, the possibility cannot be ruled out that they may be subtly influenced in favour of the executive where there is a dispute between the citizen and the State. Public confidence in the independence and impartiality of the judiciary would be impaired. It is also possible that political considerations may influence the decision to appoint or promote a particular candidate as a judge and in the process, the best person may not get selected, thus affecting the quality of the judiciary.

We in India have therefore tried to qualify the power of the Executive to appoint a judge by making it mandatory for the Government to consult the Chief Justice of India in the matter of appointment of judges of the Supreme Court, the Chief Justice of the High Court and the Chief Justice of India in the matter of appointment of High Court judges. It is of course consultation and not concurrence but the Supreme Court of India has held

that consultation must be effective consultation where all relevant facts are disclosed and reasons discussed. But even this requirement of consultation has unfortunately not proved effective. It is true that the Executive has, so far, not made a single appointment which is not approved by the Chief Justice of India but there have been instances where persons recommended by the Chief Justice of India have not been appointed judges, his recommendations having been turned down.

Some lawyers and jurists take the view that the recommendations made by the Chief Justice of India must be binding on the Government, which would mean that the power of appointment would be effectively vested in the Chief Justice of India. But I do not agree with this view. In the first place, there is no country in the world where the Chief Justice has been given the power to appoint superior court judges. Secondly, the Chief Justice is not elected himself and he therefore does not represent the people and is not accountable to them. Thirdly, no such power should be vested exclusively in one individual, howsoever high he may be. Power can be misused or abused by any one, whether he be the President of the Prime Minister or the Chief Justice. But, as I said before, even the procedure adopted in India, of vesting the power of appointment in Government to be exercised in consultation with the Chief Justice of India has not worked well and it has failed to eliminate political interference in appointments. I would therefore suggest that the power of appointment must be vested in a Judicial Service Commission composed of judges, lawyers and law academics of eminence presided over by the Chief Justice where the executive should also have representation, and this Judicial Service Commission should recommend a name which must be accepted by the Government. That alone would ensure appointment of persons with ability and integrity and eschew political interference.

Another important factor that has considerable bearing on the independence of the judiciary is security of tenure. Of course, I may make it clear even if repetitious, that independence is a quality that must come from within the breast of the judge. Lord Coke had no security of tenure and yet he was independent and fearless and had the courage to defy the King. But judges are human beings with the frailties and failings which common people have and their independence and impartiality in cases

Government is a party are likely to be affected by the fear of losing their job. Security of tenure is therefore essential. The tenure of judges cannot be made dependent on the mere pressure of the Government. It must be secured against executive and legislative action and that is why in most Constitutions we find provisions guaranteeing security of tenure to judges. It is a matter of regret that in Kenya, these provisions which originally existed in the Constitution have recently been deleted and now absolute and unfettered power is vested in the President to dismiss any judge. So also in Bangladesh, there is no protection of tenure of judges. In fact, some years ago, two judges of the Supreme Court of Bangladesh, one being Justice Mahomed Hussein, were summarily dismissed by the President.

In Malaysia a judge cannot be removed from office unless he is found guilty of misbehaviour by a Tribunal consisting of sitting or retired judges of the Supreme Court of Malaysia or of any other Commonwealth country. This procedure might *prima facie* seem to ensure security of tenure to the judges but as recent events in Malaysia have shown it does not. The power to constitute the Tribunal is given to the executive and the executive can pack the Tribunal with judges of its own choice; judges who would be pliant and advise the dismissal of a judge whom the executive did not like. Judges can in this way be subjugated to the will of the executive. T. Saleh Abbas who was the Lord President of Malaysia and who is here with us today was the victim of the Executive's wrath and a hand-picked Tribunal chosen by the Executive found him guilty of misbehaviour. And what was the misbehaviour? One charge was that after consultation with his colleagues and the obtention of their approval, he addressed a letter to the King concerning certain attacks which were made by the Prime Minister on the judges when they decided cases against the Government, another charge was that he made speeches pleading for judicial independence. It is difficult to see how these two facts would possibly constitute misbehaviour warranting the dismissal of the Chief Justice. And yet the Tribunal found him guilty of misbehaviour in a verdict which was a gross insult to justice and a death blow to the independence of the judiciary. And what was the composition of the tribunal? It was presided over by the judge next in line, who was appointed acting Lord President and who clearly had an interest in the removal of Saleh Abbas.

Having regard to this constitution of the Tribunal, Saleh Abbas moved the Supreme Court for a stay and five judges of the Supreme Court sat on a Saturday and granted stay of the proceedings before the Tribunal. The Executive therefore suspended all the five judges, acting on the recommendation of the same Acting Lord President before whom the proceedings had been stayed and who was a respondent to the action, and a Tribunal was set up by the Executive to inquire into the conduct of the five judges. It was a travesty of justice which resulted in the dismissal of two of the five judges. The result is that the judiciary in Malaysia is now cowed down. This is evident from the fact that on 10 December 1988 – Human Rights day – when I (a former Chief Justice of India) was invited by the Bar Council of Malaysia to give an address on "Ratification of International Human Rights Instruments", not a single sitting judge was present, although it was a function of the Bar Council of Malaysia and judges were invited to the function.

We in India have a more fool-proof procedure to guarantee security of tenure. A judge can be removed only by an address by both Houses of Parliament to the President, passed by a special majority and on the ground of proved misbehaviour or incapacity. And it is only if a judge is I found guilty of misbehaviour or incapacity by a Tribunal constituted not by the Executive but by the Chief Justice of India and consisting of sitting members of the Supreme Court judiciary chosen by a Chief Judge, that a resolution can be passed by both Houses of Parliament for removal of the judge and moreover, only by a special majority. Thus security of tenure is fully ensured to a judge.

The Executive should have no power to suspend a judge of a Superior Court. It is power which can be abused as was done in Malaysia. Principles 17 to 20 of the Basic Principles on the Independence of the Judiciary restrict the power of suspension and should be fully implemented on the national level. No judge should be removable except for proved misbehaviour or incapacity and that only after a disciplinary inquiry by his peers chosen by the Chief Justice or President of the Supreme Court and not by the Executive. This procedure should also not be allowed to be set in motion unless a resolution is passed by Parliament by a special majority at the instance of a sizeable number of members.

One other factor which may tend to impair the independence of the judiciary is the transfer of judges by the Executive. Transfer can be a potent weapon of oppression or retaliation, and to vest the power of transfer in the Executive would be to give the Executive power to control the judiciary. The Executive can transfer an inconvenient judge from one place to another and by doing so not only punish him but also convey a message to other judges that if they do not behave, they too will be subject to transfer. The power of transfer may be necessary in the public interest but it should never be vested in the Executive. There must be a Judicial Service Commission which alone should have the power to effect transfer of judges. In India, the power to transfer High Court Judges is conferred on the Government. It is a power exercisable in consultation with the Chief Justice of India but even so, it has been abused when the Chief Justice of India has been weak or submissive. I would not vest this power even in the Chief Justice or the President of the Supreme Court, because even he may abuse this power or misuse it, sometimes deliberately, sometimes out of misinformation and sometimes out of ignorance. I would not trust any single individual with power. Power must be broad-based, it must be shared so that with several minds contributing to the decision, the possibility of its abuse or misuse may be eliminated.

There are further pressures and obstacles which are not as apparent. One of them is preventing a judge from travelling outside his country to accept the hospitality of any organisation, be it a University, an international organisation or even the International Commission of Jurists, without obtaining leave of the Executive. The salaries of the judges are inadequate in many countries which makes it very difficult to persuade the members of the Bar to accept appointment on the Bench and in consequence, the best lawyers are not executives and quality suffers – the quality and independence of the judiciary is also affected. It is also necessary to have proper and adequate training programmes and seminars for the judiciary so that the judges realise the value of independence. It is a quality which must be injected in their minds. Periodic seminars can serve a very useful purpose of bringing judges in a country together where they can discuss the pressures and obstacles which each of them face and how they can be overcome. Unity of judges is most essential for securing independence of the judiciary. If the judges are united, no executive on earth can bring them

down. I will give you only one example from my country. When the first Chief Justice of India died, there was a proposal to bring the Chief Justice of Bombay as the next Chief Justice of India and the proposal was backed by the Attorney General, but the judges as a whole intimated to the Prime Minister that if that happened all the judges would resign. The result was that no such appointment was made. Even in Malaysia, if all the judges had stood together, Saleh Abbas could never have been removed. Every effort must therefore be made to periodically bring judges together in a common conclave and strengthen in their minds the resolve to maintain judicial independence and if necessary, to fight against any on-slaughts on it.

Another factor which impairs the independence of the judiciary is the dependence of the judiciary on the executive for resources. The judiciary has no power of the purse. It has to act within the allocation of funds made to it in the Annual Budget. It cannot spend a cent more even if it is necessary for streamlining the machinery of justice and improving its performance. If the judiciary wants to introduce modern science and technology in the functioning of the court system or to expand its facilities or to appoint more judges with a view to expediting disposal of cases, it cannot do so unless the necessary funds are made available by the executive. The executive can twist the arm of the judiciary if the judiciary does not behave to its liking or if the Chief Justice is too independent, and does not fall in line with the executive on sensitive issues such as the appointment of judges. Of course, the budget is discussed and voted on in the legislature and, theoretically, the elected representatives of the people can appreciate the needs of the judiciary and vote an adequate budgetary allocation. But, as a matter of a practical reality, in most countries, it is the executive which controls the legislative. In India, the Chief Justice of India has power to alter their heads under which budgetary allocation is made so long as he remains within the budgetary allocation, but the Chief Justice of the High Court has no such power. If he wants to spend the budgetary allocation made under "Salaries" on furniture, he cannot do so without the approval of the executive. More judges cannot be appointed, even if it might be imperatively necessary to do so. The result is that a backlog of cases piles up, cases take years and years to dispose of and the credibility of the judicial institution is affected – once the credibility and the respect

for the institution goes, this has an adverse impact on the independence of the judiciary as an institution.

Now, apart from the ordinarily recognized sources of danger to the independence of the judiciary, there is another source of danger which is often not perceived as such, and it is for that reason much more dangerous than the other sources. This source of danger lies in injust, and improper criticism of the judges for the judgements which they deliver. There is a pernicious tendency on the part of some to attack judges if the decision does not go the way they want or is not in accordance with their views. Of course, I may straightaway concede that there is nothing wrong in critically evaluating the judgment given by a judge, because, as observed by Lord Atkin, justice is not a cloistered virtue and she must be allowed to suffer the criticism and respectful, though out-spoken, comments of ordinary men. But improper or intemperate criticism of judges stemming from dissatisfaction with their decisions constitutes a serious inroad into the independence of the judiciary and, whatever may be the form or shape which such criticism takes, it has the inevitable effect of eroding the independence of the judiciary. Each attack on a judge for a decision given by him is an attack on the independence of the judiciary, because it represents an attempt on the part of those who indulge in such criticism to coerce judicial conformity with their own preconceptions and thereby influence the decision-making process. It is essential in a country governed by the rule of law that every decision must be made under the rule of law and not under the pressure of one group or another or under threat of adverse criticism by irresponsible journalists or ill-intentioned politicians: and if a judge is to be in fear of personal criticism by political or pressure groups or journalists while deciding a case it would most certainly undermine the independence of the judiciary. Unfortunately this is what is happening in some countries and those who indulge in such improper or intemperate and even sometimes vitriolic criticism or attack on judges, little realise what incalculable damage they are doing to the institution of the judiciary.

One other question which has great relevance to the independence of the judiciary is whether judges should accept any Government assignment after retirement. Opinion is divided on this question. One view is that after

retirement, the talent of a judge should be utilised in the service of the nation and there is no reason why the nation should be deprived of the benefit of the learning and experience of a retired judge. The other view is that the desire of getting an assignment after retirement may affect the independence and impartiality of a judge particularly during the latter part of his judicial tenure. He may try, consciously or unconsciously, to be on the right side of the Government in cases coming before him. It is a difficult question as to which view is correct. Perhaps it is not possible to give a definite answer to this question. Much depends on the strength of character of the individual judge.

It is also necessary to point out that in some countries, particularly India, appointments of Chief Justices of High Courts are made on an acting basis and they continue as acting Chief Justices for months. This is a pernicious practice detrimental to the independence of the judiciary, because the acting Chief Justice would always be in a state of suspense, not knowing whether he would be confirmed or not and depending on the Executive for his confirmation.

There is one other aspect of the judiciary that needs to be profiled more clearly. The public, spurred on by the media and political images, often thinks of judges as either single individuals or an assemblage of persons. Yet this image obscures an essential truth. And the denial of that truth obscures further insights. The essential truth is that *the judiciary is an institution.* Its business as an institution of governance is larger than the individual profile of a judge. It is important to reflect on the constituent elements of the institution. This institution consists of the Bar and the judges. While judges maintain our personal integrity, it is the Bar that fiercely maintains the independence of the judiciary as an institution. The Bar has a vital role to play in safeguarding judicial independence. The legal profession must raise its will and fight in defence of the independence of the judiciary.

In conclusion, I wish to point out that it is not enough merely to lay down principles for the independence of the judiciary. These principles have to be implemented and strategies must be devised for that purpose. I think it is essential that these principles be disseminated amongst lawyers, judges

and the people and they must be made aware of these principles and any violations of these principles must be exposed and brought to the notice of the lawyers, judges and public so that strong public opinion can be created in defence of the independence of the judiciary and public opinion may force the Government to observe the principles for maintenance of judicial independence.

THE INTERNATIONAL PROTECTION OF THE INDEPENDENCE OF THE JUDICIARY

by Jules Deschênes[*]

The program of the conference announces the topic of this address as follows: "The U.N. Basic Principles on the Independence of the Judiciary and the Montreal Principles". The matter therefore presents a twofold aspect, but the one and the other merge into a single question which is that of the protection of the independence of the judiciary at the level of the United Nations. The matter has indeed been under active consideration in the U.N. since the beginning of this decade. Yet some people feel that this is an exercise in futility, inasmuch as the independence of the judiciary, which is an essential feature of a sound administration of justice, must drive its roots deeply into the national soil where all efforts should be primarily, if not solely, concentrated.

There is admittedly a certain degree of truth in such a position. Essentially, justice is administered at a national, regional, or local level and it is at those levels that its independence must be organized, must be seen and must be respected.

Indeed that independence was violated in Chile in June 1981 when four eminent lawyers were expelled from the country after having offered to defend eleven union leaders before the courts.

That independence was violated in Colombia in 1985 when, in the course of a battle between the guerilla and the army for the control of the Court house in Bogota, at least 95 persons, including 17 judges, were killed.

That independence was violated in Malaysia in 1987 when the law was amended so as to deny any right of judicial review to persons arrested by virtue of the Internal Security Act.

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That independence was violated last year in Fiji under a similar act which provides for a period of administrative detention of up to two years under the Ministerial Fiat, without any right of judicial review.

That independence was violated last year also in Kenya where the President has been authorized, by a constitutional amendment, to remove judges at his own discretion.

But I do not want to appear to be closing my eyes to the situation in my own country. We boast in Canada of a long tradition of respect for the judicial process and it is probably true that we enjoy one of the most independent systems of justice in the world. Instances of outside interference with the legal process are, to say the least, extremely scarce. Yet at times judicial independence has been put in jeopardy at the hands of some ill-advised political authorities. Let me quote three examples picked from the present decade.

The first example occurred in the Province of Québec. A well-known lady, who had acted for five years as Deputy-Speaker of the National Assembly, was appointed in 1982 as a member of the Québec Municipal Commission. This is a quasi-judicial body whose members are appointed, according to the statute, for a fixed term of ten years. However in this particular case the appointing instrument alluded cryptically to "annexed conditions". This phrase referred actually to a document in which the lady in question resigned her position in advance at the end of a period of five years and the Government reserved the right to renew at will her appointment. Shortly before the end of the 5-year period, the Government put the lady on notice that her mandate would not be renewed. She applied to the Superior Court which had no difficulty in finding that the alleged agreement violated a law of public order: no one could, either by decree or by contract, reduce or vary the tenure of a judge as determined by law. To decide otherwise would amount to a toleration of a distinct attack on judicial independence. The Québec Government did not dare challenge the judgment before the Court of Appeal.

The second example occurred some four or five years ago, in the course of a political squabble between the Government of Canada and the

Government of the Province of Saskatchewan. Here one must bear in mind a provision which is specific to the Constitution of Canada: the Courts are set up by the Provincial authorities, but the judges who preside over the Courts of Superior jurisdiction are appointed by the Federal, or central, authority.

In 1982 Canada had a liberal government, but Saskatchewan elected a progressive-conservative provincial government. Shortly thereafter a dispute arose between the two Governments concerning the exercise of the federal power of appointment of judges to the Saskatchewan Courts. This was strictly a political issue, but it very shortly carried with it a threat to the independence of justice. Indeed the Courts became a tool in the hands of the parties. The Provincial Government started to reduce the number of judges by a procedure which, in theory, could lead to the total extinction of the courts. In practice it gave rise to serious administrative difficulties. The obvious purpose of the policy was to force the federal Government to put judicial appointments on the bargaining table.

However in September 1984 the central liberal Government was replaced by a Progressive-Conservative Government which soon announced that it would "seek the views of the provinces in all areas of mutual concern." Some time later the dispute was settled. But the whole episode had put in stark relief the fragility of the independence of justice. It had shown vividly how some politicians will not hesitate to use courts as a pawn in their power games.

The third and last example took place in my Province of origin, Québec, no more than half a year ago. For quite some time there had been discussions aiming at the unification of three Courts coming within provincial jurisdiction, namely: The Provincial Court, the Court of Sessions of the Peace and the Youth Court. The initiative appeared advantageous and it was finally brought to fruition under the present Government: the relevant law, which was assented to on 17 June, 1988 consolidated the three Courts into one under the name of the court of Québec. Unfortunately, the realization was marred at the level of the chief judges, their deputies and associates. In spite of the adverse submissions of the Bar, s. 154 of the Act was passed, providing that 'the terms of

office of (the various chief judges) shall end on the day of the entry into force of the Act'. Thus the legislature decided unilaterally to oust the chief judges in the course of their mandate and gave to the executive the power to appoint replacements. In actual fact, one of the three chief judges was re-appointed as the chief judge of the new court but, of the other two, one who had been ill for some time was not re-appointed whilst the third one was purely and simply thrown out of office.

This is an extremely dangerous precedent. Under the guise of a reorganization of the judicial system, both the Executive and the Legislative branches of Government have assumed the right to interfere with the independent administration of the Courts, to dismiss chief judges legally in office and to appoint new judicial officers in their stead. The procedure provided for by law for the removal of judges for cause has been sidestepped. In my personal view, the constitutional provisions designed to underpin the independence of justice in Canada have been flouted. Who can now be assured that, following an eventual change of Government, the new legislature would not intervene again to dismiss the recently-appointed chief magistrates and appoint new ones more to its liking?

So we see that nobody is immune from the danger of erosion of justice; and, be it in one part of the world or another, in one form or another, some attempt against judicial independence is nearly always raising its ugly head. So, worthy as it obviously is, the battle for that independence at the national level can never be totally won, unless the effort be bolstered by strong international support. The search for such support is, therefore, not an exercise in futility. Indeed it is because so many people have reached that conclusion that the effort, at the level of the United Nations, has, in recent years, attained such telling proportions.

This effort has followed two separate, yet converging streams and, in order to properly assess the current situation, it is necessary to survey each of those streams individually. I propose to call them *stream I*, which started in Geneva, and *stream II* which, properly enough, started here and continued in Vienna. Those two streams correspond, but in reverse order,

to the two aspects of my topic which are stressed on the programme of this conference.

Stream I goes back to 1980. The U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities had then entrusted Dr. L.M. Singhvi, President of the Bar of the Supreme Court of India, with a study "on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers".

In a parallel fashion, however, many international organizations were tackling the difficult subject; between 1980 and 1983, no less than nine conferences were held in Oslo, Malta, Geneva, Siracusa, Lisbon, Jerusalem, New Delhi, Noto and Tokyo. But the more conferences there were – and I had taken part in the majority of them – the more it appeared that a common forum must be found where a world consensus could be reached. In the spring of 1982 I initiated the setting up of that forum. It eventually led to the first World Conference on the Independence of Justice, held in Montreal in the first week of June, 1983. Participants represented 24 international organizations from all parts of the world: from Europe, North, Central and South America, the Middle East, Asia and Africa. To give but one example of the interest of the meeting, it was the first time in history that judges of the four international courts sat together to discuss the status of international judges.

During four days, the Conference considered a *draft Declaration* which had been patterned after the U.N. mandate given to Dr. Singhvi. It consisted of five chapters dealing respectively with international judges, national judges, lawyers, jurors and assessors. By miracle, solutions were found to all the problems and, when I put the matter to the final and critical vote, the *draft* as amended was approved unanimously. This was quite a moving moment: the full audience rose to their feet, applauding and cheering; they were realizing that, for the first time, participants from all parts of the world had agreed on a set of principles acceptable to all civilizations and conducive to the sound establishment of an independent system of justice.

Unfortunately we must lament the absence of China and the U.S.S.R. Both countries had been invited; they both declined by letters addressed to

me which alleged, for China the heavy workload, for the U.S.S.R. the pre-planned schedule and the imminent elections in the judiciary. At least neither country can complain that their views would not have been sought.

At the closing dinner I enjoyed both the honour and the pleasure of delivering into the own hands of Dr. Singhvi the text of the "Universal Declaration on the Independence of Justice" which, barely three hours earlier, had been adopted by the Conference. Dr. Singhvi undertook to take the matter to the United Nations.

Now might be the time to discuss the Montreal Declaration. This however would give but a truncated view of the actual situation. Life did not stop in 1983. Indeed I was then elected to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. Thus chance made me a member of the very body to which Dr. Singhvi was expected to report.

He did indeed report finally in 1985. He then proposed the adoption of a Declaration patterned after that of Montreal, save that he completely eliminated the first chapter on international judges. I pleaded with him to restore that chapter: it was, to my knowledge at least, the only authoritative statement of its kind and it had been drafted with the help and concurrence of the President and two judges of the International Court of Justice as well as one judge each of the Court of Justice of the European Communities, the European Court of Human Rights and the Inter-American Court of Human Rights.

However Dr. Singhvi stood his ground "because", as he wrote to me on 30 June 1985, "the essential elements are already a part of international law and statutes and in any case the principles and standards applicable to 'national judges' are applicable to international judges."

In my humble view, it is a pity that the pioneering work accomplished in Montréal has thus been lost. But let us not spend time shedding useless tears, especially since Dr. Singhvi had recommended, for judges at large, the adoption of nearly the full and integral chapter carried in Montréal with respect to national judges.

However in 1987 the Secretary General of the U.N. was requested by the Sub-Commission to send Dr. Singhvi's text for comments to all Governments. Nineteen countries responded and, as a result, Dr. Singhvi brought to his draft several substantive amendments. Overall, the final text which he submitted to the Sub-Commission last summer is weaker than the Montreal Declaration in at least three main aspects:

1. The position of civilians vis-à-vis military tribunals in times of emergency is weakened;
2. The immunity of judges from prosecution is restricted;
3. The ban against judges taking an active part in political activities is dropped.

The weakening of those provisions is extremely regrettable.

As a matter of fact all three points had been specifically stressed in the recommendations which emerged from the two Seminars held under the auspices of this Commission in Lusaka, Zambia in November 1986 and in Banjul, Gambia in April 1987.

However that may be, the Singhvi draft has an overall value which should not be underestimated. During the course of the debate on the question in the Sub-Commission on 24 August 1988, a couple of members suggested amendments, an equal number wanted to further defer the consideration of the draft, but a large majority expressed their satisfaction as well as their desire for concrete and immediate action. Together with the other chapters dealing with lawyers, jurors and assessors, which I am not called upon to examine, Dr. Singhvi's suggestions with respect to judges were agreed to by the Sub-Commission which forwarded the *draft Declaration* to the Commission on Human Rights on 1 September 1988, for its consideration in February 1989.

Such was the meandering course followed by *Stream I* in Geneva.

Stream II began here in Caracas, at the VIth U.N. Congress on the Prevention of Crime and the Treatment of Offenders. The Congress called on the Vienna Committee on Crime Prevention and Control to include

among its priorities the elaboration of guidelines relating to the independence of judges.

The Vienna Committee in turn asked me to prepare a draft of such guidelines. The Montréal Conference had been held shortly before. No one will therefore be surprised that my draft followed very closely, with only a few necessary adaptations, the text of the Montreal Declaration.

This draft was discussed in Vienna (March 1984) and Varenna (September 1984), finally to appear on the agenda of the VIIth U.N. Congress in Milano. On 6 September 1985 the Congress adopted the *"U.N. Basic Principles on the Independence of the Judiciary"*. Without being encumbered by the delays which have plagued the progress of the Singhvi Report, the *Basic Principles* were immediately endorsed by the U.N. General Assembly (29 November 1985) which invited Governments "to respect them and to take them into account within the framework of their national legislation and practice".

This would complete the survey of the course followed in the U.N. by *Stream II*, were it not for the fact that the drafting of procedures for the implementation of the *Basic Principles* was later undertaken by the U.N. Social Defence Research Institute (based in Rome) jointly with the U.N. Committee on Crime Prevention and Control (based in Vienna), in cooperation with the International Association of Judges (also based in Rome). This effort resulted in the adoption by the Vienna Committee, on 31 August 1988, of "Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary". This technical document, which fills a few gaps in the *Basic Principles* and establishes a quinquennial reporting obligation on the part of member states, should appear on the agenda of the Economic and Social Council in the spring of 1989.

We could thus witness, in the autumn of 1988, a curious coincidence: barely 24 hours had elapsed between the adoption of the *Procedures* concerning the *Basic Principles* in Vienna and the interim approval of the *Declaration* in Geneva.

In the end, we therefore see that the U.N. have been seized with two different instruments, flowing however generally from the same source. One – the *Basic Principles* – the General Assembly has endorsed in 1985 and the Economic and Social Council which should be completed in May 1989. The other – the *Declaration* proposed by Dr. Singhvi – should appear on the agenda of the Commission on Human Rights in Geneva next month and should also eventually reach the General Assembly. It must now be decided which course of action would appear the more suitable under those unusual circumstances.

The two documents are aiming of course at the same target: the recognition and protection of judicial independence. Yet they differ in their nature and approach.

The *Basic Principles* – and this should not be taken as a disparaging remark – are but what they propose to be: a basic utterance of the very foundations of the independence of the judiciary. They form the skeleton of the living body of justice. As Dr. Singhvi has himself commented in his July 1988 report to the Sub-Commission: "It may, however, be pointed out that the Varenna guidelines are far more comprehensive whereas the principles adopted at the Milan Congress are considerably abridged" (P. 5, par. 10).

Yet the *Basic Principles* do generally cover the ground of judicial independence. Taking their various headings, they deal with freedom of association and expression, qualifications, selection and training, professional secrecy and immunity, discipline, suspension and removal. Together with the opening chapter on independence of the judiciary itself, the *Basic Principles* do at least establish a foundation for judicial independence and all countries should heed the admonition contained in Principle No. 1: "The independence of the judiciary shall be guaranteed by the state and enshrined in the constitution or the law of the country".

Even if it be true, as stated by Mr. Ahmed Khalifa, a most distinguished member of the Sub-Commission, during the summer of 1988, that the *Basic Principles* apply "more to minimal justice than to the judiciary system as a whole", nevertheless they possess the immense advantage of

being the first and only international instrument on the subject to have been adopted by governments and approved by a unanimous vote in the U.N. General Assembly. As we have already seen, the General Assembly has recommended to all governments to respect those *Basic Principles* and to take them into account within the framework of their national legislation and practice. This express endorsement makes the *Basic Principles* an invaluable tool in the never-ending struggle for justice in the world and commends them our faithful support.

I feel however that I would not fulfil my duty if I did not draw the attention of this Conference to various improvements which could be brought to this first instrument, through the adoption of a *Declaration* along the lines of the draft which has now reached the U.N. Human Rights Commission.

Some might be tempted to suggest that, in view of the *Basic Principles*, a *Declaration* would be redundant; that would be quite a wrong conclusion. True, because of their very nature both documents are dealing with the same subject matter: but the *Declaration* is aiming at a higher, though still reasonably attainable, level. Indeed there are no less than 25 provisions in the *Declaration* which are not found in the *Basic Principles*. It would be a tedious job to go through them all, but let me refer, by way of illustration, to the headings of the most prominent of those desirable provisions:

Art. 1:	The Objectives and Functions of the Judiciary;
Art. 5:	States of Emergency;
Art. 6:	Closing Down of the Courts, etc.;
Art. 8:	Freedom of Thought, of Speech and of Movement for Judges;
Art. 9, 10 and 11:	The Selection of Judges;
Art. 15:	Prohibition of Transfer of Judges;

Art. 19: Security of Judges;

Art. 22
Through 25: Grounds for Disqualification;

Art. 32
and 34: Responsibility for Court Administration and Budget;

and I could go on.

Indeed there is but a single point on which the *Basic Principles* have put forward a more generous view of judicial independence than the *Draft Declaration*: it is on the vexed question of the immunity of judges.

No doubt the *Draft Declaration* which is now on the agenda of the Human Rights Commission can still be improved. But, judging from the slow progress made by this *Declaration* since the mandate given to Dr. Singhvi in 1980, it is likely to take some time before it reaches the General Assembly and wins its approval. In the meantime the *Basic Principles* are the beacon by which all nations should be guided. Let us press forward for their worldwide dissemination and respect.

THE INDEPENDENCE OF THE LEGAL PROFESSION

by Param Cumaraswamy[*]

Introduction

Great strides have been taken and continue to be taken at international levels for the protection of the independence of the judiciary and the legal profession as prerequisites for the promotion of the rule of law and human rights. Basic norms and principles have been formulated and declared at Noto in Sicily in 1982, in Montreal in 1983 and in Milan in 1985 and at other places at meetings of eminent jurists from different parts of the world for the same ends. Despite this international activism the onslaught on the independence of the judiciary and the legal profession continues and in recent years has increased to such magnitude that the CIJL[1] in an editorial in its latest Bulletin had the following lead:

> "The past six months have been difficult ones for those who look to an independent judiciary and a free and fearless legal profession as the best guarantees of human rights under the rule of law. The leaders of the deeply respected judiciary of Malaysia have been ignominously dismissed. Courageous judges and lawyers have been murdered in El Salvador, Haiti and the Philippines."

To that list ought to be added the latest aggression on the rule of law by the Singapore Government when it re-arrested four detainees one of whom is a member of the Council of the Law Society detained without trial under the Internal Security Act (ISA). The four were ordered to be released by the Court of Appeal upon writs of habeas corpus. In its immediate response to the re-arrests, Amnesty International protested over the incident in the following terms inter alia:

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* Immediate Past President, Malaysia Bar Council.

1 CIJL No. 22 October 1988.

"This clearly raises an important constitutional issue and suggests *habeas corpus* in Singapore may no longer provide an effective remedy for those subjected to detention without trial".

As a sequel to the decision of the Court of Appeal, the Singapore Government has declared in a written statement[2] its intention to amend the Internal Security Act to restore the law as it stood prior to the decision of the Court of Appeal. The following are excerpts from the Home Ministry's statement:

"The Court of Appeal has altered the principle, long accepted by the courts in Singapore, that the power to detain persons deemed prejudicial to national security rested solely with the Executive, acting on its subjective judgment as to whether detention was necessary. The Court of Appeal has now decided, in the light of cases in the United Kingdom and Commonwealth, that the courts will now examine the grounds on which a detention order is based. They will examine not only that the detention order was within the enabling legislative powers but also whether the order is reasonable and based on evidence acceptable to the court.

In Singapore, since the first legislation giving the Executive powers of detention without trial was passed in 1948, the Executive alone has been responsible for decisions on security arrests and detentions. Until this decision of the Court of Appeal, the courts would only review the Executive's use of these powers to verify that it had strictly conformed to the procedural requirements of the enabling legislation, and had not used the powers in bad faith. The judges could not look over the shoulders of the Executive in respect of detention orders or other orders made for security reasons. The cases of *Lee Mau Seng* and *Karam Singh* established these principles, and set important precedents which have since guided the courts.

These settled principles of law have enabled the Government to deal effectively with Communists, communalists and others who posed a

2 Singapore Government Press Release No. 22/Dec 11-0/88/12/08.

threat to security and stability. They remain essential to the security of Singapore.

Meanwhile, because of developments in Britain and elsewhere in the Commonwealth, totally unconnected with conditions in Singapore, courts in the United Kingdom have adopted an interventionist role in reviewing the actions of the Executive. The Privy Council in London, as Singapore's final appeals' court, can overrule the Court of Appeal in Singapore. So in its recent judgment, the Court of Appeal stated that in future it will follow these changes in British judicial attitudes. The Court of Appeal has thus reversed their previous rulings on detention under the ISA.

If Singapore courts review ministerial discretion in security matters, Singapore judges will in effect become responsible, and answerable, for decisions affecting the security of Singapore. This was not, and is not, the intention of the legislature as expressed in the ISA.

The Government has decided to amend the ISA to reaffirm that the established principles of preventive detention, stated in the cases of *Karam Singh* and *Lee Mau Seng*, are still the law in Singapore. The legislation will be passed when Parliament convenes in January 1989, and will have retrospective effect. It will restore the supervisory jurisdiction of the courts to what it was before this latest judgment of the Court of Appeal."

What is most disturbing and must be a source of some concern to the legal fraternity is that these violations are either actively contrived or at least connived and condoned by members of the same fraternity. This was clearly demonstrated by the manner in which the Malaysian judiciary was divided recently over the suspension of the six senior most judges and the later dismissal of three. In Singapore the man at the helm is a Cambridge educated and London trained barrister aided very ably by a Home Minister who is a professor of law and who was formerly the Dean of the Faculty of Law at the National University of Singapore who taught many currently practising lawyers in Malaysia and Singapore the finer points of Administrative and Constitutional law. As professor of law he taught at

American universities too. At one time he was an assistant human rights officer with the UN Secretariat's Human Rights Division. It is depressing to note that often the architects of repressive laws are lawyers themselves.

Across the causeway in Malaysia we saw similar traits. The leader of our opposition in Parliament together with some opposition MPs and members of public interest groups continue to be detained under the Internal Security Act. Last year one of them, Mr. Karpal Singh, an M.P. and a prominent lawyer, was ordered to be released by the High Court on a writ of Habeas Corpus. His freedom was shortlived. Shortly after his release he was re-arrested. Subsequently the Internal Security Act was amended and now habeas corpus applications in such cases may remain an exercise in futility.

However, the Court of Appeal in Singapore must be commended for its courageous decision to depart from the previous law. Earlier, the Malaysian Supreme Court did not show the same courage in dealing with similar habeas corpus applications[3]. It refused to depart from its previous decisions despite cogent arguments to do so. In fact it endorsed the previous outdated decisions against the weight of authorities which were relied on by the Singapore Court of Appeal in its latest judgment.

Independence – from whom?

The term "independence of the judiciary" or the "independence of the legal profession" is often misunderstood. Even if understood it is misapplied or distorted. In the developing nations where the literacy levels are low this concept means nothing to the masses. To many the independence of the legal profession is an ornamental slogan used by the profession for its own enrichment. At least that is how politicians distort the concept to the masses to undermine the credibility of the profession. Little is said or done to explain that this independence is not a concept coined to enhance the image or enrich the profession but it is a prerequisite for the advancement of the rule of law and the protection of the liberties of the people. Here the

3 Theresa Lim Chin Chin vs. Inspector General of Police (1988) 1 M.L.J. 293.

profession itself is to be blamed for inaction. Little is done by the profession to explain itself to the people of its role.

The Montreal Declaration [see CIJL Bulletin No. 12] declares, inter alia:

> "There shall be a fair and equitable system of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter for any reason."

While interference from 'any quarter' is deliberately used so as not to confine to governmental interference alone, yet, whenever there is allegation of interference into the independence of the profession it is assumed that it is governmental. Another subtle and insidious interference which impedes lawyers' independence today is control by multi-national corporations, large financial institutions and other corporations. This is more apparent in countries where the profession is overcrowded and competitive – a case where the supply surpasses demand. Such corporations dictate terms to the profession to the extent that the lawyer is no longer an independent professional but a mere commercial salesman selling his services. Out of a need to compete and survive the lawyers succumb to such dictates. There is a need for organisations like the CIJL and the International Bar Association to look into this area of interference which if left unchecked could not only impede independence but could erode professionalism.

Role of the Legal Profession

It is now recognised that the independence of the legal profession is an essential guarantee for the promotion and protection of human rights. In addition to discharging their traditional roles of just advising clients and representing their interests in court, lawyers either individually or collectively have a wider and more noble role to discharge in society today. Human rights being legal in nature, the legal profession, quite naturally, is looked upon by all quarters, save some governments

particularly in the developing countries, to take the lead in the promotion and protection of this noble cause.

Here the lawyers in the more developed countries are in a safer environment. In such countries the independence of the profession is taken for granted. Any serious encroachment by the Government could lead to the downfall of the Government. Further, in such countries there are proper and well defined avenues or channels in addition to the traditional courts for the people to use if their rights are violated, and to seek redress. Another asset to the developed nations is a free and vigilant press which stands as a bulwark ready to expose any human rights violations. But this is not so in many developing countries. The lack of a free press and machineries like human rights commissions or an ombudsman for the people to bring to light complaints of human rights violations, imposes a greater burden on the legal profession to take on these tasks.

Sometimes even the Courts in such countries are ineffective institutions as independent arbiters of disputes against the Government. The regime's judges in these courts become, to use the words of Lord Atkin, more executive-minded than the Executive itself to play any meaningful role.

It is in this area of activism that the profession is subjected to severe harrassment and its members subjected to all forms of persecution including detentions without trial, unjust prosecutions and even assassinations.

Essentials of an independent legal profession

In practically all developing countries the profession is governed by statute. It is also assumed that in such countries the profession is fused rather than distinct as in England and Wales and some other developed countries. There need to be some control over qualifications, practice and discipline. Statutory provisions over such matters are quite common. The disadvantage of such statutory control is that it negates the concept of absolute independence. Parliamentary control may lead to control by the government. The ruling party forming the executive arm of the

government will necessarily control Parliament. In those circumstances the profession cannot be said to be absolutely independent. Executive interference through Parliament was seen in recent years in the number of amendments to the Legal Profession legislation in Pakistan, Malaysia, Singapore and other countries. One advantage of statutory control is the legal recognition it entails for the profession. What is of uttermost importance is that the legislation recognises, declares and expresses in clear terms the independence of the profession. Once that is secured, the commitment of the members of the legal profession to uphold the cause of justice and human rights without fear or favour will be the motivating force to nurture and preserve the independence. Without commitment from the rank and file within the profession it will be an exercise in futility. Independence will remain a dead letter.

To secure and preserve independence, the profession must be given responsibility to decide on the qualifications of entrants and it must be self regulatory and self disciplining. Any legislation governing the legal profession should leave these three essentials to the profession itself. There may not be much objection if some or all these matters are left to be dealt with by the profession together with the judiciary. But there should be no involvement of any government organs or departments save maybe the Attorney General in the case of qualifications.

Qualifications for admission to practise

The profession is in the best position to decide on the qualifications for practise so as to see that uniform standards within the profession are maintained. However, this should not be abused by applying closed shop or restrictive policies. The profession must be conscious of the need for legal services within the country and constantly monitor the situation. In practice this responsibility is shared with other bodies interested in the administration of justice and institutions or higher learning namely the judiciary, the Attorney General and the Universities.

There is today a growing concern over the deterioration in the standards of the profession. It is lacking in commitment and is becoming too

commercialised. This is a universal problem. It reflects on the education and training of lawyers. If the situation is not arrested and improvements sought, the profession will become the target of further public criticism thus undermining public confidence in lawyers leading to government control. It is imperative therefore for the profession to reflect on this issue and seek radical changes to the training of lawyers. In the training curriculum a course on human rights should be made compulsory for a better appreciation and awareness of this course and inculcate a sense of commitment to its cause.

Self-Regulation

Self-regulation is imperative for maintenance of the independence of the profession. Here again the profession should not abuse this privilege and take a lackadaisical attitude. It should regulate the practice of the law for the achievement of the highest standards and integrity from its members. Stringent rules should be formulated to achieve these goals. There should be an effective enforcement machinery to enforce these rules. While entrusted with the power to self regulate the profession must review the rules from time to time so as to see that the rules are adequate to meet with the changing times and the public interest.

Self-Discipline

Stemming from self-regulation is self-discipline. This has been a sore issue in practically all jurisdictions including the advanced. The public cannot possibly understand the rationale of a lawyer being tried for professional misconduct by his own peers. There is a constant suspicion in their minds that the profession cannot possibly be independent in such adjudications as it will at all times protect its members. This does not conform with their notion of justice. To them the very structure of the profession is to protect itself and the interests of its members. The system cannot possibly be expected to protect the public against delinquent lawyers. Hence the public outcry continues supported by the media which always finds the legal profession a target for sensationalism. Governments, particularly in developing countries, where the profession

is active, exploit the situation and further add to the injury by interfering under the pretext of putting some order in the profession as the profession itself is unable to handle the situation. Governments achieve their purpose. The profession becomes discredited and the public begin to lose faith in its lawyers. The profession's influence in society is lessened. It is often suspected that in developing countries where the media is often controlled by the governments, issues are sensationalised by the media and blown out of proportion to the detriment of those groups who are critical of the government and its policies.

Be that as it may, the profession is to a large extent to be blamed for such a situation. The cumbersome disciplinary procedures resulting in long delays of adjudication of complaints leaves the public utterly frustrated. In that event whatever explanations may not redeem the profession. The profession's apathy to the feelings and aspirations of the general public is another causative element. Complacency is yet another cause. All these culminate into a public outcry for the discipline to be taken over by another body like the government. The government is only too ready to oblige.

The Malaysian Bar was subjected to criticisms by the public over its disciplinary procedures. For a period such complaints became a feature in the letters to the editors column in the English-language dailies. The Bar Council took cognisance and began a soul searching exercise and in November 1985 set up a committee to look into the disciplinary procedure provided in the Legal Profession Act and consider its adequacy and any necessary changes. The committee was headed by a former Prime Minister Tun Hussein Onn, a practising lawyer himself. The committee was composed of the former Lord President of the Federal Court Tun Mohamed Suffian, representatives of the Chief Justice, public interest groups and members of the Bar. The formation of the committee was generally welcomed by the public. Media editorials hailed it as a step in the right direction. The committee's report was made public at the end of 1986. Radical changes were recommended. Amongst its recommendations was the need for the presence of lay persons in disciplinary tribunals. Such representation will allay the public suspicion of protectionalism within the Bar. The presence of lay persons in such tribunals is now accepted in many countries. Their presence will not in any way erode the

independence of the Bar but could very well enhance the public image of the profession. What is important here is that the public is made aware that self-regulation and self-discipline also involve self-examination and self-correction. For the preservation of independence it is imperative that the profession handle these problems and not give the government an excuse to encroach. The Bar Council has submitted draft amendments to the Legal Profession Act incorporating the recommendations. The draft is currently before the Attorney General.

While on the subject of discipline, the very recent advice of the Privy Council on the appeal of Singapore's former lone opposition member in Parliament, Mr. J.B. Jeyaratnam, against the order of striking him off the roll of advocates and solicitors, should serve as a warning to disciplinary bodies, whether of the Bar or the court. Such bodies should not be seen to be the tool of the Government and be seen to be used to persecute its political opponents. This seems to be what happened in J.B. Jeyaratnam's case. In Singapore the disciplining authority is the court. In a scathing attack over the manner in which the courts earlier found Mr. Jeyaratnam guilty of some criminal charges which resulted in his losing his seat in Parliament and thereafter became the subject of disciplinary proceedings the Privy Council in its advice concluded as follows:

> "Their Lordships have to record their deep disquiet that by a series of misjudgments the appellant and his co-accused, Wong, have suffered a grievous injustice. They have been fined, imprisoned and publicly disgraced for offences of which they were not guilty. The appellant, in addition, had been deprived of his seat in Parliament and disqualified for a year from practising his profession. Their Lordship's order restores him to the roll of advocates and solicitors of the Supreme Court of Singapore, but because of the course taken by the criminal proceedings, their Lordships have no power to right the other wrongs which the appellant and Wong have suffered. Their only prospect of redress, their Lordships understand, will be by way of petition for pardon to the President of the Republic of Singapore[4]."

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4 Jeyaratnam vs. Law Society of Singapore (1988) 3 M.L.J. 465 at 434.

Role of Bar Associations

Bar Associations, being the association of lawyers, are the hubs of the legal profession. They carry out the objectives of the legal profession. They speak up for the legal profession. In addition to looking after the interest of the profession, Bar Associations also have the duty to protect the public interest against delinquent lawyers. Being the spokesmen for the legal profession, they are expected to speak out against human rights violations. In some countries where there is extensive repression the collective voice of an association may be safer than those of individuals. However, individual activist lawyers look upon their associations for support against any reprisals from the Government. It is the duty of the association in such circumstances to rush to the aid of their members.

Often activist Bar Associations involved in the promotion and protection of human rights are characterised as being political. Very recently the Malaysian Prime Minister was reported[5] to have accused the Bar Council of "playing too much politics and devoting less time to legal work". He went on to say that it appeared "as though the Bar Council was more like a political party". "They give more attention to their political role. And while they play politics, many are in remand waiting for counsel to represent them in Court". He then went on to make a startling and misleading remark. "In other countries like the United Kingdom the Bar Council was headed by a lawyer in the Government. However in Malaysia an 'independent lawyer' preferred to play politics than being devoted to legal work".

In response to that accusation the President of the Bar replied sharply in a three page press statement. But the controlled and self-restrained Malaysian press failed to give that statement full coverage. A copy was sent to the Prime Minister.

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5 New Straits Times 31.10.88.

In 1982, the Legal Practitioners and Bar Councils Act of 1973 in Pakistan was amended to preclude Bar Councils and Bar Associations from engaging in political activity.[6]

On this very issue the Prime Minister of Singapore said in the course of a Parliamentary Select Committee Proceedings on the Legal Profession (Amendment) Bill 1986:

> "But if I come to the conclusion that, in fact, as was the case with so many Chinese old boys' associations and musical gong societies, that some activists, through the indifference of the majority of members, have misled the society to wilful ways unconnected with the profession, then I will find an answer to it. Because it is my job as the Prime Minister in charge of the Government of Singapore to put a stop to politicking in professional bodies. If you want to politick, you come out. That is why I asked you. You want to politick you form your own party or join Mr. Jeyaratnam[7]."

With those amendments, the Singapore Government effectively removed Mr. Francis Seow from his position as President of the Law Society. More than a year later he was detained under the Internal Security Act "for investigations into foreign interference into Singapore's domestic affairs". Upon release Mr. Seow stood as a candidate at the last general elections under the banner of Mr. Jeyaratnam's party. He was returned to Parliament. He is now hounded with multiple charges for tax evasions and tried in absentia, convicted and sentenced while he was away overseas receiving medical treatment. Going by precedent there is every likelihood that he would be deprived of his seat in Parliament before even he takes it. Thereafter in all probability he would be suspended or struck off the rolls of advocates and solicitors for the convictions. Either way, one who becomes a threat to such regimes loses.

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6 See CIJL Bulletin Nos. 19 & 20 pg. 66 at pg. 76.

7 Report of the Select Committee on the Legal Profession (Amendment) Bill 20/86 pg. B115.

What needs to be emphasised to our political masters is that every human rights issue will have political overtones. Even, as stated by Sir Owen Dixon C.J.[8], a discussion on the constitution would be political because the constitution is a political instrument. Hence, are these political leaders seriously suggesting that a comment on the constitution is beyond the purview of Bar Associations? It should also be driven home that issues involving human rights are not the preserves of politicians. It is wholly undemocratic to suggest that only the politicians are competent and entitled to comment on such issues. To avoid any suspicion on their part, Bar Associations should stay clear from aligning themselves with political parties or subscribing to any political philosophies. They should not lend support or seen to be lending support to organisations whose motives are subversive in nature. To maintain our integrity and credibility in society we must at all times be constructive and not destructive.

Unity within the legal profession

A united Bar is the best defence against any encroachment into the independence of its members. The adage 'united we stand, divided we fall' applies in equal force to the Bar. The Malaysian judiciary would have averted the Executive's aggression on its independence recently and would have stood up mightily today if there was unity within it. Unfortunately there was not. And as such its independence fell submissively without a united and concerted challenge. In contrast, about two years ago, the lawyers in Bangladesh displayed admirable unity and courage when they successfully protested over the appointment of the Chief Justice who was alleged to be aligned to the Executive. It is learnt that as a result the Chief Justice does not sit on the Bench but is confined more to administrative work.

A concerned, insecure or threatened Government would always attempt to dislodge or disunite an activist Bar. This was done in Pakistan in 1981 when the Legal Practitioners and Bar Councils Act of 1973 was amended to enable the right of an advocate to practise at the Bar without being a

8 Graham Fricke, Judges of the High Court.

member of a Bar Association. The profession is then put to the test. If there is individual commitment to the cause of the profession, unity can be achieved without any legislation. In the final analysis it is the character and commitment of the individual lawyers which will reflect upon the quality and independence of the legal profession in any country.

The Bar in defence of the independence of the judiciary

The extent and quality of the independence of the judiciary is often measured by the extent and quality of the independence of the Bar in any country. It is a fearless Bar which gives strength and sustenance to the judiciary to remain independent. While the Bar can often speak up on any violations on human rights outside the four walls of the courtroom the judiciary often has to exercise restraint unless the matter is formally brought before it for adjudication. Recently in Malaysia when a High Court judge made an extra judicial comment relating to a constitutional provision after declaring open a students' legal seminar he was immediately characterised as having "gone political". Even when the opposition party in Parliament brought its causes for redress to the Courts, the Courts were accused of being use by politicians.

Be that as it may, it is the duty of the Bar to remain alert and rush to the aid of the judiciary whenever the latter's independence is threatened. The Malaysian Bar has, to date, lived up to this expectation admirably. Never in the history of the Malaysian legal profession was it put to test as it was last year when the six Supreme Court judges were suspended and thereafter three of them dismissed and the other three reinstated. Their only offence was that they stood up in support of the independence of the judiciary. At two extraordinary general meetings attended by an unprecedented number of members, very strongly worded resolutions were adopted, one of which called for the then Chief Justice, now the Lord President, to resign for his conduct in the whole affair. A fund for the defence of the independence of judges and lawyers was launched. Many contributed generously. Despite the controlled media, which in one case refused even advertising space to print the resolutions, the Bar handed self-printed copies of the resolutions as hand bills to the public.

Senior lawyers from large leading firms appeared as Counsel for all the judges. They did not seek any fees, not even disbursements. Armbands, badges and car stickers were used by lawyers to show the public the Bar's solidarity with judicial independence. Now the Bar Council ends all its correspondence with the words "return the independence of our judiciary". The Council has called upon all lawyers to do likewise in their correspondence with clients and others.

Public relations

The legal profession is by far the most misunderstood of all professions. To the average layman the profession is clouded by a mystery of legal jargon antiquated laws and procedures perpetuated to keep it exclusive for the enrichment of its members. Very little attempt is made to explain and unveil the mystery of the profession. Added to this is the general public dislike of lawyers.

It is this dislike which leads the public to sympathise with the Government whenever the lawyers are taken to task publicly. It is therefore imperative for the profession to win the goodwill of the general public. Public respect is not something which can be demanded. It must be earned. In addition to providing legal services of quality and displaying honesty and integrity in the discharge of professional duties, the profession collectively must explain itself and unveil the mystery surrounding it. It must be involved in public interest and social issues. This is particularly important in developing countries. The profession's involvement, in addition to attending to human rights violations, in legal aid work for the poor and legal literacy programmes to educate the masses of their rights and duties, will result in considerable respect for the Bar and will immensely enhance the image of the Bar. Public respect for the profession cannot possibly be ignored by Governments.

The role of international organisations

Activist lawyers who struggle for the cause of the independence of their profession and human rights do so at a heavy price. They make considerable personal sacrifices. The reprisals taken against them take different forms. Between December 1987 and December 1988, 30 human rights activists have been killed and 750 such activists have been persecuted by 61 Governments around the world. These figures include many non-lawyers[9].

The burden and stress of those who struggle for these ideals would be lessened if it is known that their cause is shared and actively supported by others and in particular by international and other national associations of lawyers and human rights organisations. It is most gratifying to note that more international and national organisations have become aware of the increasing persecution of judges, lawyers and human rights activists around the world and are taking concerted actions by way of protests and observer missions. Some of those involved in these missions take considerable risks. The work of Amnesty International, the ICJ, the International Bar Association and LAWASIA in this field should not be underestimated. The interest shown by the American Bar Association and very recently the Japanese Bar Association is most heartening.

But the violating governments resent interference by these organisations. They assert that it is an interference into the internal affairs of their nations. It was on this ground that together with three other Malaysians, I have been banned from entry into Singapore since October 1987 because of our protests over the Internal Security arrests in April 1987. We are not even allowed to use the Singapore International airport for transit purposes!

Human Rights violations by a government are no longer an internal issue. The United Nations was formed with member nations declaring in the preamble to the Charter their determination to reaffirm faith in fundamental human rights. It is therefore imperative for lawyers, and in particular

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9 The Persecution of Human Rights Monitors – Human Rights Watch December 1988.

international associations of lawyers and other human rights organisations to continue their efforts to press home this and establish the importance of accountability of governments whenever they violate human rights.

Conclusion

As I had said earlier, in the final analysis the quality and extent of the independence of the legal profession will depend largely on the character and commitment of its individual members. Without these twin attributes independence will remain a dead letter. It is not something which can be demanded. It is something which the profession should nurture and jealously guard against any aggression.

An independent judiciary and an independent Bar are twin pillars of the rule of law. When these two are stripped of their independence, the rule of law will be dead. The enemies of equality before the law will succeed and the administration of the law will be brought to disrepute. Where there is no rule of law there will be no human rights. When man is denied his rights he is denied his humanity. The test of civilisation is not the quantum of wealth or materials enjoyed by the people but as Felix Frankfurter put it: "it is the degree to which justice is carried out, the degree to which men are sensitive to wrongdoing and desirous to right it"[10] . The degree of civilisation we all seek is a new world where, in the words of President John Kennedy, "the strong are just and the weak secure and the peace preserved". Lawyers everywhere must take the lead to pursue and further the cause of justice and promote and protect human rights to achieve that ideal state of civilisation.

10 From the Diaries of Felix Frankfurter pg. 39.

INTRODUCTORY REMARKS ON "PRESSURES AND OBSTACLES TO THE INDEPENDENCE OF THE JUDICIARY"

by Prof. Alfredo Etcheberry[*]

Introduction

The most important notion in this field is that of "independence" of the judiciary. In our view this means that, when deciding a case, a judge must take into account only the evidence produced as to the facts of the case, the constitutional and legal provisions, and his sense of justice and equity as it is present in his conscience.

Any other factor, whether internal or external, pretending to influence the judge's decision must be considered as contrary to the independence of the judiciary.

Limits to judicial independence

The judiciary, as well as the other powers of the state, has a sphere of jurisdiction whose boundaries are set forth in the constitution. But within that sphere its independence must be absolute.

In normal circumstances, nothing justifies a limitation to the powers of the judiciary.

In the so-called "states of exception" only a restriction of the jurisdiction of courts may be justified, but within that restricted sphere, the courts must retain full independence. If the legality of administrative arrest is admitted in such circumstances for reasons of public security, the judiciary must retain power enough to ensure that such arrests are carried out within the

* Professor of Law, University of Chile.

boundaries provided for in the constitution and the laws regulating such states of exception (such as the places where people may be kept in custody, the prohibition of torture and harsh treatment, the right to be visited, and so on).

Pressures and obstacles

A judge is not independent:

- if the prevailing legal system subjects him, in order to be appointed, to decide a case (or a certain category of cases) in favour of the authorities that have appointed him;
- if he is exposed to an unjustified removal from office, as a consequence of a decision that runs contrary to the interests or wishes of other powers of the state or any particular public agency;
- if he runs the risk, for the same reasons, of being transferred to a lesser position or one in which living conditions are much harsher than in his former post;
- if his promotion depends exclusively on the discretionary will of other powers of the state so that his career may be blocked if he has decided a case against the will of such powers;
- if the monetary compensation for his task is subject to increases or reductions without an objective set of rules, and only at the will of other powers of the state.

It will be easily understood that such situations do hamper a judge's independence, for when he has to decide a case he will inevitably take into account – if only to reject them – other factors different from the text of the law, the facts of the case and his sense of justice.

We do not see as contrary to the independence of the judiciary the limitation of the tenure of members of the highest court in a given country, provided that such limitation is reasonably long and renewal of the respective appointment is not allowed. This limitation is applied only to people who have reached the highest rank in the judiciary and are therefore not concerned about their promotion. On the other hand, the prohibition of

reelection or reappointment frees them from the temptation of making "merits" for reappointment.

Apart from the pressures embodied in the legal system, there are others applied in fact, though not permitted by the law. They may come from other public powers or agencies, or from private persons. They consist mainly in attempts to bribe or corrupt a judge, and in the threat of death or other serious harm to the judge himself or to members of his family. Those facts should be considered by national laws as particularly serious offences and be severely punished by the criminal law. If these pressures come from political authorities or public servants, they should be subject to an additional disqualification to hold public office in the future.

Lastly, a judge's own passions, beliefs, interests, etc., are also constant threats to his independence. As they lie in the judge's mind, they are most difficult to control from the outside through legal standards.

Nevertheless, an attempt should be made to minimise this risk by such devices as:

1. before appointing a judge, to scrutinise the candidate's temperament and moral strength to overcome his leanings, prejudices or sympathies in the religious, political and other sensitive fields. In this examination all representative bodies concerned with law and the administration of justice should take part: bar associations, law schools, retired justices and the like.
2. during his term in office, all excessive activity by a judge in politics or other socially controversial fields should be discouraged, if not outright forbidden. Similarly, he must restrain from expressing opinions publicly on matters that he might be called upon to decide as a judge, and from mingling in matters that are within the province of other powers of the state.
3. if it becomes common for a judge to issue decisions in which it is evident that he has been inspired by passion, prejudice or interest alien to the facts of the case and existing law, a procedure for impeaching or dismissing him should be provided for in the constitution or the laws. Of course, such procedures should be full of safeguards against

possible abuses, so that the possibility of dismissal does not tamper with judicial independence.

Resources for the administration of justice

Financial autonomy is essential for the proper independence of judges. It is desirable that the constitution should assign funds to be directly administered by the judiciary, duly assisted by the competent technical bodies. With such funds the judiciary must provide for compensation of judges and the material needs of the administration of justice (court housing and furnishing, correspondence and other communications, publishing, etc.). The funds assigned in this way, within the financial means and general standard of living of any given country, should suffice to grant a judge a decent level of income, according to the dignity of his functions and to free him from serious financial problems, so that his pressing needs do not weigh against his independence.

Judiciary and de facto regimes

We believe that judges who have been legally appointed within the frame of certain constitutional provisions do not cease to be judges by reason of the fact that the other powers of the state have been seized or dissolved through *de facto* methods not recognised by the constitution in force up to then.

The presence of new powers in the executive and legislative provinces is a simple matter of fact. A judge may acknowledge the existence of such a situation in fact and he need not pronounce a judgment of moral or political legitimacy that the different constitutions usually do not request from him.

If the new regime dismisses some of, most or all judges, it will be only a matter of fact to ascertain whether or not the latter have power enough to resist the arbitrary dismissal, that is, to continue to sit as judges, issue their decisions and have them enforced. If they do not have such power, as will usually be the case, they will have to submit to their dismissal,

under a formal protest, to which they will try to give maximum publicity and make it reach the appropriate international organisations.

If the dismissal affects only some judges, the rest will have to face the moral dilemma so common in these cases: either to make common cause with their fellow judges that have been dismissed and resign, or to decide that by remaining at their posts they may help to avoid further evils. It is an ethical question that the law cannot answer with one and the same answer for every case.

If the new authorities derogate from individual rights and the rights to *habeas corpus* and *amparo* proceedings and supporting individual freedoms, if they lack the necessary means to enforce their orders or decisions, they must again issue a formal protest and denounce that fact internally and externally.

Identical rules apply when martial law is proclaimed or military courts are given jurisdiction over civilians, or the ordinary jurisdiction of the courts is restricted further than permitted by the constitution.

Such measures can be accepted only when they are in accordance with the rules set forth in the constitution up to then in force, and when the new authorities exercise their power within the limits provided for in that constitution. The judges must deny recognition to everything that exceeds those boundaries, and if their decisions are not in fact respected, they must protest publicly and resign.

HOW THE JUDICIARY SHOULD REACT TO VIOLENT CHANGES OF GOVERNMENT AND *DE FACTO* REGIMES

by E. Dumbutshena[*]

The independence of the Judiciary is tied up inextricably with the doing of justice to all men. This allows of no division or discrimination between the small group of people who control and run the affairs of the country or the rich and the poor. This also requires each judge to say unflinchingly: "I cannot surrender to any man the right of the people to a fair and just trial because the independence of the Judiciary protects that right". Coupled with this is the duty of an independent Judiciary to uphold the citizens' human rights and fundamental freedoms. This is a growing area of a judge's work. If the Judiciary performs its work without fear or favour then the people will hold the legal system in great esteem. The independence of the Judiciary implies no doubt that the Executive does not interfere with the courts or try to influence them. But all other things depend on the appointment of good judges, their remunerations and security of tenure.

I would like to discuss among other topics how the Judiciary should react to violent changes of government and *de facto* regimes reflecting on this topic. I have in mind events affecting the Judiciary in Southern Rhodesia before independence in 1980:

In 1960 Sir Robert Tredgold resigned as Chief Justice of the now defunct Federation of Rhodesia and Nyasaland because the Southern Rhodesian Parliament, made up of white members of Parliament and Ministers, had passed the Law and Order (Maintenance) Act which had draconian measures meant to suppress the political aspirations of the Africans of Southern Rhodesia. It was a good thing for him to do. It earned him the respect of all men of goodwill.

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* Chief Justice of Zimbabwe.

On 11 November 1965 Mr Ian Smith's government illegally and unlawfully declared the independence of Southern Rhodesia against the wishes of the United Kingdom, the colonial power. Judges reacted differently: After serving the illegal regime for a few years Mr. Justice Fieldsend and Mr. Justice Young resigned. They felt unable to continue to serve under an illegal regime. But that was not the reaction of the majority of the judges, who remained in office. The abrogation of the lawful Constitution was in their view less important to the maintenance of the judicial system. Because they remained in office, the illegal regime became respectable. The judges became part and parcel of the illegal regime.

What is interesting in this respect is that the Governor of Southern Rhodesia issued a statement telling Mr. Smith's government that it no longer, by command of Her Majesty the Queen, held office. Then the statement went on:

> "I call on the citizens of Rhodesia to refrain from all acts which would further the objectives of the illegal authorities. Subject to that, it is the duty of all citizens to maintain law and order and to carry on with their normal tasks. *This applies equally to the judiciary, the armed services, the police and the public service."* (Sentence in italics is mine).

For the time being all the judges, including the two mentioned above, remained in office.

For the purposes of this paper it is important to give the reactions of two of the judges who heard an application to set free two citizens illegally detained: an application was brought for the release from detention of Mr. Madzimbamuto and Mr. Baron (now deceased). Lewis, J and Goldin, J heard the application. They dismissed it. Why? Because they felt that the illegal government was the only government in the country. Lewis, J said the government:

> "... is ... the only effective government of the country and therefore, on the basis of necessity and in order to avoid chaos and a vacuum in the law, this court should give effect to such measures of the effective government, both legislative and administrative, as could lawfully have

been taken by the lawful government under the 1961 Constitution for the preservation of peace and good government and the maintenance of law and order."

The judges' attitude to a revolutionary change of government in a sovereign independent country was put thus by Lewis, J:

"... provided that the old order has completely disappeared, the existing judges of the courts are in no difficulty. Their former allegiance to the old order disappears with its complete annihilation and it is then a simple step to recognise their allegiance to the new order and to continue to function as if they had been appointed under the new order."

Goldin, J said:

"... the obvious proposition that what is destroyed no longer exists, so that a lawful government is seized by a group of persons who successfully overthrow the existing order and effectively replace it by a new order, the men whom a revolution brings to power often annul the lawful constitution and replace it 'by a new constitution which is not the result of the constitutional alteration of the former'. ... In the case of Pakistan, ... that country was a sovereign state where a successful revolution had the result described therein, and accordingly the court 'joined' the revolution which destroyed and replaced the existing order."

Lewis, J rejected the contention that the judges bound by the legal Constitution which was thrown out by the illegal regime could not recognise the laws passed by an illegal Legislature. The learned judge remarked:

"One cannot have a vacuum in the law. One cannot say that since November 11, 1965, no valid and effective laws whatsoever have been made in this country. The law is a living organism, it is an essential part of the life of the community and moves with it; this is especially so in a modern state."

Lewis, J was of the view that it was necessary for the Legislature to enact a charging Act for purposes of determining income tax so that revenue could be collected to service the various facilities such as hospitals, education, the police, etc. The judges said they were obeying the Governor's instruction to remain in power. I think the arguments used by the judges who continue to hold office after the takeover of governments by military regimes will find comfort in what Lewis, J said:

> "It is fanciful to suppose that the judges of this court, by refusing to recognise anything done by the present *de facto* legislature and executive, could force the present government to abandon the revolution, nor would it be an appropriate function of this court to attempt to influence the political scene in this way, even supposing that it could do so as a matter of reality. The instruction of the Governor does not include a direction to take active steps to end the revolution; it is merely a direction to refrain from acts which will have the effect positively of aiding the revolution, while at the same time to continue in one's normal task and to continue to maintain law and order.
>
> Those who embarked on the present revolution were not deterred by the illegality of their actions at the time, and it would be naive to suppose that, if faced now with a decision of the court that nothing whatsoever done by the present government could be recognised, the government would tamely capitulate. The only course open would then be the drastic one of filling the vacuum by replacing all nine of the existing judges with revolutionary judges, who, regardless of judicial conscience, would be prepared to accept without question the 1965 Constitution as the *de jure* Constitution of this country, despite the ties of sovereignty and despite the anomalies in the Constitution itself...".*

In Africa judges tend to remain in office after violent changes of government. I cannot say whether they subscribe to the views of Lewis, J

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* See: *The Law Quarterly Review*, vol 83: R.S. Welsh: The Constitutional Case *in Southern Rhodesia*, at 64; *Madzimbamuto and Another* v *Lardner-Burke, N.O. and Another (2)*, 1966 RIR 756.

and Goldin, J. The two judges continued in office and only retired as Supreme Court judges in independent Zimbabwe.

It is a notorious fact that the majority of judges in Africa have remained in office after military coups. I cannot say why they do so. They may be compelled by the desire to continue doing justice to the people. They may be afraid of the consequences of refusal.

Each judge, I believe, should decide on what to do, after examining the surrounding circumstances. It may be one should observe the new situation. If he believes that for good reason he cannot operate under the new environment he ought to resign. I personally believe it is improper to assist a revolutionary government that denies the citizens of the country justice.

In Southern Rhodesia the situation I have referred to above arose, as I have said, from the detention of two citizens under Emergency Regulations which were published by the illegal regime of Ian Smith in 1966. The Regulations were published in terms of the Emergency Powers Act, enacted on 5 November 1965 – before the unilateral declaration of independence on 11 November 1965. While the Act was lawful, the Regulations were illegal. The Smith regime interfered illegally with the liberty of the two citizens. It cannot be suggested under those circumstances that the judges of the High Court were administering laws for the furtherance of the peace, order and good government of Southern Rhodesia. The judges surrendered the rights of Mr. Madzimbamuto and Mr. Baron to be free or their right to be tried fairly.

It happens all the time in third world countries, especially in Africa, that military regimes, when they come to power, violently suspend Constitutions and human rights; and for reasons best known to themselves, judges go along with this and serve the illegal regime. Judges seem never to ask whether it is right to continue as judges. It may be they may believe like the two Southern Rhodesian judges that they must assist the illegal regime to maintain peace, order and good government. Yet we know that the duty to decide on laws that are conducive to peace, order and good government belongs to the Legislature and not to judges. The

sole duty of the judge in this respect is to interpret laws passed by the Legislature.

Once the illegal regimes suspend Constitutions, human rights and fundamental freedoms, those judges who continue to be in office surrender to them the right of the people to justice.

What should we do when confronted by illegal military regimes of this nature? Do we resign and leave the people to the mercy of a revolutionary dictatorship? Or do we solder on in the hope that we will somehow improve the administration of justice?

Some of our colleagues who have found themselves, sometimes frequently, under these circumstances have carried on in the hope that things would improve. In the process some judges have been killed for not doing the bidding of the military regimes. There must be others who have resigned. I have not come across any. But I am certain there must be. If I were asked what those who find themsevles under an illegal regime should do, I would advise resigning or retiring from the Bench. Yet that has dangers of its own. I think that each judge must make up his own mind.

What each one of us thinks in the relative security of our Chambers or in seminars of this nature may be inconsistent with the situations that each judge face when violent changes of government take place.

I think, however, that the overriding consideration is whether one can still do justice to all manner of people without fear or favour. If one cannot, then the best thing to do is to resign or to retire conveniently.

Other matters

I take it that every country has a machinery for the dismissal of judges. In Zimbabwe, like in many other Commonwealth countries that got their independence from Britain in recent years: "A judge may be removed from office only for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause, or for

misbehaviour, and shall not be so removed except in accordance with the provisions of the law". "If the President considers that the question of the removal from office of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the matter". In the case of other judges, if the Chief Justice thinks that the question of the removal of a judge of the High Court or the Supreme Court ought to be investigated he shall advise the President to appoint a tribunal to inquire into the matter. I believe this happens in all new democracies.

It may be that a *de facto* government may decide to dismiss all judges who served the replaced constitutional government and appoint judges of its own. Dismissed judges may legitimately refuse to be dismissed by an illegal regime. But is this wise to do when the new change of government has been brought about by violence? In the case of Southern Rhodesian judges at U.D.I. the Smith regime asked all of them to swear a new oath of allegiance. They refused. And they were not dismissed. It was good of them to refuse. If the illegal regime or *de facto* government goes ahead and appoints new judges there is nothing the old or constitutionally appointed judges can do. The *de facto* government controls the purse strings.

Supposing the *de facto* government has complete control of the administration, there is the view that the judges must continue to administer the laws of the *de facto* government for the good of society. Once the new government is effective, it is the duty of the judges to obey the laws they administer. Once the lawful Constitution is torn up and destroyed judges cannot continue to believe that they administer the law under the old order. If the judges continue to sit, it means that while they are performing the judicial function of the new regime they must give effect to the laws and Constitution of an illegal regime or a *de facto* government. It is better for those judges who are totally opposed to a new revolutionary and illegal government to resign if they do not want to give effect to the laws of the *de facto* regime. It means, therefore, if they are dismissed they must accept it with grace and dignity and leave the Judiciary.

The question of *habeas corpus* proceedings is a constant worry in some developing countries. The liberty of the subject means nothing to some

governments. When the courts issue writs of *habeas corpus* for the liberty of a detained citizen, the Executive re-detains him. This results in a conflict between the Judiciary and the Executive. The judges get frustrated. The citizens are equally frustrated and lose faith in the courts. It is a problem some judges have learnt to live with.

What is more discouraging is that some Constitutions allow preventive detention. Governments with such Constitutions detain their subjects under the cloak of legality. The right to personal freedom is fundamental to the administration of justice and the Rule of Law. Detention without trial is against the principles upon which the concept of the Rule of Law are founded.

The questions posed in this discussion are full of imponderables:

There may be violent changes of governments that are accompanied by the establishment of stability and, in a manner of speaking, good government. What does a judge do? Does he resign there and then or continue until he proves that the new conditions are unbearable?

As I have said above, there are judges who have gone along with new military regimes and ended being killed. There are also judges who have stayed on in spite of the violent nature of the change of government and have carried out their judicial functions with dignity. Some have lost their lives in the process.

The answer might be that it is wise to leave everything to the judgment of those affected by the change.

IMPLEMENTATION OF THE U.N. BASIC PRINCIPLES ON THE JUDICIARY AND ADOPTION OF THE U.N. DRAFT BASIC PRINCIPLES ON LAWYERS

by P. Telford Georges[*]

My experience of the administration of justice has been largely derived from practising as a lawyer in Trinidad and Tobago while it was on its way to independence as a territory exercising full internal self government, and from holding judicial office in Trinidad and Tobago, Tanzania, Zimbabwe and the Commonwealth of the Bahamas shortly after each had achieved independence.

At no time during this period was I ever conscious that any attempt was being made to influence my decision in any case listed before me for hearing. None of my colleagues on the Bench of the Superior Courts of any of these countries has ever reported to me that any such attempt had ever been made to influence them. There was, however, always a feeling of tension in the relationships between the judiciary and the executive. Judges who were independent could not be controlled. This made them unpredictable. Politicians tended to regard this as potentially threatening to their power.

In only one instance have I ever had reason to think that a Government had taken action which could be regarded as punitive as a result of a decision of a court of which I was member and which it must have thought adverse to its interest. The case cannot be made out beyond a reasonable doubt but on the balance of probabilities I would think it was established.

In May 1971 I returned from Tanzania where I had served on secondment for 6 years to Trinidad and Tobago. I was immediately appointed an acting judge of the appeal court. The Chief Justice had just retired and a judge of

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* Chief Justice of the Bahamas, former Chief Justice of Tanzania.

the Court has been appointed to act as Chief Justice. So in a bench of 4 there were 2 acting appointees. This persisted for some 7 months, itself an undesirable situation which provoked comment in the press. In the seventh month there came before the court an appeal by 6 soldiers against a conviction for mutiny by a court martial. That mutiny had seriously shaken the peace of the country causing the Government to be justifiably alarmed. The court hearing the appeal consisted of the acting Chief Justice, a substantive judge and myself an acting judge of appeal. We allowed the appeals of three of the appelants who could be described as the ring leaders and dismissed the appeals of the three others. We also refused leave to appeal to the Privy Council which the Government sought.

Action was not taken immediately but it followed some eight months later. The acting Chief Justice (who had by then acted for over a year) was not appointed to the post. He reverted to his post as an appeal judge and I was not appointed appeal judge but reverted to my post as a high court judge. I had predicted to the acting Chief Justice when we reached our decision that this result would follow. He had dismissed my prediction as sheer cynicism. The fact is that there is always a price to be paid for independence. It is not a gift.

It has always been my view that while judges should at all times stress their independence, they should not make it appear that they stand apart from the societies in which they work. It should be clear that they are committed to the ideals enshrined by the community in its constitution and will use their powers to further their realisation. The judiciary should be seen as an integral part of the process of good government. The nature of the work requires objectivity which necessitates some withdrawal but this withdrawal should not become aloofness.

Although to me and to many people in the Commonwealth Caribbean the concept of the independence of the judiciary may seem trite, it is in reality a radical concept which developed slowly and with some difficulty in England, the country from which we have in modern times inherited it. This development took place centuries ago but the history must not be forgotten. It is a necessary preparation for working for its acceptance in milieux in which its inherent soudness may not be so clear. A judiciary

and a legal profession which remain too aloof places themselves at a disadvantage in the vital educational work that has to be done at comparative speed if dangerous situations are to be averted and damage avoided.

It seems to me that the Basic Principles are most useful as an effective teaching aid. Their acceptance by the executive arm of the Government also represents a significant triumph since it is vital to the consolidation of the independence of the judiciary to miss no opportunity which will require members of the executive branch to declare their commitment to the principle.

The acceptance of the Principles as an international norm is also a great step forward. I firmly believe that the struggle for acceptance must essentially be a local struggle. In the final analysis the independence of the judiciary will not become a political reality until politicians realise that they may suffer by challenging it and will gain from supporting it. In difficult situations, however, the support of the international community can assist. It strengthens the morale of those pressing for progress towards independence even though it may not shame those opposing it into proper conduct.

The Basic Principles on the Independence of the Judiciary themselves call for little comment. As principles they can be found in the constitutions of the Commonwealth of the Bahamas where I now work and in the constitutions of all the countries of the Commonwealth Caribbean.

It is important to note that principle 2 makes clear that the independence of the judiciary rests also on the correct behaviour of judges. There is a correlative duty on the part of the judge to decide matters impartially, on the basis of facts and in accordance with the law. Concerned with their independence, judges are not infrequently unaware of their own biases and prejudices. Inducements and influences may spring from sources other than state power and result in decisions which cannot be categorised as corrupt so as to deserve disciplinary action but seriously affect the credibility of the institution. I may not have been amiss to have included in this paragraph a reference to the need to make decisions with reasonable

promptness. The image of the judge as a privileged and often idle person does not conduce to respect. The members who actually behave in that manner may be few but the harm which such an image can cause is often substantial.

Articles 3 and 4 raise the issues of executive action on the basis of the existence of a state of emergency which often makes ineffective judicial action and demeans in the eyes of the public the role of the judge as the protector of constitutional rights. I have not had to face this issue in the Caribbean but it was always a problem in Africa. A defendant acquitted after a trial or freed on a successful appeal may almost immediately on his release be arrested as a threat to national security. The judiciary takes no part in the decision-making process as to whether or not a state of emergency does exist or whether the person so detained is indeed a threat. Acceptance of the need for the exercise of such a power was a condition of survival in many newly independent countries. The need for it could be understood. Full implementation of the Basic Principles will, however, require tight restriction on the exercise of such power.

Article 6 also seems to me most important. It requires the judge himself or herself to respect and apply the principle of fairness. Implicit also in this principle is the duty to behave correctly towards members of the legal profession and to permit them, within the rules, to present fully the cases, of their clients, however unmeritorious they may appear to be.

Article 7 on the need for adequate resources requires little comment. Too often, however, the position of the judiciary as independent of the executive, reduces the effective influence of the judiciary in the preparation and presentation of its budgetary needs. This depends heavily on the mediatory role of a minister of justice or some official performing such a function. My experience has been that funding for the judiciary has a low political priority.

The articles on freedom of expression and association appear to me fundamental though that aspect of judicial independence is often overlooked. The capability of judges to be the propagandists of the cause of the independence of the judiciary has seldom been fully explored. The

nature of judicial work, particularly first instance work, where most judges begin, tends to make judges individualistic in their approach. The need for joint discussion of difficulties and the formation of joint approaches to the resolution of problems is vital. I learnt this lesson early in my judicial career when, under the leadership of the late Sir High Wooding then Chief Justice of Trinidad and Tobago, the judges struggled successfully for substantially improved pay and pensions and for securing the ranking of the Chief Justice in the order of protocol as next to the Prime Minister instead of after all the Ministers where he had been placed.

Questions of qualifications, selection and training are dealt with in articles 10, 11 and 12. Article 10 highlights the difficulty by stating broadly without particularising that "any method of judicial selection shall safeguard against judicial appointments for improper motives". The reference to "motives" emphasises the importance of the integrity of the appointors. Increasing the number of persons involved in the selection process can serve to achieve a balancing of interests thus ensuring that no dominant interests prevails – though this does not necessarily follow. Judicial and Legal Service Commissions can turn out to be facades behind which politicians carry on their manipulations. An appointment directly by a politician can be more salutory in so far as his responsibility is plain and he may be forced to take into account the consequences of plainly being partisan.

Experience indicates that too often the problem is that the pool of candidates available for selection is so restricted. Members of the Bar seeking to meet what they consider to be their legitimate financial needs do not offer themselves for appointment to the Bench. The consequence is that the Bench by default is staffed by persons who fail to command the respect of their colleagues. An independent judiciary does carry the price that competent advocates should make the sacrifice which accepting an appointment to the Bench requires. The judiciary as an institution will only be respected when its members as individuals are accepted.

Conditions of service and tenure are dealt with in articles 11, 12, 13 and 14. They are non-controversial and need little comment. Paragraph 14 is particularly important as the assignment of cases is a sensitive task which

can have an effect on the decision of the case, quite apart from any question of influence or interference.

Clearly, judges must to some extent have immunity from suits against them personally for monetary damages, for improper acts or omissions in the exercise of their judicial functions. The breadth of such immunity can be a matter of disagreement. A case can be made out for making judges liable where it can be clearly proved that they acted out of personal malice. It could be argued that in such cases disciplinary action against the offending judge leading to his dismissal would be an adequate sanction. On the other hand there is a point in making the judge personally liable to further strengthen the barriers against malicious abuse of judicial power.

An important element of security of tenure, which is the foundation of judicial independence, is the provision for the determination of a charge against a judge and the assessment of a penalty where guilt is established. In the British Caribbean the procedure usually requires the setting up of a commission of inquiry made up of judges of superior courts either serving in the Commonwealth or retired. The Chief Justice has to be consulted on the appointments, which are made by the Head of State. We have avoided Parliamentary involvement since experience has been that legislatures under the whip of party discipline have generally proved compliant to the wishes of the party leader. The issue can only be framed broadly as in the Basic Principles. The actual mechanisms must take into account the reality of the political culture. The aim is clearly to ensure that no judge is dismissed or suspended unless it is proved that he or she is incapable of performing the duties of office or has behaved in a manner which renders him or her unfit for office.

Except in Guyana, there is an appeal from the Tribunal to the Privy Council. This would be generally regarded as an appropriate review.

The Basic Principles should, of course, be read as supplemented by the draft Procedures for their effective implementation now before the Economic and Social Council.

Of great importance is the dissemination of the Basic Principles and the requirement of quinquennial reporting. This should make clear that the strengthening of the Independence of the Judiciary is a matter of concern to the executive arm of government as well. The requirement of a quinquennial review will also compel examination of the state of judicial independence. Associations of lawyers and other persons connected with the administration of justice will have an opportunity to focus representations on areas where there are deficiencies within a framework of international law.

The Basic Principles should be of assistance to the CIJL in that they provide an accepted norm of international law to apply in the determinations it makes as regards its interventions when complaints are submitted.

Procedure 6 requires the promotion of seminars and courses at national level to emphasize the role of the judiciary in the society and the necessity for its independence. Associations of lawyers can organize such seminars. Judges should participate. The fact is that respect for the judiciary can lead to a failure to voice complaints against the judiciary in cases where it has failed to adhere to the highest standards or at least where it is not clear that it has done so. A seminar could offer an opportunity for the voicing of such complaints and for a reasoned response. It will also tend to ease that sense of aloofness which attracts attacks.

I have not sought to provide a textual examination of the Principles. The fact is that they have been accepted. They are vague and from a practical point of view they would hardly have been agreed upon had they been more precise. They do, however, provide a framework on which can be built a sound edifice.

THE INDEPENDENCE OF THE LEGAL PROFESSION – PROBLEMS, PRESSURES AND EXPECTATIONS

by F. S. Nariman[*]

All of you will have reached this beautiful city by air. On the trip you possibly encountered patches of rough weather high in clear skies – the sort of weather an airline pilot cautions passengers to expect at high altitudes: in aeronautical terms, High Altitude Turbulence.

The legal profession – in most parts of the world – is at present passing through a similar phase; a patch of "High Altitude Turbulence" an unsettling disturbance caused by the extreme pressure of public expectation about the role of the legal profession, and the apathetic response of its members; their incapacity to perform as expected of them.

In an article written many years ago in the centennial edition of the Boston University Law Review, Dean Erwin Griswold (a former distinguished Solicitor General of the United States) lamented that the legal profession enjoyed increasing disrepute and faced a most uncertain future without sufficient organised leadership from the Bar or the Bench. He felt that the members of the profession could not move the system in new direction to meet the needs of the people whom it should serve. The legal system, he said, was in a state of great crisis victimised by its size and complexity. He concluded in these words:

> "In the last hundred years everything in this world has changed dramatically and explosively except the legal system and the legal profession. It cannot as a result be expected that either will survive the next hundred years without substantial change. The quality and the effectiveness of such change will depend in large measure upon our response."

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[*] Former Solicitor-General of India.

A couple of years ago Mr. John Kaplan a professor at the Stanford Law School put the case even more bluntly – he asked himself why people hate lawyers? And answered it by saying that it was due to the personality traits that identify lawyers – "aggressiveness and the ability to manipulate". People associate lawyers with unpleasant events like divorces, murders, rapes, traffic accidents and the like; reasonable people find it shabby that someone will take up either side of the question and argue it for money. Lawyers are hated, says Kaplan, because lawyers interfere with what people and governments want to do. All this is no exaggeration. In some countries members of our profession are so hated that they have legislated them out of existence. Libya is an instance in point, where the legal profession stands abolished.

The ancient Chinese Emperors took the view that litigation being evil, the system of Imperial Justice should be made hateful rather than beneficial. One of these Emperors was quoted as saying:

> "I desire that those who have recourse to the tribunals be treated without any pity and in such a manner that they should be disgusted with the law and tremble to appear before a magistrate".

The present Lord Chancellor of Great Britain whilst commenting on legal aid schemes, not long ago, spoke in the same vein:

> "I hope that no one will ever come to think that by introduction of schemes of this kind litigation can ever be said to be a good thing. It is, in its nature, an evil, a concession which we make to the follies and wickedness of mankind; it can never be anything else".

It is not surprising then that over the centuries we men and women of the law have had a bad press. It is inherent in our traditional role as intermediaries in (what we call) the administration of justice; what Lord Hailsham describes as "the follies and wickedness of mankind". We appear for one party against another – and are therefore regarded necessarily as partisan. We do not argue a case because we believe in it, but because we are engaged by a client. Unfortunately, even in this

traditional role, we have not gained much kudos. And this is where I come to my first point.

Every practising lawyer must realise the nature of the functions he is expected to perform – that he is something more than the fuel in the engine of the law. The practising lawyer functions as a catalyst between those who judge and the vast majority of those whose cases are to be judged. A catalyst, as you know, is an agent which causes activity between two or more forces without itself being affected. Though his functions have vastly varied, this is a lawyer's main function. A lawyer can fulfil this function only if he is efficient and honest. Each attribute is as important as the other. An inefficient but honest lawyer is not much use either to his client or to society. An efficient but dishonest one is positively dangerous.

The principal form of dishonesty – which clogs up the system is fostering litigation for the sake of litigating.

To be of use to society – especially in a developing country like yours and mine – a practising lawyer must first be *efficient*: he must have and profess to have *competence*. An efficient lawyer can and often does make a great contribution to the development of the law. And the law in turn develops when it responds to the needs of society. But the development of the law is achieved only with enlightenment. This requires an enlarged acquaintance with human nature. A lawyer, it is said, never stops learning. If he is to serve efficiently he must be proficient in what he practises and the practice of law requires – in fact demands – an awareness and knowledge of a vast array of events and things. The object of the study of law, as Holmes pointed out, is *prediction*, the prediction of the incidence of public force through the instrumentality of courts. Lawyers are able to fulfil this function if they have the equipment – the mental and intellectual equipment – to predict how the judge (the public force) will react to a given set of facts and circumstances. That is why the law is a profession and people pay lawyers to advise them and argue cases for them in court. The lawyer more than his brethren in the other professions, must be equipped in what (for want of a better expression) is known as "significant learning" – learning which is more than a mere accumulation of facts, learning which makes a difference in the individual's behaviour in the

course of action he pursues, in attitudes, in approach, in personality. Correct advice at the right time obviates litigation. After all, as an English Judge said not very long ago: "Litigation is an activity that does not markedly contribute to the happiness of mankind, though it is sometimes unavoidable". Avoiding needless litigation and advising against it is what modern society expects from its lawyers.

Way back in 1859 there was an enactment of the State of Jersey describing those it would enrol as members of the Bar. The Act is of ancient vintage but it can do with an airing – it is still relevant in the last fifteen years of the 20th century. It is reproduced in Vol. 13 Moore's Privy Council Cases (1959). The traditional function of the lawyer has not been stated more clearly or with greater brevity than in the preamble to the Act of 1859:

"PREAMBLE: Considering that the interest of justice require admission at the Bar of all those who offer substantial guarantees of capacity;
And that the monopoly of the profession of advocates is limited by considerations other than those of capacity is a bar to intellectual emulation, indispensable to the useful exercise of that profession;
And that the profession of advocates being a public function depending above all on the confidence of suitors it behoves that the public be not exposed to place the protection of its interests in the hands of those who cannot show proofs of *"undoubted special capacity"*.

Undoubted special capacity – that is what is expected of the legal profession; only substantial guarantees of capacity will inspire the confidence of litigants.

Till recently, in the developing countries, we were still in the realm of dispute – handling, advising, litigating, arbitrating. We have been reluctant to take over new functions. But, the second half of this twentieth century has made great demands on the legal system – it calls for new approaches and fresh responses. Even for the traditional functions lawyers are needed principally because law makers have not the time to think or reflect and

produce, more often, complicated law rather than simple law – complicated law is a challenge to lawyers – to be better equipped than before.

Procedures once adequate no longer yield results. Lawyers are out of their depths, their concepts out of touch, their techniques ineffectual. Sociologists, philosophers, economists, environmentalists, ecologists and politicians have sensed some of these dangers and prepared for them. Lawyers have been slow to do so, hampered by outdated concepts and methods.

The transition from the role of the slumbering Sentinel to the Sentinel on the *qui vive* is difficult and arduous. But if the profession as we know it is to survive – if the Draft Principles on the Role of Lawyers is to have real meaning and effect, we all must awaken to the realisation that those who need our help and tap our competence must not find us waiting.

The Secretary-General of the Commonwealth sent a message to a Conference of Lawyers from South and South-East Asia, a couple of years ago, in which he reminded the participants that they were heirs to a noble tradition of "intellectual inventiveness"; a nice, well-rounded phrase of great relevance to the lawyer practising in the second half of this decade. The lawyer of today has to meet and contend with challenges beyond the law: challenges also to his traditional role as an intermediary between his client and Courts of justice. Many decades ago, when the then Chief Justice of Australia, Sir Owen Dixon was asked whether it was any part of the duty of a lawyer to contribute towards the progress of society, he said that it was not – the duty of a lawyer (he said) was to keep a hand on and hold steady the framework and foundations of the law. But that was long long ago.

The quickening pace of technological advance and a new sense of service and duty to society has now replaced the old ideal. In the post-war years (the fast changing period after the Second World War) lawyers have been in the vanguard of progress, in the frontline of freedom movements.

We are feared – that is an occupational hazard of recent occurrence. It is also our badge of fame. It is because of their fearlessness that lawyers are

harrassed and persecuted in many parts of the world today – read the recent issues of the ICJ Review and the CIJL Bulletin: innumerable incidents of tyrannical Governments' conduct.

Sometimes the law itself inhibits the freedom of the legal profession and seriously prejudices its independence – this in turn necessarily affects the judiciary. Take the Law of Sedition, not as understood in my country (and I hope not as understood in yours) but as prevailing in a South Asian country in the LAWASIA region.

At the end of 1985 a distinguished lawyer in Malaysia, the Vice-President of its Bar Council was prosecuted for Sedition under the Sedition Act of 1948.[1] His offence: In an open appeal to the Pardons Board (a body which advises the Malaysian Head of State on petitions for clemency) he asked them to reconsider the petition of one Sim Kai Chou for commutation of his death sentence. Sim, a poor man, had been charged for possession of a firearm. He had no licence for his gun but he had not used it – he had not killed or injured anyone. He was not a terrorist nor was he involved in any subversive activities. He was tried under the Internal Security Act, and being guilty of possessing a gun, had to be awarded the mandatory sentence of death. Sim approached the Pardons Board for clemency but his plea was rejected. The Vice-President of the Bar Council of Malaysia contrasted the refusal of the Pardons Board to accept Sim's plea for clemency with the case of Mokhtar Hashim (who was an important person). This man was found guilty of discharging a fire arm and killing another. He was charged and tried under the Security Cases Regulation, given a light sentence, which on a representation to the Pardons Board was commuted. In the course of contrasting the case of Sim with that of Hashim, the Vice-President of the Bar Council of Malaysia said:

> "What is disturbing and will be a source of concern to the people is the manner in which the Pardons Board exercises its prerogative... On records before the Courts Sim's case certainly was less serious than Mukhtar Hashim's case; yet the latter's sentence was commuted. The

1 See CIJL Bulletin No. 00.

people should not be made to feel that in our society today the severity of the law is meant only for the poor, the meek, and the unfortunate, whereas the rich and powerful and the influential can somehow seek to avoid the same severity".

These words were alleged to be seditious and punishable under the (Malaysian) Sedition Act of 1949. Whether they are is not the point. The lawyer had to stand trial and, was ultimately acquitted, by a High Court Judge. What is alarming is that a person who was in the position of the Vice-President of the Bar Council of a country – could not freely express his opinion on a question of public importance. The case is an example of enacted law (inappropriately enforced) tending to suppress a free and frank expression of views. It is also an example of what an independent judiciary can do to foster freedom – and what independent bars around the world can do to help.

Without a free, fearless and independent bar, the judiciary would soon cease to be independent. A free legal profession and an independent judiciary go hand in hand. Laws which suppress the freedom of lawyers (and other citizens) to freely criticize their government – or even tend to do so – are a grave threat to the independence of the legal profession. And since in many countries it is the Bar which supplies the judges, necessarily a threat to the independence of the judiciary.

In the developing countries of Asia where state action dominates almost every field of activity and the levels of tolerance are always at the danger point, there is a feeling that the judiciary – which adjudicates without fear or favour between citizens and between citizen and State – is an unnecessary evil. This feeling is engendered even in those countries with a written Constitution and with virtually unlimited judicial review – like India. But we tend to stand up to it, and have so far succeeded.

We in India are fortunate. We have a written Constitution and an independent judiciary – the wrongs felt by a section of the people (small or large) are ventilated in courts and the courts do grant relief (substantial relief) against the State: the innovation of Public Interest Litigation has further accelerated this trend. For this new vista it would be unfair to name

one man – but there is one man who must take credit and it is the former Chief Justice of India (Mr. Justice Bhagwati). But let us face it – there are countries in the world – they are not few – where the conditions mentioned by a senior diplomat in El Salvador obtain and persist:

> "Ask anyone here how many people have been tried and convicted for any political crime – murder, kidnapping, arson, bank robbery. You will find the number is zero because no judge here has the courage to try anyone, be he left, right or centre. They know that if they do they will be killed. Justice here simply does not function any more. Since the violence began there is no example of the judiciary system functioning except in occasional cases of petty no political crimes, crimes such as larceny and pickpocketing."

There are countries in many continents including South America where under the plea of emergency, human rights provisions are suspended – even countries which have ratified the Covenant on Political Rights are enabled to take advantage of the so-called national safety clause: Art. 4. (it is really a national escape clause). In some of these countries States of Emergency have been institutionalised – in Paraguay for instance (where the State of Emergency had not been lifted since 1929 – and was only lifted very recently) and in Chile (to mention only two of them).

The lawyer of today has a vast role to play. You might almost say the world is his dominion. In the international field when consensus is required for any branch of activity – human rights, problems of land and sea frontiers, extra-territorial claims – it is lawyers who occupy the front seats. Even when national issues are at stake, people watch to see the stand that lawyers take. An explosion in a coalmine, a riot killing several people, a plane-crash, a collision at sea, corruption amongst officials – all these instantly evoke in the public mind a *judicial* enquiry. Let a judge – again a legal professional – look into it, they say.

I for one, am not pessimistic of the importance of the future role of the lawyer in society. But there are difficulties that have to be watched. For instance, if enquiries by judges take too long and are too legalistic, they sap public confidence. If this is repeated too often, the public will soon

say – "Let us have an enquiry but for God's Sake, not by a Judge". That would be a sad day for the profession, but we will not be able to blame society for the verdict.

The remedy lies in vigilance. If eternal vigilance be the price of liberty, it is also the price we must pay for maintaining and enhancing the usefulness of the legal profession to society.

THE INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION: THE DRAFT UNITED NATIONS BASIC PRINCIPLES ON THE ROLE OF LAWYERS – A CARIBBEAN PERSPECTIVE

by Dr. Lloyd Barnett[*]

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 the 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 than 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.

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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 who have at times been seen as exploiters of the ignorant rather than defenders of the weak. It is therefore of great importance that basic principles should be established for the protection of lawyers against undue interference in the discharge of their legitimate functions as well as that rules governing the conduct of lawyers should be laid down to ensure the maintenance of fair practices and ethical standards.

It is therefore of utmost significance that attempts are being made to establish internationally recognized and accepted norms respecting the role of lawyers in their communities. The United Nations Draft Basic Principles on the Role of Lawyers approved by the Committee on Crime Prevention and Control 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 terms of this Draft are complimentary to the provisions of the United Nations Basic Principles on the Independence of the Judiciary. As the effectiveness and fairness of the machinery of justice depend on the strength, capacity and cohesion of the judiciary and the legal profession, it is essential to make provision for both elements of the system.

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 which neither in its formulation nor in its exposition can the legislative or executive organs easily exercise control or give directions. In

the Commonwealth Caribbean the judiciary has been to a large extent 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, it nevertheless has an important role with respect to all four factors. The United Nations Draft recognizes the relevance and importance of these factors and the critical role which lawyers must play in securing the objectives.

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 discriminates against individuals or groups, 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 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 Draft makes an important statement to the effect that:

> "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."

This objective is accepted in the English-speaking Caribbean. At the CIJL Seminar on the Independence of Judges and Lawyers held in Tobago in September, 1988 one of the concluding recommendations of the participants was that "Lawyers and Bar Associations should promote legal literacy among the public, including an awareness of constitutional rights and available remedies".

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 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 Caribbean Council of Legal Education and an indigenous system of legal education for the English-speaking countries of this Region, 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 provisions of the Draft.

Judicial appointments

In the Caribbean the legal profession has in one respect failed to make a sufficient contribution to the judicial selection process. 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 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 ideal expressed in the Montreal Universal Declaration on the Independence of Justice (see CIJL Bulletin No. 12) 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".

Terms and conditions of judicial service

Our Constitutions generally give effect to principles of security of tenure and remuneration to which the Basic Principles subscribe. 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 themselves have to negotiate with politicians about their own terms of service. In some cases judicial terms of service, though secured against diminution 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 the Government to establish a mechanism 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 administration of justice is dependent on how the nation is perceived as evaluating 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.

Interdependence of Bench and Bar

As demonstrated in the preceding paragraphs 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 of an attorney-at-law are defined as including the following:

(1) "An attorney shall act in the best interest 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
(2) "An attorney has a duty to assist in maintaining the dignity of the courts and the integrity of the administration of justice".

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 costs, although the same

case resulted eventually in two powerful dissenting Opinions in the Privy Council in favour of the advocates' submission.

The freedom of lawyers from undue interference

A legal profession which is controlled, manipulated or intimidated by politicians cannot effectively carry out its duty of sustaining the independence of the administration of justice. As a corollary of this, 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 Resolution adapted at the 7th U.N. Crime Congress and approved by the General Assembly on the Role of Lawyers recognizes that adequate protection of the rights of citizens requires that all persons have effective access to legal services provided by the lawyers who are able to perform effectively their proper role for the defence of those rights, and to counsel and represent their clients in accordance with the law and their established professional standard and judgment without any undue interference from any quarter. It recommends that "member States should provide for the protection of practising lawyers against undue restrictions and pressures in the exercise of their functions".

Our Commonwealth 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 clients' 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, neither providing comfort nor confidentiality. It seems that the

Draft could usefully deal more directly with these practical and everyday but critically important matters.

Access to lawyers is also restricted by the rules relating to admission to Bars and the obtention 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 postulates, 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 which adjudicate in disciplinary matters, so as to avoid the appearance of mutual self-protection in such cases. Further, the legal profession should implement effective measures for educating the public in the responsibilities and obligations of the profession and the legal rights which clients have against their lawyers. Assistance should be given to the layperson in the formulation and presentation of his complaints against lawyers and the disciplinary procedures should be fairly and expeditiously carried out.

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.

DEVELOPMENT AND THE INDEPENDENCE OF THE LEGAL PROFESSION

*by Chris de Cooker**

Introduction

As one of the cornerstones of its policies and activities, the International Commission of Jurists has been advocating the adoption, on a world-wide level, a definition of the legal profession's (judiciary and practicing lawyers) role and the protection of its independence. The ICJ and the Centre for the Independence of Judges and Lawyers have organised and co-sponsored several conferences, often at regional level, on this issue. Many conclusions and recommendations resulted from these conferences and seminars, which, in their turn, had a major influence on the establishment of the United Nations Basic Principles on the Independence of the Judiciary and the Draft Basic Principles on the Role of Lawyers. It suffices here to refer to these recommendations and principles and to the contributions on the matter for this conference.

As a second cornerstone of its policies and activities, the ICJ and its sections have been advocating an integrated human rights policy, emphasising the interrelationship between civil, political, social, economic, and cultural rights, in particular in relation to, but not limited to, (rural) development. Development, especially in rural areas, requires a framework for the application of integrated human rights policies. The legal profession has a special role to play within this framework.

In this contribution I will discuss the need for independence for all those working within that framework and its protection.

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The Role of Lawyers

The preamble of the Draft Basic Principles on the Role of Lawyers provides, inter alia, "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."

Indeed, access by all persons to legal services is essential for the protection of human rights and the Draft Basic Principles provide adequate guarantees.

Nowadays, it is, on the other hand, well recognised that the legal profession must not limit itself to providing the services of counselling and representing clients. Lawyers also have the responsibility to educate the public on law. Lawyers must assist in programmes to educate and inform the public about their legal rights and duties and the relevant remedies. These services must, moreover, be available to all citizens, and, in particular, to those in need of them, i.e. in the deprived sectors of the community. This concept is, for example, laid down in principle 30 of the Noto Draft Principles on the Independence of the Legal Profession, which provides: "The provision of legal services for the poor and disadvantaged goes beyond legal representation before the courts, and includes educating and counselling them as to their rights, and the ways to assert and secure them. One means of achieving this is for lawyers to cooperate with organisations working in deprived communities, informing them about relevant laws and procedures by which the members of these communities can assert their rights and, where necessary, call upon the assistance of lawyers".

It goes without saying that Bar Associations also have a role to play. They should, in addition to their "classical" functions, be increasingly involved in the continuing legal education and training of practicing lawyers, in public education, and in rendering legal services to people living in the rural areas, and in particular to those who are defending and implementing the rights of these people.

As was already recognised in the 1981 ICJ Conference on Development and the Rule of Law, "the enjoyment of the totality of human rights calls for the organisation and mobilisation of the poor in developing countries for self-reliant development. Mobilisation and organisation provide the most effective means whereby the poor are enabled to marshall resources, to protect their rights and assert their interests..."

Law and legal resources are essential in this respect. In the first instance, the legal profession has to take away the basic mistrust felt among the poor. The latter have to be convinced that human rights and the rule of law are distinct from the "official" law, which so often contributed to their impoverishment and that these are indeed instruments of equity, progress and change.

Legal resource groups then are "those which seek to enable people, themselves, working collectively, to understand law and use it effectively to perceive, articulate and advance or protect their interests".[1]

To this effect "different groups should be identified and trained as para-legals. These groups would include community workers, religious workers, law students and community leaders. There can be different levels of general legal training suited to the needs of the different groups of para-legals. This can be combined with in-house and on-the-job training for field workers... Initially, there may be a need for lawyers to maintain a physical presence at places of crisis but this can be gradually reduced as para-legals gain confidence. Thereafter lawyers can support the para-legals through further training and advice".[2]

The additional role for lawyers outlined in these few paragraphs should be laid down more clearly in the Draft Basic Principles on the Role of Lawyers. One could do so by inserting a clause, for example, which follows the lines of Principle 30 of the Noto Draft Principles quoted above.

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1 Jakarta seminar, ICJ Newsletter, No. 32, p. 46.

2 Idem, p. 50.

The independence of lawyers and para-legals

The Draft Basic Principles on the Role of Lawyers correctly emphasises the independence of lawyers as a prerequisite for their proper functioning and a number of guarantees are outlined in principles 11-16.

It is obvious that without these guarantees lawyers cannot fulfil their role as outlined in the same text. It is also clear that lawyers require the same independence when fulfilling the additional roles and functions outlined above in this contribution.

Also, the para-legals must be able to enjoy an independence necessary to execute their tasks properly. It is underlined that these tasks are the corollary to the role of lawyers and are after all a means for the legal profession to fulfil its role. It should be examined then to what extent the guarantees given in principles 11-16 can be applied mutatis mutandis to the para-legals.

It also goes without saying that the para-legals must at all times act in accordance with the law (Principle 11). It may indeed be appropriate to establish guidelines for professional standards and ethics. In several countries, for example the Netherlands, such codes already exist with respect to social legal aid programmes, which are executed by para-legals (social workers and law students). In these cases, the governments, who are often providing subsidies, ensure that the para-legals are able to perform their functions without hindrance or improper interference (Principle 12).

To enable them to provide effective assistance, the para-legals must have access to appropriate information, files and documents in the possession or control of (local) authorities (Principle 13). Communications and consultations between the para-legals and their "clients" must be confidential (Principle 14).

Lastly, it should be established that para-legals shall not suffer, or be threatened with, prosecution or sanctions for any action taken in the proper exercise of their role.

It may, in conclusion, be interesting to note that a working group of the United Nations Commission on Human Rights is preparing a draft declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally-recognized human rights and fundamental freedoms. The draft will contain a chapter which is, provisionally, entitled "the right to be protected in the exercise, assertion and promotion of one's rights and those of others, and to have recourse to effective remedies in the event of violations of those rights".[3]

3 See UN Doc. E/CN.4/1988/26.

RAPPORTEURS' SUMMARIES

I. PRESSURES ON THE JUDICIARY

The Rapporteur, Mr. Justice Dorab Patel, summarized the discussions in the following paragraphs:

1. An independent judiciary is the firmest guarantee of the maintenance of the rule of law and the protection of human rights.

2. The independence of the judiciary can only be secured if all concerned, whether judges, magistrates, lawyers or the public in general, are committed to sustaining free and democratic institutions.

States of Emergency

3. States of emergency pose serious problems for the independence of the judiciary. When wide powers are given to the executive, the armed forces or the police, they should be subject to strict controls to ensure that the powers are used only for the purpose for which they are introduced. The judiciary should be free to review executive actions and to ensure that emergency measures do not go beyond what is required in the circumstances. States of emergency should be governed by the principles of necessity and proportionality. These principles should form the framework for deciding the legality of the declaration, and the continuance of the state of emergency, as well as of particular pieces of legislation or particular acts taken during the state of emergency. An independent judiciary is necessary to ensure that these principles are followed.

4. Pursuant to article 4 of the International Covenant on Civil and Political Rights, certain fundamental rights are deemed to be non-derogable even in times of emergency. While the right to due process of law and the right to be heard before an independent tribunal are not expressly contained among these non-derogable rights, it is increasingly obvious that the effective enjoyment of non-derogable rights rests upon the availability of

essential judicial guarantees. In this respect, account should be taken of Advisory Opinions OC-8/87 and OC-9/87 of the Inter-American Court of Human Rights holding that "essential" judicial guarantees which are not subject to derogation include *habeas corpus, amparo* and any other effective remedy before judges or competent tribunals which is designed to guarantee the respect of the rights and freedoms guaranteed in the Inter-American Charter.

Violent changes of government, de facto regimes

5. As guardians of the rule of law and of the constitution, judges should always protect and uphold the constitution and not permit, justify or condone its abrogation or suspension by resort to doctrines inconsistent with the rule of law.

6. In accordance with the Basic Principles on the Independence of the Judiciary (art. 3), it is the province of the judiciary to decide which issues are within its competence as defined by law. Consequently, the judiciary always has the responsibility to decide upon the legality of acts of the executive, such as the suspension of constitutional guarantees, the curtailment of the judiciary's jurisdiction and the introduction of martial law. In reviewing such actions, the judiciary shall, as far as possible, act in unison and take into account the relevant principles of international law, including the obligations which states may have contracted pursuant to article 4 of the International Covenant on Civil and Political Rights.

7. While the attitude of the judiciary to violent or extra-constitutional change of government must depend on the conscience of the judges and the circumstances of each case, that attitude should be informed by an attachment to the rule of law. When a democratic government upholding the rule of law is overthrown, judges should presumptively refrain from collaborating with or lending legitimacy to the usurper regime.

8. Courts have no coercive power to enforce judgments against the government except through the pressure of public opinion. The public however, will not come to the support of the judiciary where it is seen as a slow, expensive or corrupt mechanism for protecting entrenched interests

rather than as a vehicle for the enforcement of fundamental human rights. Therefore, a most important task is to build up public opinion for the independence of the judiciary. This must be done, *inter alia*, through public education, national, regional and international seminars and, particularly, through the performance of the judiciary in upholding the rule of law.

II. THE INDEPENDENCE OF THE LEGAL PROFESSION

The rapporteur, Mr. Kofi Kumado, summarised the discussion in the following paragraphs:

1. The existence of a free, fearless, independent but responsible and responsive legal profession is essential for the preservation of the rule of law, the development of society and the effective protection and promotion of human rights. It is indispensable to an independent judiciary and the institutionalisation of a system of administration of justice which is effective, equitable, accessible and just.

2. In order to retain public confidence and maintain its independence, the legal profession must act and be seen as acting for the common good rather than only in its own narrow pecuniary interest. Consequently, it is incumbent on the profession to widen access to legal services by:

a) Participating actively in programmes designed to simplify the law and legal procedures.
b) Cooperating with other organisations working in deprived communities and developing alternative legal services (e.g. para-legal schemes).
c) Instituting schemes, within the financial possibilities, for the provision of competent legal services, if necessary without charge, with a view to ensuring that these services will be available to all in need of them.

3. The legal profession has a special obligation to maintain and defend the rule of law and the creation of a climate of respect for law and legal institutions. To this end, lawyers must refuse:

a) To co-operate with the public authorities when they act in violation of the rule of law and human rights.
b) To assist or participate in the drafting or implementation of laws which violate human rights norms or which undermine the rule of law.

4. It is the duty of lawyers and bar associations to establish education programmes for the general public as well as for government officials and legislators to create awareness of the importance of an independent legal profession to society.

5. While ultimately threats to the independence of the legal profession can only be effectively dealt with at the local level, the utility of solidarity with a threatened bar association or a harassed lawyer should be recognised. Accordingly, the existing mechanisms for mobilising national and international public opinion should be strengthened and co-operation between various lawyers associations for supportive action should be put on a more formalised basis. In this respect, bar associations should consider ways in which they can participate more effectively in the activities of the CIJL. Further, the use of regional meetings to devise ways of strengthening solidarity with harassed lawyers should assume increasing importance in the programmes of the CIJL.

6. It is also the duty of the legal profession to ensure, by pressure if necessary, that the competent authorities give lawyers access to their clients at all reasonable times, and to appropriate information, documents and files to enable the lawyers to provide effective legal services to their clients. Taking into account the diversity of existing legal systems, such access must be provided at the earliest stage where proceedings have been set in motion by the public authorities against the client.

7. Bar associations should institute programmes of continuing legal education for practising lawyers. Such programmes must emphasize,

where appropriate, the special legal services needs of people living in rural communities and include the training of para-legal personnel to inform them of their legal rights and help to secure them.

8. Bar associations must ensure that an adequate and effective machinery for the discipline of members of the legal profession is established in their respective countries. While retaining effective control of the disciplinary apparatus, bar associations must ensure participation therein by members of the public.

9. Disciplinary measures should be taken against those lawyers who assist in the elaboration of repressive laws, the harassment of other lawyers and the legal profession generally or who by their active connivance encourage, participate in or engage in other acts which undermine the observance of the rule of law.

10. Bar associations and lawyers should work actively for the adoption of the Draft Basic Principles on the Role of Lawyers by the United Nations and, when adopted, they should institute mechanisms for monitoring their observance within the framework of national legislation and practice. In this regard, the monitoring role which the CIJL plays is especially important.

III. IMPLEMENTATION OF THE U.N. PRINCIPLES

The Rapporteur, Mr. Justice Giovanni Longo, summarized the discussion in the following paragraphs:

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

2. A positive step towards implementation of the Basic Principles is the endorsement by the U.N. Committee on Crime Prevention and Control at its Tenth Session of the Draft Procedures for their Effective Implementation. These Implementation Procedures provide for states to

publicize the Basic Principles, translate them into the main language or languages of the country, and make the text available to members of the judiciary. In addition, they provide for regular U.N. reporting procedures for monitoring their implementation. States are urged to ensure that the Draft Procedures are adopted by the U.N. Economic and Social Council at its first regular session in 1989.

3. States which have not yet done so should reply to the Secretary-General's questionnaire of 31 December 1987 on the implementation of the Basic Principles.

4. In addition to the reporting procedures already envisaged, complaint procedures for violations of the Basic Principles should be established. The appointment of a U.N. Special Rapporteur to receive such complaints as well as prepare reports on the independence of judges and lawyers is one possibility to be considered, as is the establishment of regional mechanisms.

5. The Basic Principles should form part of the curriculum in the institutes or academies for the training of judicial officers and the draft Basic Principles on the Role of Lawyers, should be included in curricula of law schools.

6. There should be periodic seminars of judges at the national and regional level for discussing the Basic Principles and inculcating in the minds of judges the imperative necessity for maintaining judicial independence. The judges may also discuss at these seminars what pressures and obstacles they are facing in regard to judicial independence and how they can be overcome. The exchange of ideas may tend to produce unity amongst judges and help them to strengthen their resolve to maintain judicial independence.

7. There should, where useful, be joint national or regional conferences of the Bench and the Bar for discussing pressures on and obstacles to the independence of the judiciary.

8. 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 should support their adoption and, if possible, their strengthening by the Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

9. The draft Basic Principles on Role of Lawyers should be circulated to all international, regional and local bar associations with a view to eliciting their comments and suggestions.

10. Maximum support should be given to the action taken by the U.N. Human Rights Committee, the Commission on Human Rights and its Sub-Commission, as well as the Committee on Crime Prevention and Control, for the protection of the independence of the judiciary and the legal profession.

CARACAS PLAN OF ACTION

Considering the mission of the International Commission of Jurists (ICJ) to uphold the principles of the rule of law, the independence of the judiciary and human rights,

Considering the establishment by the ICJ of the Centre for the Independence of Judges and Lawyers and the work of the Centre,

Considering the summaries of discussion presented by the three rapporteurs of the Conference,

The participants *adopt* by consensus the following Plan of Action:

I. Action in the area of standard-setting

The International Commission of Jurists, its National Sections and Affiliated Organisations are requested to urge Governments:

a) To support and, where necessary, to strengthen the United Nations Draft Basic Principles on the Role of Lawyers with a view to their adoption by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990 through its regional preparatory meetings in 1989;
b) To support and, where necessary, to strengthen the Draft Procedures for the Effective Implementation of the United Nations Basic Principles on the Independence of the Judiciary with a view to their adoption at the May 1989 Session of the United Nations Economic And Social Council;
c) To take constructive measures at the 45th session of the United Nations Commission on Human Rights (February-March, 1989) regarding the Draft Declaration on the Independence of Justice.

II. Measures in the field of implementation

1. The International Commission of Jurists and its Centre for the Independence of Judges and Lawyers are requested:

a) To undertake, where possible with the co-operation of the ICJ National Sections and Affiliated Organisations, and other parties concerned, country studies on the extent to which international standards on the independence of justice and in particular the United Nations Basic Principles on the Independence of the Judiciary are implemented, as well as on obstacles with regard to their implementation;

b) To seek ways and means to assist governments to fully comply with international standards on the independence of justice and in particular the Basic Principles. In this regard the following methods should be utilized in line with the Draft Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary and in co-operation and consultation with the competent United bodies:

- rendering technical assistance and advisory services,
- promoting the appointment at the United Nations level, and where possible at regional levels, of a Rapporteur on the independence of the judiciary and the legal profession, establishing contacts and carrying out dialogues with governments,
- sensitizing national and international public opinion, to the importance of an independent judiciary and legal profession through all appropriate means of publicity, including the mass media,

c) To place renewed emphasis on intervening, by appropriate means, to protect judges and lawyers who are harassed or persecuted as a result of carrying on their professional duties including in situations where the institutional independence of the judiciary or the legal profession is threatened;

d) To provide the U.N. Human Rights Committee and the Special Rapporteurs of the U.N. Commission on Human Rights with

relevant information on the independence of the judiciary in countries under examination by them.

e) To continue its public education and promotional work through regional and national seminars on the independence of judges and the role of lawyers.

2. The United Nations is urged to offer assistance to governments in the implementation of international standards on the independence of justice and in particular the Basic Principles, by providing research and training programmes as well as technical assistance.

3. Governments are urged to respond, if they have not done so, to the United Nations Survey of 31 December 1987 on the implementation of the Basic Principles on the Independence of the Judiciary, to be presented to the United Nations Committee on Crime Prevention and the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

III. The role of the Centre for the Independence of Judges and Lawyers

The Centre for the Independence of Judges and Lawyers is requested:

a) To send the conclusions and recommendations of the Conference as well as the present Plan of Action to local, regional and international associations of judges and lawyers, including ICJ National Sections and Affiliated Organisations;

b) To initiate and implement the present Plan of Action and to act as a focal point in all matters concerning the independence of the judiciary and the legal profession.

ANNEX

UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

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

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 on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

"Whereas the organisation and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

"Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

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

"Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 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 laws 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 it 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 duly 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 or 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, whether 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.

ANNEX

DRAFT BASIC PRINCIPLES ON THE ROLE OF LAWYERS (A/CONF./144/IPM.5)

Recommended for endorsement of the Economic and Social Council by the Committee on Crime Prevention and Control (Draft Resolution XIV, E/1988/20) for submission to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990.

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 co-operation 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 proclaims, in addition, the right to be tried without undue delay and the right to a 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[7] 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 co-operating 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 its resolution 18,[6] 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[8] and of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities on the Draft Universal Declaration on the Independence of Justice,[9]

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 co-operate 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 number 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 of lawyers shall co-operate 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).
2) General Assembly resolution 2200 A (XXI), annex.
3) *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.83.XIV.1), section G.29.
4) General Assembly resolution 34/169, annex.
5) A/CONF.121/IPM.3, para. 34.
6) See *Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985: report prepared by the Secretariat* (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. E.
7) Economic and Social Council resolution 1985/50, annex.
8) A/C.6/42/L.12.
9) E/CN.4/Sub.2/1985/18/Add.5/Rev.

ANNEX

PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

Recommended by the Committee on Crime Prevention and Control
(Draft Resolution V, E/1988/20)
for adoption by the Economic and Social Council

Procedure 1

All States shall adopt and implement in their justice systems the Basic Principles on the Independence of the Judiciary in accordance with their constitutional process and domestic practice.

Procedure 2

No judge shall be appointed or elected for purposes, or be required to perform services, that are inconsistent with the Basic Principles. No judge shall accept judicial office on the basis of an appointment or election, or perform services, that are inconsistent with the Basic Principles.

Procedure 3

The Basic Principles shall apply to all judges, including, as appropriate, lay judges, where they exist.

Procedure 4

States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective country. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content

and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In particular, States shall make the text of the Basic Principles available to all members of the judiciary.

Procedure 5

In implementing principles 7 and 11 of the Basic Principles, States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to case-loads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, remuneration and emoluments.

Procedure 6

States shall promote or encourage seminars and courses at the national and regional levels on the role of the judiciary in society and the necessity for its independence.

Procedure 7

In accordance with Economic and Social Council resolution 1986/10, section V, Member States shall inform the Secretary-General every five years, beginning in 1988, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into national legislation, the problems faced and difficulties or obstacles encountered in their implementation at the national level and the assistance that might be needed from the international community.

Procedure 8

The Secretary-General shall prepare independent quinquennial reports to the Committee on Crime Prevention and Control on progress made with respect to the implementation of the Basic Principles, on the basis of the information received from Governments under Procedure 7, as well as other information available within the United Nations system, including

information on the technical co-operation and training provided by institutes, experts and regional and interregional advisers. In the preparation of those reports the Secretary-General shall also enlist the co-operation of specialized agencies and the relevant intergovernmental organizations and non-governmental organizations, in particular professional associations of judges and lawyers, in consultative status with the Economic and Social Council, and take into account the information provided by such agencies and organizations.

Procedure 9

The Secretary-General shall disseminate the Basic Principles, the present implementing procedures and the periodic reports on their implementation referred to in Procedures 7 and 8, in as many languages as possible, and make them available to all States and intergovernmental and non-governmental organizations concerned, in order to ensure the widest circulation of those documents.

Procedure 10

The Secretary-General shall ensure the widest possible reference to and use of the text of the Basic Principles and the present implementing procedures by the United Nations in all its relevant programmes and the inclusion of the Basic Principles as soon as possible in the United Nations publication entitled *Human Rights: A Compilation of International Instruments*, in accordance with Economic and Social Council resolution 1986/10, section V.

Procedure 11

As part of its technical co-operation programme, the United Nations, in particular the Department of Technical Co-operation and Development and the United Nations Development Programme, shall:

(a) Assist Governments, at their request, in setting up and strengthening independent and effective judicial systems;

(b) Make available to Governments requesting them, the services of experts and regional and interregional advisers on judicial matters to assist in implementing the Basic Principles;

(c) Enhance research concerning effective measures for implementing the Basic Principles, with emphasis on new developments in that area;

(d) Promote national and regional seminars, as well as other meetings at the professional and non-professional level, on the role of the judiciary in society, the necessity for its independence, and the importance of implementing the Basic Principles to further those goals;

(e) Strengthen substantive support to the United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other entities within the United Nations system concerned with implementing the Basic Principles.

Procedure 12

The United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other concerned entities within the United nations system, shall assist in the implementation process. They shall pay special attention to ways and means of enhancing the application of the Basic Principles in their research and training programmes, and to providing technical assistance upon the request of Member States. For this purpose, the United Nations institutes, in co-operation with national institutions and intergovernmental and non-governmental organizations concerned, shall develop curricula and training materials based on the Principles and the present implementing procedures, which are suitable for use in legal education programmes at all levels, as well as in specialized courses on human rights and related subjects.

Procedure 13

The regional commissions, the specialized agencies and other entities within the United Nations system as well as other concerned intergovernmental organizations shall become actively involved in the

implementation process. They shall inform the Secretary-General of the efforts made to disseminate the Basic Principles, the measures taken to give effect to them and any obstacles and shortcomings encountered. The Secretary-General shall also take steps to ensure that non-governmental organizations in consultative status with the Economic and Social Council become actively involved in the implementation process and the related reporting procedures.

Procedure 14

The Committee on Crime Prevention and Control shall assist the General Assembly and the Economic and Social Council in following up the present implementing procedures, including periodic reporting under Procedures 6 and 7 above. To this end, the Committee shall identify existing obstacles to, or shortcomings in, the implementation of the Basic Principles and the reasons for them. In this context, the Committee shall make specific recommendations, as appropriate, to the Assembly and the Council and any other relevant United Nations human rights bodies, on further action required for the effective implementation of the Basic Principles.

Procedure 15

The Committee on Crime Prevention and Control shall assist the General Assembly, the Economic and Social Council and any other relevant United Nations human rights bodies, as appropriate, with recommendations relating to reports of *ad hoc* inquiry commissions or bodies, with respect to matters pertaining to the application and implementation of the Basic Principles.

ICJ CONFERENCE ON THE INDEPENDENCE OF JUDGES AND LAWYERS

UNDER THE AUSPICES OF THE UNITED NATIONS

Caracas, 16-18 January 1989

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