Chapter 32

INTERNATIONAL BAR ASSOCIATION CODE OF MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

The Jerusalem Approved Standards as adopted in the Plenary Session of the 19th IBA Biennial Conference held on Friday, 22nd October 1982, in New Delhi, India.

A. Judges and the Executive

1. (a) Individual judges should enjoy personal independence and substantive independence.

   (b) Personal independence means that the terms and conditions of judicial service are adequately secured, so as to ensure that individual judges are not subject to executive control.

   (c) Sustantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.

2. The judiciary as a whole should enjoy autonomy and collective independence vis-a-vis the Executive.

3. (a) Participation in judicial appointments and promotions by the Executive or Legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body, in which members of judiciary and the legal profession form a majority.

   (b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4. (a) The Executive may participate in the discipline of judges, only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.

   (b) The power of removal of a judge should preferably be vested in a judicial tribunal.

   (c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.

5. The Executive shall not have control over judicial functions.

6. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.

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7. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.

8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

10. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

11. (a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

    (b) In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when praticable.

    (c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.

12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.

13. Court services should be adequately financed by the relevant government.

14. Judicial salaries and pensions shall be adequate, and should be regularly adjusted to account for price increases independently of Executive control.

15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.

    (b) Judicial salaries cannot be decreased during the judges' service except as a coherent part of an overall public economic measure.

16. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.

17. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.

18. (a) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.

    (b) The Executive shall not have the power to close down, or suspend, the operation of the court system at any level.

B. Judges and the Legislature

19. The Legislature shall not pass legislation which retroactively reverses specific

court decisions.

20. (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation, unless the changes improve the terms of service.

(b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before ad hoc tribunals.

C. **Terms and Nature of Judicial Appointments**

22. (a) Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement, at an age fixed by law at the date of appointment.

(b) Retirement age shall not be reduced for existing judges.

23. (a) Judges should not be appointed for probationary periods except for in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment.

(b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.

24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.

25. Part-time judges should be appointed only with proper safeguards.

26. Selection of judges shall be based on merit.

D. **Judicial Removal and Discipline**

27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.

28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to a final and reasoned disposition of this request by the Disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

29. (a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.

(b) All disciplinary action shall be based upon standards of judicial conduct promulgated by law, or in established rules of court.

30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of

judges shall be permanent, and be composed predominantly of member of the Judiciary.

32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

E. **The Press, the Judiciary and the Courts**

33. It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.

34. Subject to Standard 41, judges may write articles in the press, appear on television and give interviews to the press.

35. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

F. **Standards of Conduct**

36. Judges may not, during their term of office, serve in Executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.

37. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence-taking.

38. Judges shall not hold positions in political parties.

39. A judge, other than a temporary judge, may not practice law during his term of office.

40. A judge should refrain from business activities, except his personal investments, or ownership of property.

41. A judge should always behave in such a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.

42. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.

43. Judges may take collective action to protect their judicial independence and to uphold their position.

G. **Securing Impartiality and Independence**

44. A judge shall enjoy immunity from legal actions, and the obligation to testify concerning matters arising in the exercise of his official functions.

45. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.

46. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

H. **The Internal Independence of the Judiciary**

47. In the decision-making process, a judge must be independent vis-a-vis his judicial colleagues and superiors.

Note—The above standards are subject to periodic review by the appropriate committee or committees of the International Bar Association and amendment from time to time by the International Bar Association in plenary session as circumstances may warrant or require.

APPENDIX

Text of Jerusalem Approved Standards which were Amended in New Delhi

(Remaining Jerusalem Standards were approved without change.)

3. (a) Judicial appointments and promotions by the Executive are not inconsistent with judicial independence.

   (b) Except for countries where by long historic and democratic tradition judicial appointments operate satisfactorily, judicial participation in the process of judicial appointments and promotions, whether by judicial commission or otherwise, is imperative for the maintenance of judicial independence.

15. (a) The position of the judges, their independence, and their adequate remuneration shall be secured by law.

20. (b) In case of legislation abolishing courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.

28. The procedure for discipline should be in camera; however, judgments in disciplinary proceedings may be published.

44. A judge shall enjoy immunity from legal actions in the exercise of his official functions.

Chapter 33

THE EMERGING TRANSNATIONAL JURISPRUDENCE ON JUDICIAL INDEPENDENCE: THE IBA STANDARDS AND MONTREAL DECLARATION

Shimon Shetreet

The Course and Framework of IBA Project

The judiciary has developed from a dispute-resolution mechanism, to a significant social institution with an important constitutional role which participates along with other institutions in shaping the life of its community. Social, political and economic changes, in recent times, in most countries, have confronted the courts and judges with new challenges and new problems.

The centralization of the responsibility and supervision of court administration and judicial administration has raised the issue of the relationship between the judiciary and the executive, and made it necessary to examine and delineate the boundaries of the scope of executive control on judges, courts and judicial administration, and court financing. It was also necessary to review the rules, traditions, and practices governing the conduct of judges off the bench, in the various areas of activities.

A modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole. The concept of collective judicial independence may require a greater measure of judicial participation in the central administration of the courts including the preparation of budgets for the courts, and depending on one's view of the nature of judicial independence, the extent of judicial participation may range from consultation, joint responsibility with the executive, or exclusive judicial responsibility.

Examination of the law and practice of various countries, concerning issues which have a bearing on judges and judicial independence, reveals differences and even conflicts. These differences sometimes result from differences in conceptions and perceptions, and sometimes stem from historical reasons or diversity of circumstances, including a lack of initiative to review old practices and introduce reform.

In recent years, the problem of judicial independence has been highlighted by

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numerous incidents of violation of judicial independence in many parts of the world. These violations of judicial independence took different forms, and occurred in countries with different systems of government.

These events, the apparent diversities and conflicts between different countries on the law and practice, concerning judges and judicial independence, and generally the developments in modern society, in political and social conditions, called for the review of conceptions, traditions and principles bearing on judicial independence. Moreover, the concepts on the nature of judicial office and on the role of the individual judge and the judicial branch have undergone changes. The time was ripe for a crystallization of these changing concepts in a set of International Minimum Standards of Judicial Independence.

These were the main reasons behind the decision of the International Bar Association in August 1980 to embark upon a project for the development of an international comprehensive code of minimum standards of judicial independence. In 1982 after over two years of intensive work since the initiation of the project, it was possible to develop an international code of judicial independence based on the General Report, on 29 National Reports, and 15 topical reports. The National Reports followed the guidelines laid down by the General Rapporteur, detailing the specific questions which the National Rapporteurs were requested to address.

It was in 1980 at the 18th Biennial Convention in Berlin that the International Bar Association embarked upon the project for the development of an International comprehensive code of minimum standards of judicial independence. The Project was the responsibility of the Committee on Administration of Justice in the Section of General Practice. Justice D.K. Haese of Australia, the Chairman of the Committee acted as the Project Coordinator, and this author served as General Rapporteur of the Project. Justice Haese succeeded Chief Justice L. King, also of Australia, in the office of Project Coordinator, in the beginning of 1982.

National rapporteurs and topical Rapporteurs of the highest academic and professional standing from over 30 countries took part in the Project. The participating countries are geographically representative of the world, and fairly represent the major legal families of judicial systems, as well as the major systems of government. (The exception is the communist-bloc countries which abstained from involvement in the project.)

After the initiation of the Project in August 1980 substantial work has already been done. The first Draft of the Minimum Standards were presented by the General Rapporteur to the Lisbon conference in May 1981, where the Draft Standards were debated and revised.[1] Based on the resolutions in the Lisbon Conference and other suggestions made in the course of the proceedings in that

conference, the General Rapporteur prepared the Jerusalem Revised Draft Standards, for debate and approval in the Jerusalem Planning Conference in March 1982. The Jerusalem Approved Standards, the fruits of the Jerusalem Conference, were submitted for final approval to the nineteenth IBA Biennial Convention in New Delhi in October 1982, and were finally approved with slight changes.

I take this opportunity to acknowledge with gratitute the help of the National Rapporteurs and of the Topical Rapporteurs and to express deep appreciation for their most significant contribution to the success of the IBA project. I am particularly indebted to Chief Justice King and Justice Haese, the Project coordinators, for their invaluable and indispensable work. Thanks are also due to the IBA Head Office in London for their help throughout the period of work on the project.

In the course of the Project we have been in touch with other organisations involved in similar efforts such as the International Commission of Jurists in Geneva, whose representatives attended our conferences in Lisbon in 1981 in Jerusalem in March 1982 and in New Delhi in October 1982.

The Montreal Conference

In June 1983 the First World Conference on the Independence of Justice was held in Montreal at the Queen Elizabeth Hotel under the leadership of Chief Justice Jules Deschênes, as he then was. Justice Deschênes, succeeded in the difficult task of gathering under one roof about 130 distinguished jurists representing some 20 international organisations, in order to approve a Universal Declaration on the Independence of Justice.

Long before the conference in Montreal, a steering committee developed a Draft of the Declaration, which was put before the participants of the Montreal Conference.

The debates in Montreal were conducted in five Commissions, which discussed each of the Five Chapters of the Declaration: I) The International Judges (led by Judge Oxner and Bâtonnier Pettiti); II) The National Judges (led by Justice Gonthier and this author); III) The Lawyers (led by Bâttonier Louis Phillippe de Grandpré, and Debo Akande); IV) The Jury (led by Chief Justice William Sinclair and Mr. James Parkison; V) The Assessors (led by Judge Guerin and Judge Poirier).

The chapters of the Declaration were finally approved by a plenary session of the Conference. Among the organisations which were represented in Montreal were the International Bar Association, International Commission of Jurists, International Court of Justice at The Hague, LAWASIA, European Court of Human Rights, Amnesty International, and numerous international lawyers' organizations, both

global and regional.

The Declaration was conveyed to the United Nations' Human Rights Subcommittee which is engaged in the study of the independence of judges, lawyers and juries. It was submitted by the General Rapporteur of the Montreal Conference, Dr. Singhvi, who acts as a special Rapporteur of the UN study.

Now that Justice Deschênes, one of the chief architects of the Declaration is serving as a member of the Human Rights Sub-Commission, the study will have an ardent supporter in the UN Commission.

This author and others who were involved in the IBA Project were very pleased to note the high involvement of the IBA delegates in the Montreal Conference. Justice Haese, Mr. Parkison and myself were the IBA delegates in the Conference. Mr. Parkison served as Rapporteur for Commission IV (Juries), myself as Rapporteur for Commission II (National Judges). With all due modesty, may I say that the IBA Code of Minimum Standards of Judicial Independence has had a significant impact on the text of the Declaration in several main areas: a) The recognition of the concept of collective independence; b) the emphasis on the vital importance of the administrative independence of the judiciary; c) the recognition of the concept of internal judicial independence, i.e., the judges independence vis-a-vis his fellow and superior judges; d) the restriction of executive power over the judiciary; e) the encouragement of the idea that the judiciary should fairly reflect society (which was proposed in previous IBA drafts but was not actually approved in the final text).

Toward an International Code

The development of an international code of judicial independence is highly important. Numerous incidents of violation of judicial independence have been recorded in recent years. These violations have many faces and many colours, and may be direct or indirect, covert and overt. The country studies contain numerous illustrations of violations of judicial independence, such as suspension of the operation of the courts, transfer tantamount to de facto removal, withholding of increases in judicial salaries, withholding sufficient resources and judicial personnel from the courts, the use of pre-emptive and retroactive legislation to prevent recourse to the courts or to reverse retroactively specific judicial decisions.

Against such a background the development of international standards of judicial independence with the support of prestigious professional organizations, which hopefully will receive the approval of the UN, will have a most important, dynamic effect on the enhancement of judicial independence.

The aim of the IBA Project was to develop international, minimum standards of judicial independence. The aim was not necessarily to photograph or reflect the

prevailing practice in the world today. Rather our aim was to formulate such standards that the nations of the world should strive to comply with. True minimum standards are not the ideal, most desirable standards, and they must not exceed the boundaries of feasibility and reasonableness. We certainly were aware of this, but we made an honest effort to turn the International Minimum Standards of Judicial Independence into a dynamic catalyst for the introduction of the necessary reforms, to assure compliance with the Standards. We felt that we proceeded in this important project upon the premise that it was our duty to assume a responsibility of leadership, not merely a static reflection of the reality. Throughout my involvement in the IBA Project and in the Montreal Declaration, I was convinced that this was the course which would lead to the promotion of judicial independence in our communities around the world.

The IBA Standards approved in Jerusalem and confirmed in New Delhi are based on this underlying conception which was shared by the participants in the Lisbon Conference, in the Planning Conference in Jerusalem, and in the IBA Convention in New Delhi. Among many other things, the IBA Standards stress the importance of the collective independence of the judiciary vis-a-vis the Executive and the Legislature, and the need for judicial autonomy in matters of judicial administration and court budgets. They recommend selection committees for judicial appointments, and they stress the idea that judges are independent statutory officers of the state and not civil servants of the executive government. The Standards call for the security of terms of judicial office, the safeguard of adequate judicial salaries, and regular pay increases according to economic changes by constitutionally protected procedure. The Montreal Declaration generally follows the IBA lines of thinking, as shall be illustrated later.

After the approval of the IBA Standards in Jerusalem and New Delhi, the Project undertook the preparation of a compliance report. In the compliance report, the situation in various countries will be examined to ascertain which countries comply with the IBA standards, and which do not comply, and in what respect. It is planned that the country compliance reports will be discussed at IBA Conferences in Committee 15 on the Administration of Justice.

It is important to emphasize the interdependence between the protection of human rights and the Independence of Justice. In the last 35 years, the international community has made a giant step towards the crystallization of substantive human rights. They were embodied in international treaties, global and regional, general and specialized.

Substantive human rights are worthless without an effective mechanism for their enforcement. The enforcement of rights is assured by an independent and

impartial tribunal. The establishment of clearly stated standards on the meaning of independence will enhance the promotion of human rights around the world.

In the remaining part of this paper, a brief outline of the IBA Standards will be offered. In general, the Montreal Declaration contains provisions similar to those of the IBA Standards, and in the course of the ensuing analysis references will also be made to the provisions of the Montreal Declaration.

Outline of the IBA Standards

A) Personal and Substantive Independence

The IBA standards are based on the conception that the independence of the judiciary carries two meanings: the independence of the individual judges, and the independence of the judiciary as a body. The independence of the individual judge is comprised of two essential elements; the substantive independence and the personal independence. Substantive independence means that in the making of judicial decision and exercising other official duties, individual judges are subject to no other authority but the law.

Personal independence means that the judicial terms of office and tenure are adequately secured. Personal independence is secured by judicial appointment during good behaviour terminated at retirement age, and by safeguarding judicial remuneration. Thus, executive control over terms of service of the judges, such as remuneration, pensions, or travel allowances, is inconsistent with the concept of judicial independence. Still much less acceptable is any executive control over case assignment, court scheduling, or moving judges from one court to another or from one locality to another.[2]

B) Judicial Conduct

Independence of the judiciary implies not only that a judge should be free from executive or legislative encroachment and from political pressures and entanglements, but also that he should be removed from financial or business entanglement likely to affect, or rather to seem to affect, him in the exercise of his judicial functions. The duties of the judge as to the standards of his conduct are detailed in Standards 36-45.[3] The Standards are aimed at removing judges from political and business entanglements and from controversies or improprieties. As to judges and the Press, IBA Standards 33-35 allow for interviews to the Press, subject to the duty to preserve judicial dignity.

C) Collective Independence

A modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole.[4] The concept of collective judicial independence requires a greater measure of judicial participation in the central administration of the courts, including the preparation of budgets for the courts. IBA Standard 9 calls for exclusive judicial responsibility for judicial administration on the central level, or at least joint responsibility with the Executive. The Montreal Declaration provides that the main responsibility for court administration shall vest in the judiciary.[5]

The conception of personal independence and substantive independence of the individual judges is universally recognized by law and by legal writers. However, the concept of collective independence of the judiciary which this writer has advocated in recent years[6] is not yet well established.

The significance of the IBA Standards, and following them, the Montreal Declaration, was the recognition of the concept of collective independence of the judiciary, which calls for greater administrative independence of the judiciary in matters of central court administration including the participation in the formulation of the courts' budgets.[7] One of the important achievements of the IBA Standards and the Montreal Declaration was the emphasis on this most significant conceptual aspect of the principle of judicial independence in modern society.

D) Internal Independence

Another aspect of judicial independence which has not attracted sufficient attention is the internal independence of the judiciary. That is the independence of a judge from his judicial superiors and colleagues. This also transcends both the substantive and personal independence of the judge vis-a-vis his colleagues and superiors. IBA Standard 46 stresses this point; and, in the commentary for this IBA Standard, we recommend that separate and dissenting opinions be permissible in order to encourage internal judicial independence.[8] In this context it should be noted that IBA Standard 11 calls for a division of work among judges according to a pre-determined plan, to be conducted by the head of the Court according to clearly defined rules. This Standard generally accepts the civil law concept of natural judge. (Gesetzlicher Richter).

E) Judges and the Executive

The protection of judicial terms of service from Executive interference is attained by the Standards in many ways. Executive participation in disciplinary procedures for judges is limited to referring or initiating complaints. The Executive is excluded from adjudication of such complaints. (Standard 4). The IBA Standards

call for judicial removal by a judicial tribunal or by the legislation upon a recommendation of a judicial tribunal.[9]

As to judicial appointments, IBA Standard 3 calls for appointment by a predominantly judicial body, but allows the continuation of judicial appointment by non-judicial bodies, in countries, where by long historic tradition, such a practice operates satisfactorily.[10]

The IBA Standards exclude the Executive from involvement in judicial matters and matters concerning judges (Standard 5), and vest the judiciary with the responsibility for such matters (Standard 8).[11] Thus the power to transfer a judge should be vested in a judicial authority (Standard 12),[12] and the execution process is put under judicial supervision (Standard 7).[13]

The Standards call for security of judicial remuneration and provision of adequate judicial salaries by regular and timely pay increases (Standard 14).[14] They prohibit a decrease of judicial salaries which is not part of an overall economic measure (Standard 15).[15] One of the most pressing problems of the Court system in recent times is the limited resource. Standard 13 responds to this issue and imposes on the relevant government a duty, to adequately finance the Court Services.[16]

The Standards impose on ministers a duty to refrain from adverse statements on judges (Standard 16), and call for cautious exercise of the power of pardon (Standard 17).[17]

Against the background of incidents of closing down courts, and frustrating of judicial decisions by Executive action, Standard 18 prohibits Executive preemption or frustration of judicial resolution of cases,[18] and provides that the Executive shall not have the power to close down or suspend the operation of the court system at any level.[19]

F) Security of Judicial Tenure

Probationary appointments are considered inconsistent with judicial independence, except for legal systems where judges are appointed without prior practical experience (Standard 23): Temporary appointments of judges are also rejected by the Standards, except where they exist by long historic, democratic tradition.[20] Part time judges can only be appointed, subject to proper safeguards.

Detailed principles are set down in Standards 27-32 concerning the procedure and the grounds for judicial discipline and removal.[21] The Standards call for a judicial procedure and a judicial tribunal for removal or discipline of judges. In cases of Legislative removal, the Standards call for a recommendation by a judicial tribunal.

G) The Legislature and Judges

The Standards recognise the problems emanating from adverse Legislative interference with judicial terms of office and judicial adjudication. Standard 19 prohibits retroactive legislative reversal of specific decisions.[22] Standard 20 qualifies the application of legislation, changing terms of judicial office or abolishing courts to future holders of office,[23] and not to present judges serving at the time of the passage of the legislation.[24]

H) Standards of Judicial Selection

Standard 26 provides that selection of judges should be based on merit. I call your attention to the commentary on this standard, where it is stated that the selection process of judges should take into account the fair representation on the bench of the various social classes, ethnic groups, geographical regions and ideological inclinations, so as to insure equality of access to judicial office, and a broad spectrum of community attitudes and feelings among the persons holding judicial office. This principle is expressly provided in the Montreal Declaration which requires 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" (Art. 2.13).

Conclusion

In conclusion, it is important to stress that the confirmation of the Jerusalem Approved Standards in New Delhi by the IBA Convention was a significant step in the improvement of the administration of justice and the better protection of human rights in our world today, and so was the confirmation of the Universal Declaration of the Independence of Justice.

Notes to Chapter 33

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1. See The International Bar News for the text of the Standards submitted by this author to the Lisbon Conference, and revised at the Conference.

1a. See Standard 1 of the IBA Code Minimum Standards of Judicial Independence. Cf. Art. 2.02, 2.03 of the Montreal Declaration.

2. This idea is expressed in numerous IBA Standards restricting executive control over judges and judicial matters.

3. Cf. the Montreal Declaration Art. 2.09-2.10, 2.26-2.31.

4. IBA Standards 2, 9. The Montreal Declaration Art. 2.04-2.05.

5. The Montreal Declaration Art. 2.40.

6. See e.g. Shetreet, "The Administration of Justice: Practical Problems, Value Conflicts and Changing Concepts," 13 UBC L. Rev. 52 at 57-62 (1979); Shetreet, "Judicial Independence," Lisbon Background paper, at p. 6 (1981).

7. IBA Standards 10, 13. The Montreal Declaration Art. 2.41.

8. Cf. the Montreal Declaration Art. 2.03.

9. Cf. the Montreal Declaration Art. 2.33.

10. For the Montreal Declaration see Art. 2.14 which stresses professional participation in less specific terms.

11. The Montreal Declaration Art. 2.05, 2.07.

12. Id. Art. 2.18.

13. Id. Art. 2.47.

14. Id. Art. 2.21.

15. Id. Art. 2.21(c).

16. Id. Art. 2.41.

17. See generally the Montreal Declaration Art. 2.07.

18. Cf. Art. 2.07(d).

19. Cf. Art. 2.07(c).

20. Id. Art. 2.20.

21. Cf. generally id. Art. 2.32-2.38.

22. Id. Art. 2.08.

23. Id. Art. 2.22.

24. Id. Art. 2.39.

Chapter 34
THE IBA STANDARDS ON JUDICIAL INDEPENDENCE: AN AUSTRALIAN PERSPECTICE

The Hon. Leonard King

The IBA Project and Its Significance

The International Bar Association's project on Minimum Standards of Judicial Independence had its origin in a decision made by the Committee on Administration of Justice at the 18th Biennial Conference of the I.B.A. held in Berlin in 1980. The decision of the Committee was to undertake, subject to International Bar Association approval, a project of developing standards which would be adopted by the International Bar Association as its Minimum Standards for Judicial Independence. Judge Norman Mackie of Alberta, Canada, was the Chairman of the Committee at that time. I was entrusted with the task of co-ordination of the project and Dr. Shimon Shetreet of the Faculty of Law of the Hebrew University of Jerusalem undertook the onerous position of General Rapporteur. The necessary approvals having been obtained, the project was pursued with considerable vigour. Reports as to the local situation regarding judicial independence were obtained from National Rapporteurs in over thirty countries. On the basis of those national reports a general report was prepared by Dr. Shetreet. A further meeting of the Committee was held in Lisbon in May 1981. By that time Judge Mackie had retired as Chairman of the Committee and had been replaced by Mr. Justice Haese of the Family Court of Australia. At the Lisbon Conference, substantial advance was made in the task of developing a set of standards to be submitted for approval by a general conference of the I.B.A. A further meeting was held in Jerusalem, in March 1982. At that meeting a draft set of standards was approved by the Committee for submission to the next General Conference of the I.B.A. to be held in New Delhi in October 1982. At this point, as my commitments precluded my attendance at the Delhi Conference, I relinquished my position as Project Co-ordinator to Mr. Justice Haese, who thereafter filled the dual roles of Committee Chairman and Project Co-ordinator. At the 19th Biennial Conference of the I.B.A. at New Delhi in October 1982 the I.B.A. adopted a set of minimum standards of judicial independence.

The significance of the adoption by a body as diverse in its membership as the

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International Bar Association, of a set of minimum standards of judicial independence, should not be underrated. There is, of course, general acceptance of the principle that the judiciary should be impartial and independent. The exercise which we undertook, however, emphasized dramatically the differences in approach to judicial independence and understanding of what it involved, in different countries, different cultures and different legal systems. A study of the various national reports which were furnished to the Committee made it obvious that practices which were regarded in some places as inconsistent with the notion of judicial independence were accepted in others as ordinary practice and in no way impinging upon the principle. Practice, which, considered logically and objectively, could only be regarded as destructive of judicial independence, had to be accepted and accommodated into the standards because they were found to possess a long and venerable history in some systems and places without apparent harm to the independence of the judiciary. It was therefore no easy task to devise a set of standards which would have substance and meaning and yet be acceptable to all countries and systems in which the rule of law is observed. Sometimes this was only possible by engrafting on to a standard an exception in favour of places where there existed a long historic tradition to the contrary, which had been found out to be inimical in that tradition to independence of the judiciary.

This diversity of attitudes to practices affecting the judiciary and the administration of justice, and the absence hitherto of any universally recognized criteria for judicial independence, have made it difficult for those who have felt that the independence of the judiciary is under threat in a particular country, to justify that belief by reference to generally accepted norms. The adoption of this set of standards, the minimum which can be regarded as compatible with the existence of judicial independence, has corrected a situation in which judges, lawyers and other interested persons in all parts of the world can point to criteria for judicial independence which have the sanction of the International Bar Association. The project is not the only attempt to develop international standards of judicial independence. A set of standards has been developed by the International Commission of Jurists and another by Lawasia. In June 1983 a conference was held in Montreal. Delegates from the International Bar Association, the International Commission of Jurists and Lawasia and other organizations, took part in the conference, and have adopted the Universal Declaration of the Independence of Justice which will serve as an authoritative point of reference in all controversies as to what is involved in judicial independence.

Judicial independence is frequently conceived in terms of the freedom of the judge from pressure or influence in the making of his decisions in his courtroom.

That freedom is referred to in the Delhi standards as "substantive independence." In Clause 1(c) of the Standards, "substantive independence" is said to mean "that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience." In one sense, this is the undoubted kernel of judicial independence. A significant outcome of the project, however, was the emphasis which came to be placed upon the collective or institutional independence of the judiciary. From the national reports and the discussions, it became increasingly clear that the substantive independence of the judge in his courtroom is dependent ultimately upon the collective independence of the judiciary as a whole. It is no accident, therefore, that the second clause in the Standards is: "The judiciary as a whole should enjoy autonomy and collective independence vis-a-vis the Executive." This emphasis is reflected throughout the Standards. It is not too much to say that the primary thrust of the Delhi standards is the protection and buttressing of the freedom from interference of the judge in his individual decision-making, by means of the strengthening of the collective independence of the judiciary as a whole. Thus there is emphasis upon judicial appointments, salary and conditions of service of judges, judicial administration and the provision of material and financial resources. These are all important factors in the collective or institutional independence of the judiciary and, for that reason, they all feature prominently in the Delhi Standards.

Threats to judicial independence are generally thought of in terms of direct political interference, or interference by means of threats or corruption. Attention generally focuses upon dramatic incidents such as the establishment of military tribunals which supplant the regular civil courts, direct threats to the physical safety or moral authority of the judges, suspension of the powers of the judiciary or the promulgation of laws or decrees requiring the judiciary to give effect to ideological considerations in the making of judicial decisions. This type of interference with the independence of the judiciary is clear and unequivocal. It requires no analysis, only condemnation. I thought that it might be worthwhile to focus attention upon certain clauses in the Standards which deal with potential threats to judicial independence which are far less dramatic, but which can occur only too readily, even in societies in which respect for the rule of law and the independence of the judiciary is thought to be strongest.

Financial and Administrative Independence

The effective functioning of the judiciary depends in large measure upon the financial and material resources made available to it. In all systems with which I am familiar, these financial or material resources are provided by the legislature,

either directly or indirectly through the executive government. In the typical situation obtaining in the United States of America, a sum of money is allocated to the court system or to a particular court by the legislature. The court or the court system is then responsible for its own budget. In the typical situation obtaining in countries where the Westminster constitutional system exists, the executive government provides the human and material resources needed by the court with money voted by the legislature. It is doubtful whether one system has much advantage over the other. The dependence of the judiciary on outside sources for the wherewithal to perform its functions must always pose some threat to the independent and impartial administration of justice. Those who control the purse strings will always have some capacity to influence the actions of those who are dependent upon the contents of the purse. It is doubtful whether one system has much advantage over another in this respect. Under the American system, there is some greater degree of independence in the management and control of the budget. This has led to the partial adoption of this system in British Columbia in Canada and in the High Court of Australia (but not in the other Australian courts). In the end, however, whether the judiciary deals directly with the legislature or with the legislature through the executive government, or whether the material conditions for the operation of the judiciary are supplied direct by the executive government or are provided by way of lump-sum vote, the problem is essentially the same. Legislators and ministers must resist any temptation to use the power of the purse to influence judicial decision-making, either directly or by seeking to influence judicial policy, and judges must be resolute in resisting any temptation to endeavour to please the legislature or the executive government in the hope of obtaining more favourable treatment in relation to money or resources.

My personal experience is primarily with the Westminster system as it operates in Australia. In that system the independence of the judiciary from the executive is, of course, a fundamental principle of the constitutional arrangements. It involves that the judiciary be able to exercise its functions and to administer justice without fear or favour and totally free from government or official influence, or threat of interference. This independence is rightly regarded as the indispensable condition of free constitutional government and the ultimate safeguard of the rights and liberties of the citizen. Proper administrative conditions for securing and safeguarding judicial independence are therefore of the utmost importance. A close working relationship between the courts and the executive government is unavoidable. The courts are dependent upon the executive government, and ultimately upon the legislature, for the material necessities for the administration of justice. The buildings, furnishings, equipment and consumable

stores needed to operate the courts must all come from a government department having responsibility for the courts. The court staff are members of the civil service and subject to control through the civil service structure and hierarchy. These factors, I think, could be manipulated by the unscrupulous with the view to bringing about a dependence of the courts on the executive government. That this does not occur is due to the good sense and grasp of the constitutional situation, of the ministers and administrators involved. Any attempt at such manipulation would, of course, produce a constitutional crisis. The autonomy and independence of the court staff, and particularly of its senior members, is in practice respected by the public service authorities. Nevertheless, I think that some modificiation of this system is desirable. A court should be in a position to command out of its own resources the personnel and the physical necessities to carry on its work without reference to the executive branch. So far this has proved to be unattainable, except in the case of the High Court of Australia. The best which we have been able to achieve is the convention that it is the responsibility of the executive government to provide unconditionally the necessary resources for the administration of justice and to respect without question the integrity and independence of the judiciary.

To a large extent the problem presented by the dependence of the judiciary upon the legislature, and perhaps the executive government, for its resources, is insoluble. Modern court systems must be operated with public funds. Public funds can only be raised and provided by the legislature. The legislature must always therefore have a responsibility for the way in which the money is spent. In the Westminster system, there must always be a minister who is responsible to the legislature for the expenditure of public money. Whatever measures may be adopted to protect the autonomy and independence of the court system, these factors will remain intractable and they severely limit the scope of any minimum standards which can be prescribed for judicial independence in this area. Clause 10 stresses the duty of the State to provide adequate financial resources to allow for the due administration of justice. Clause 13 provides that court services should be adequately financed by the relevant government. Clause 16 provides that the ministers of the government shall not exercise any form of pressure on judges whether overt or covert. These are very general standards, but for the reasons which I have discussed, I doubt whether it is possible to be more specific in prescribing standards which will receive general acceptability.

This much, however, is certain. By whatever means the necessary resources are furnished to a court, it is essential to the independence of the judiciary that while those resources are in use in connection with the work of the court, they should be under the control of the court. If the court staff are members of the civil

service, it is essential that while they are working in the courts they must be responsible to the court and not to the executive government for all matters pertaining to the business of the court. It is essential that control of court buildings and facilities be vested exclusively in the judiciary. The court must have the right to exclusive possession of the building or part of the building in which it operates, and must have power to exercise control over ingress and egress, to and from the building or part thereof. The court must have power to determine the purposes to which various parts of the court building are to be put and the right to maintain and make alterations to the building. If a court is not invested with such rights of control over its buildings and facilities, its independence and its capacity to properly perform its function are impaired or threatened in a number of respects.

The citizen's right of access to the courts in his quest for justice includes the right of physical access to the court building. Moreover, the courts must be able to ensure that their proceedings are known to the press and the public. This can only be ensured if the judges have such control over the court building and its precincts as enables them to prevent any interference with free access to the court. The judiciary must have the power to ensure that members of the public have advance notice of when and where cases are to be heard, that the building in which the court is situated is adequately identified, that the public is given free access to the building and to the courtroom, that the interior of the building is adequately sign-posted, that adequate seating is provided in the court, and that once within the court members of the public can see and hear what is happening. They must also be able to ensure that there is no intimidation or fear of intimidation of persons seeking to exercise their right to attend the court by, for example, restrictions on the use of passageways, doors or lifts, or by being asked by anyone apparently in authority for evidence of identification or for information as to what their business in the building might be.

Where security measures are necessary, they must be firmly under the control of the judges using a particular court. The determination of whether any particular threat to security is such as to justify the presence of armed police or other security officers in and around the courts, or the screening, identification or searching of visitors to the courts, should be the responsibility of the judge. Such a determination involves a delicate balancing of competing interests which the judges alone can perform properly. Moreover, such measures have such a potential for interference with the independence of the judicial process that the judges must have the responsibility of determining whether the implementation of such measures is justified, together with the right to control their nature and extent. The judges must, of course, rely upon the executive government for the security and protection which is necessary for the free and effective discharge of their functions, but control of security measures in and around the courtroom and building should be firmly under the control of the judges.

The quality and the effectiveness of proceedings in court depend to a degree on the nature of the physical environment in which they are conducted, and upon the adequacy of the facilities provided. Their importance consists, not only in their practical significance in relation to the work of the court, but in the part they play in the ordinary citizen's perception of what the courts are and how they operate. There is a tendency to judge the significance and worth of public functions by reference to their outward manifestations. Public confidence in the judiciary could be significantly affected by the nature and the suitability of court buildings and court facilities, and by whether those buildings and facilities are seen to be controlled by the executive government or by the judges. If the courts are to have exclusive authority to declare and apply the law and to administer justice, as the principles of the rule of law and judicial independence demand, they cannot confine their responsibilities to the mere hearing of cases. They must concern themselves with all those matters which are capable of effecting the course and the outcome of legal proceedings, however mundane or remote from the traditional role of judges those matters might appear to be. For these reasons, I hold strongly to the view that, the only effective way in which judicial independence can be adequately ensured is by vesting in the judiciary complete control over the court building and its facilities. Such complete control is, I suspect, the exception rather than the rule in most countries. It is an aspect of judicial independence which commands a good deal more attention than it has hitherto received.

Personal Independence

The International Bar Association's standards lay stress upon what is described as the personal independence of the individual judge. The very first clause stipulates that individual judges should enjoy personal independence as well as substantive independence. Personal independence is defined as meaning "that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control." Clause 14 provides that "Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of Executive control". Clause 15 is as follows: "(a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law. (b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure."

These clauses relating to the personal independence of judges emphasize a very important aspect of judicial independence, namely that the judges' personal income should be determined in a way which removes any possibility of influence over judicial decision-making. Traditionally, this aspect was cared for in Westminster system countries by statutory provisions, which by convention assume the status of constitutional guarantees, that a judge's salary could not be reduced during his tenure of office. So rigidly was this guarantee observed that in Australia, during the Great Depression, when public service salaries and pensions were reduced as a general economy measure by 10 per cent, the judges salaries could not be reduced without their consent. They did in fact consent, so far as I am aware, in every jurisdiction. In times of stable monetary values, this guarantee was effective to insulate the judges from the possibility of influence resulting from concern for their emoluments. Inflation has changed that in every country. It is no longer necessary for governments, in order to exert pressure, to reduce judicial salaries. It would be sufficient to refrain from adjusting them in accordance with general movements of incomes in the community to take account of the diminishing value of money. The traditional constitutional guarantee is therefore no longer effective. For that reason the Standards stress the necessity for machinery which is independent of executive control, for the regular adjustment of judicial salaries and pensions. This may be done by means of an independent tribunal or by means of a statutory formula for the adjustment of salaries and pensions in accordance with specified, objectively ascertainable, economic criteria. What is essential if the ends of judicial independence are to be served, is that the machinery ensures the personal independence of the judge by fixing, and regularly adjusting the salary, and that it is totally independent of the executive government. In Australia the general practice is for judicial salaries to be adjusted annually by an independent tribunal. I regret to have to report that my own State of South Australia is an exception to this practice. In South Australia judicial salaries are fixed by the executive government. It has been a source of friction between the judiciary and the government for some considerable time. Indeed, the history of judicial salary fixation in South Australia is an excellent example of the dangers associated with the executive government control of judicial salaries. Prior to 1973 judicial salaries in South Australia were fixed by Act of Parliament. Increases could only be made by amendment to the Act. The rapid acceleration of inflation in 1973 and the consequent need for more frequent adjustments of judicial salaries, rendered the old method of statutory amendment cumbersome and inadequate. By agreement with the judiciary, executive government therefore took control of salary adjustments, so that regular adjustments could more readily be made. The intention was that South Australian

judicial salaries would be adjusted to 95% of the average of the judicial salaries paid in the two most populous States of Australia, namely, New South Wales and Victoria, and that when that was achieved the formula would be enshrined in a statute. In fact the formula was never embodied in a statute and was, indeed, abandoned subsequently by the executive government which retained control of the fixation of judicial salaries. The result has been continuing friction between the judiciary and the executive government and a steady decline in judicial salaries in relation to incomes in the rest of the community, and to judicial salaries in other parts of Australia. There can be no doubt that executive government control over judicial salary fixation is always at least an incipient threat to judicial independence. In this respect my own State of South Australia fails to conform to an essential minimum standard of judicial independence. One must hope that this failure will be remedied in the near future.

Judicial Removal

Security of tenure is probably the most fundamental of the guarantees of judicial independence. The reality of security of tenure depends largely upon the rules for the removal of a judge from office. Despite the fundamental importance of the topic from the point of view of the independence of the judiciary, there is a surprising lack of unanimity as to the principles involved and, in many countries, a surprising lack of attention to the topic. It seems to me that the meeting of the Committee on the Administration of Justice at this conference could usefully devote some further attention to this aspect of judicial independence. Clause 29 of the Standards provides that the grounds for removal of judges shall be fixed by law and shall be clearly defined, and that all disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court. This would seem to be a quite fundamental principle. One would think that if security of tenure is to mean anything, it must at least mean that the security can only be disturbed for breach of some clearly enunciated and promulgated rule of conduct. Strangely, however, codes of judicial conduct are unknown in England and in the countries whose legal systems derive directly from the English sytem. Judges are appointed during good behaviour, usually with a retiring age, and are removable on an address of both Houses of Parliament. What constitutes a breach of good behaviour is left to be determined by the legislature after the event. It might be questioned whether this is a satisfactory method of dealing with judicial removal for misbehaviour; it certainly does not accord with the Standards which have been adopted by the I.B.A. The concept of removal by an address of both Houses of Parliament is itself the subject of a good deal of criticism. Curiously, common

criticisms which are made are contradictory. One criticism is that the necessity for the involvement of the legislature ensures that the procedure will not be used, and that the judges, therefore, have a practical immunity from removal. Removal by this means is certainly extremely rare. That may be, however, because in the countries in which this procedure prevails, conditions are such that a judge who commits a serious act of judicial misconduct would certainly resign. That consideration, together with the fact that standards of judicial conduct are generally very high in those countries, renders removal by the legislature a rarity. The opposite criticism, however, is that there is no established procedure for the trial of a judge whose removal by the legislature is sought. It is assumed that the legislature would itself institute some form of inquiry at which the judge would be able to defend himself against the accusations, but that would be a matter for the legislature in each case. There are some who fear that a parliamentary majority, encouraged by inflamed public feeling about an unpopular judicial decision, might some day act to remove a judge without due process. It is at least questionable whether the system of removal by an address of both Houses of Parliament accords to a judge the degree of security which is required by the concept of judicial independence. It will be noted that Clause 31 required that the tribunal for discipline and removal of judges be permanent and be composed predominantly of members of the judiciary, but excepts those systems in which the power of disipline and removal is vested in the legislature. This is not the occasion to explore these topics, and I do not intend to pursue them further. It is sufficient for me to express the view that the topic of the removal of judges and its impact upon judicial independence requires a good deal more consideration and attention that it has thus far received.

Conclusion

In considering and assessing the set of Minimum Standards of Judicial Independence adopted at the Delhi conference, it is necessary to bear in mind that they do not purport to be a set of ideal conditions for the independence of the judiciary. They do not represent the ideal towards which we strive, but the irreducible minimum which must be attained if judicial independence is to be said to exist. They constitute therefore a point of reference for those who seek to build or defend the necessary conditions for the independence of the judiciary.

I have referred briefly to the First World Conference on the Independence of Justice in Montreal. It may be regarded as a natural development of the I.B.A. project which I have been discussing. It was sponsored by seven Canadian bodies representing judges and lawyers, including the Canadian Bar Association, with the

support of the Government of Canada and the Government of the province of Quebec. The International Bar Association was represented by the Chairman of this section's Committee on the Administration of Justice (Mr. Justice Haese), Dr. Shimon Shetreet who was the General Rapporteur for the I.B.A. project, and Professor James M. Parkison of the United States of America. Delegates attended from some twenty organizations representing the judiciary, the legal profession, and various aspects of Human Rights and the Administration of Justice. The purpose of the Conference at Montreal was the adoption of a draft Universal Declaration of the Independence of Justice, based upon the Standards which have been developed and adopted by the I.B.A. and the other international organizations. The intention is that such a draft should later be submitted for approval by the General Assembly of the United Nations. In that way, it is hoped that there will come into existence a definitive set of minimum standards of judicial independence possessing the authority of the United Nations, by which standards the condition of the judiciary in every country can be judged.

Much has been achieved since the I.B.A. project was undertaken in August 1980. I believe that in developing, adopting and promoting Minimum Standards for Judicial Independence, the I.B.A. has made an important contribution to the rule of law and to the cause of justice in the world.

Chapter 35
THE SYRACUSE DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

A Committee of Experts organized by the International Association of Penal Law and the International Commission of Jurists and hosted by the International Institute of Higher Studies in Criminal Sciences met at the Institute in Syracuse, Sicily, on 25th-29th May 1981 to formulate draft principles on the Independence of the Judiciary. The participants comprised distinguished judges and other jurists representing different regions and legal systems. They came from Africa, Asia, America and Eastern and Western Europe.

As presented by the International Commission of Jurists, these draft principles are to be seen as a first draft, and comments upon them will be welcomed by sponsoring organizations. Their aim is to formulate principles guaranteeing the existence and proper functioning of an independent judiciary as an essential condition for the respect and protection of human rights under the rule of law.

TEXT OF THE SYRACUSE PRINCIPLES

I. Preamble

Art. 1. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Right (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable for the implementation of this right.

II. Definition

Art. 2. 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 influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and

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

III. Qualification, Selection and Training of Judges

Art. 3. Applicants for judicial office should be individuals of integrity and ability, well-trained in the law and its application.

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Art. 4. Applicants, qualified as set out in Art. 3 above, should have equality of access to judicial office.

Art. 5. Selection for the appointment of judges should be made without distinction of any kind such as race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or status.

[**Note:** This article is without prejudice to the requirement that a judge be a citizen of the country in question.]

Art. 6. These principles apply, whatever the method of selection and appointment of judges.

[**Note:** In some countries, candidates for the judiciary are post-graduates who have been admitted by competitive examination to a special school for future judges, and when they have successfully completed the school's curriculum, they are appointed to existing vacancies. In some countries, judges are recruited by competitive examination and receive apprenticeship training by attending courts and learning from the judges. In another country, appointment is open to candidates who have successfully completed a postgraduate practical service, assisting judges, prosecutors, lawyers and administrators. In some countries, judges are elected by their fellow citizens. In other countries they are chosen from practising members of the bar. No international norms give preference to any of these methods. Experience indicates that each is capable of sustaining a competent, independent and impartial judiciary.]

Art. 7. In-service training should be made available, to keep judges informed of important developments, including developing social trends, new technologies and their legal consequences, studies into the causes of crime and sentencing policies and their effects.

IV. Posting, Transfer and Promotion

Art. 8. The assignment of a judge, to a post within the court to which he is appointed, is an internal administrative function to be carried out by the court itself.

[**Note:** Unless assignments are made by the court, there is a danger of the erosion of judicial independence by outside interference. It is vital that the court does not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the Magistrature or similar body.]

Transfer

Art. 9. Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another, without their freely given consent.

[**Note:** Unless this principle is accepted transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.]

Promotion
Art. 10. Promotion should be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law.

Art. 11. An independent commission composed entirely, or in its majority, of judges should be established with responsibility for deciding upon promotions or for recommending candidates for promotion to the appropriate authority.

[**Note:** All court systems are hierarchical in structure. Only in some countries, however, has a system developed where judges are encouraged to expect promotions to higher courts, or promotions in rank. This may create among the judges a pressure to conform, which is dangerous for judicial independence.

Creation of judicial commissions, such as those described above, constitute an important safeguard against the use of promotions to restrict judicial independence, as well as being the most reliable procedure for identifying those best qualified for higher judicial posts. Many countries have Judicial Service Commissions or Superior Councils of the Magistrature which fulfill these functions. In doing so, they should give consideration to any representations made by representatives of the bar, by other associations, or by members of the public.

In addition to the establishment of commissions such as those described in the principle, additional safeguards may be desirable, to safeguard against the possibility of promotions having an influence on judicial independence. In some countries, for example, the list of vacant posts and the list of candidates for those posts are published to permit public scrutiny of promotions. In one country, changes from one court to a higher court are considered changes in functions rather than changes in rank, and salaries are based on years of experience rather than on the particular judicial office held.

In order to ensure that respect for the fundamental human rights of all persons becomes a reality, it is of the greatest importance that the judiciary be composed of men and women having the requisite qualities. Thus in every system for the promotion of judges, the fundamental goal must be to appoint the individuals who have best demonstrated the qualities mentioned in this principle.]

V. **Retirement, Discipline, Removal and Immunity**

Retirement
Art. 12. All judges, whether selected by appointment or elected, should have guaranteed tenure until a mandatory retirement age, subject only to removal for incapacity or serious illness.

[**Note:** Pursuant to this principle, elected judges should not be required to stand for re-election. This article is not intended to apply to international courts.]

Discipline
Art. 13. Any disciplinary action should be based upon standards of judicial conduct promulgated by law or in established rules of court.

Art. 15. The decision of a disciplinary board should be subject to appeal to a court.

[**Note:** Opinion was divided as to whether the disciplinary board should also include a minority of non-judges. Disciplinary sanctions may include a variety of options, ranging from censure or reprimand to the most drastic action of removal.

A common law judge who was unable to attend the meeting has suggested that articles 13 and 15 be amended to read as follows:

"13. Disciplinary proceedings against a judge shall be taken formally where it is desired that the judge be, for serious reason, removed from his office. Such disciplinary proceedings shall be taken in the first instance before a board composed of members of the judiciary selected by their peers and there shall be a right of appeal from the decision of such a board to a court.

15. Where the conduct of a judge does not warrant removal from his office, disciplinary, or other procedures in relation to that conduct, should be taken privately in accordance with the powers vested in the Chief Judge of his court."]

Removal
Art. 16. A judge should not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.

Immunity
Art. 17. Judges should have immunity from civil suit for acts done in their official capacity.

[**Note:** The principle, that a judge, in exercising his legal authority, should be free to act upon his convictions without fear of personal consequence to himself, is of the highest importance for the proper administration of justice. Liability to answer to everyone who feels aggrieved by the action of a judge would be inconsistent with the possession of this freedom and would destroy the independence of the judiciary.

This principle is without prejudice to the right which an individual should have to compensation from the state for injury incurred by reason of negligence of fraudulent or a malicious abuse of authority by a court, and this right should be assured by an effective legal remedy.

In regard to the degree of immunity there was a difference of opinion. Some were in favour of absolute immunity, believing that the principle of public accountability would be adequately met, where necessary, by disciplinary action. Others considered that in principle, and in accordance with the practices of some countries, a disciplinary board, or a court, should be able to remove a judge's immunity in a case of fraudulent or malicious abuse of property. Another view was that an injured party should be able to apply to a court to have the immunity of a judge removed.]

VI. **Working Conditions, Administrative and Financial Arrangements**

Organization of the Judiciary
Art. 18. Any hierarchical organization of the judiciary, and any difference in grade or rank, should in no way interfere with the right of the individual judge to pronounce freely in accordance with his appreciation of the facts and his interpretation of the law.

[**Note:** In some countries the judiciary is organized in strictly hierarchical order, prevailing even between members of the same court. In these circumstances the

higher ranking judges, especially if they are likely to be asked to recommend a colleague for promotion, may even unwittingly exercise a restrictive influence on the independence of subordinate colleagues, or induce in them an unduly deferential attitude towards their superiors. Consequently it appears useful to enunciate this principle.]

Assignment of Cases
Art. 19. The court itself should be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

[Note: There may be, and in some jurisdictions there is, a right of appeal to the court as a whole, where such decisions are made by the President or a senior judge of a court.]

Specialization of Judges and Tribunals
Art. 20. Considering the increase in the volume and diversity of judicial matters, the creation of specialized courts contributes to efficiency and the effective administration of justice, which in turn enhances the independence of the judiciary. Nevertheless, a specialization should not preclude the periodic rotation of judges, assisted by appropriate inservice training.

Professional Privilege
Art. 21. Judges are bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of their duties, other than in public proceedings. They must not be required to testify on matters of which they have knowledge as judges.

[Note: It is clear that if judges can be required to testify, or otherwise disclose information about their deliberations, their independence may be threatened.]

Freedom of Association and Expression
Art. 22. In accordance with the Universal Declaration of Human Rights, members of the judiciary, like any other citizens, are entitled to freedom of expression, association and assembly. However, judges should refrain from expressing public criticism or approval of the government, or from commenting on controversial political issues, in order to avoid any impression of partisanship.

[Note: Judges should be free to form and join associations of judges, to represent their collective interests, and to express opinions and take positions orally or in writing, on matters pertaining to their functions and to the administration of justice. Such associations may organize assemblies, conferences, or general or specialized meetings for the entire judiciary or sections of it, and issue reports and communicate their views in an appropriate manner.

Opportunities for dialogue and consultation between judges of the same rank or grade can help to reinforce judicial independence.

The freedom of expression of judges is, of course, subject to the limitations of professional secrecy, in accordance with Article 21.

There was considerable discussion whether it was proper for judges to be members of political parties. Some took the firm view that they should not in any circumstances, in order both to keep themselves free from possible political pressures and not to prejudice their reputation for impartiality. Others thought that they could, without harm, be members of a political party, but that they should not hold office or take part in policy formulation, or in party activities.

Yet, others saw no objection to judges having full freedom of association in political parties and playing an active, and even leading, role in them. Some, opposed to these latter views, considered that there might be less objection to a judge being a member of a political party in a one party state.

In some countries, a "duty of reserve" is imposed upon judges. This requires them as a matter of discipline to exercise restraint in the exercise of their freedoms, in order to reconcile them with the particular nature of their responsibilities.]

Disqualification from Hearing Particular Cases
Art. 23. Judges can, and should, decline to sit in cases where their independence may properly be called into question, whether or not so requested by one of the parties. In doubtful situations the court or the Chief Justice or President of the Supreme Court should decide upon request by the judge concerned.

[Note: In some jurisdictions there is an immediate right of appeal against a refusal by a judge to disqualify himself.]

Financial Provisions
Art. 24. To ensure its independence the judiciary should be provided with the means and resources necessary for the proper fulfillment of its judicial functions.

Art. 25. The budget of the judiciary should be established by the competent authority in collaboration with the judiciary. The amount allotted should be sufficient to enable each court to function without an excessive workload. The judiciary should be able to submit their estimate of their budgetary requirements to the appropriate authority.

[Note: An inadequate provision in the budget may entail an excessive workload by reason of an insufficient number of budgeted posts, or of inadequate assistance, aids and equipment, and consequently be the cause of unreasonable delays in adjudicating cases, thus bringing the judiciary into discredit.]

Art. 26. Judges should receive, at regular intervals, remuneration for their services at a rate which is commensurate with their status, and not diminished during their continuance in office. After retirement they should receive a pension enabling them to live independently and in accordance with their status.

[Note: It is essential for the independence of the judiciary, that salary levels should be such that judges are not exposed to the temptation to seek other sources of income.

An exception to the principle of non-reduction of salaries may be made at a time of economic difficulty if there is a general reduction of public service salaries, and members of the judiciary are treated equally.]

Physical Protection
Art. 27. It is the responsibility of the executive authorities to ensure the security and physical protection of members of the judiciary and their families, especially in the event of threats being made against them.

[**Note:** Whether it is a question of direct and personal threats or of the general situation of public order, judges should be able to carry out their functions in the calmness and safety which are necessary for their independence. They should be able to count on the protection of the competent authorities.]

VI. **The Role of the Judiciary in a Changing Society**

Art. 28. In societies in which radical changes are being made, serious tensions sometimes arise between the judiciary and the executive, or legislature. In these circumstances judges often have a difficult role to fulfil, calling for the highest judicial qualities. On the one hand, they should understand and give due weight to the goals and policies of the changing society when construing legislation or reviewing administrative decisions. On the other hand, they must uphold the human rights of individuals and groups which are laid down in the constitution, laws and, where applicable, international instruments, or which reflect the lasting values of the society. As in the other situations, justice requires judges to adjudicate impartially between the conflicting rights and interests and apply the law according to their understanding of its meaning.

[**Note:** Tensions and conflicts, of the kind referred to above, have at times arisen when a constitutional or other court has invalidated reform legislation or executive action as being unconstitutional, or when there has been a series of decisions restricting the effect of reform legislation, such as trade union or land reform laws or programs of nationalisation. It may be noted that these tensions or conflicts usually arise in countries where the independence of the judiciary is in general respected, and the judiciary is not subservient to the executive.

Judges should accordingly inform themselves fully about the goals and policies of a changing society. They must also be alert to restrict limitations on personal freedom and resist all forms of discrimination. It follows that, at times, the judicial function may legitimately operate as a restraining factor on reform legislation, not as a result of an instinctive resistance to change, but following a considered weighing-up of the conflicting interests and values at stake. Where possible, judges should, in order to avert accusations of partiality or obstruction, make clear in their judgments, their understanding of the different social and political interests at stake. In some legal systems, however, this is impossible as the law forbids the judge to give judgment in this way.]

VIII. **Judicial Independence and the Protection of Human Rights**

Art. 29. The independence of prosecutors and advocates and the fearless and conscientious fulfillment of their respective professional duties is a necessary complement to the independence of judges, and is an essential safeguard for the attainment of justice, liberty and respect for the rule of law, and for the protection of human rights of all persons in any society.

[**Note:** In criminal proceedings the independence and impartiality of judges can be substantially assisted by the independence of prosecutors and lawyers. In particular the independence of defence lawyers must be fully preserved to enable them to counterbalance the role of prosecutors, and assist the judges by marshalling countervailing evidence and argument.

In some countries, prosecutors, although part of the Judiciary, are hierarchically organized, and subject to the orders of the Executive. The latter thus has the means to exercise an indirect pressure on judges of the bench through influential prosecutors. It is preferable, therefore, that prosecutors should, except in relation to specific matters specified by law, be independent of the executive power.]

Art. 30. The principle of the independence of the judiciary entitles and requires a judge in a criminal case to ensure the fair conduct of the prosecution, and to inquire fully into any allegation made, of a violation of the rights of the accused which is relevant to the issues in the case.

Art. 31. Judges should keep themselves informed about international conventions and other instruments establishing international human rights norms, and should seek to implement them as far as feasible, within the limits set by their national constitution and laws.

[**Note:** In some countries, the constitution recognizes the primacy of duly ratified treaties over national law, including even laws passed subsequent to the ratification of, or accession to the treaty concerned. In other countries, laws enacted after the date of ratification or accession prevail, and their provisions must be applied by the judiciary. The wording of this article is intended to cover both situations.]

Art. 32. Derogations from the principle that the judiciary should have jurisdiction directly or by way of review, over all issues of a judicial nature, may be admissible in times of war or grave national emergency, under conditions prescribed by law.

[**Note:** Experience shows that in times of war or national emergency., there is an increased risk of abuses of power and of severe derogations from constitutionally or legally guaranteed freedoms and rights.

The constitution and laws should, therefore, define precisely the circumstances and conditions of admissibility of such derogations by the executive, and institute controls to be exercised by the legislature or other appropriate organs.]

Chapter 36
COMMENTARY ON THE SYRACUSE DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

President Manfred Simon

Introduction

In May 1980, the Economic and Social Council of the United Nations authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities, to entrust Dr. L.M. Singhvi from India with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessor, and the independence of lawyers. (E/CN.4 Sub.2/L.731 14th August 1980).

To help the Special Rapporteur in his important task, the International Association of Penal Law and the International Commission of Jurists organized a Committee of Experts which met from 5th to 29th May 1981 in Syracuse (Italy) at the International Institute of Higher Studies in Criminal Sciences. The purpose of the meeting was to draft principles on the independence of the judiciary, leaving aside for the time being the question of the independence of lawyers, jurors and so on. The Committee, furthermore, intended to exchange information on the subject among its members, who had come form many different parts of the world.

The Draft Principles, as agreed upon by the Committee, were submitted to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities at the latter's 34th session in August 1981. (E/CN.4/Sub.2/481/Add.1 of 4th August 1981).

The Committee was divided into five commissions dealing respectively with: 1) qualification, selection and training of judges, 2) posting, transfer, promotion, retirement, inspection, discipline, removal and immunity of judges, 3) working conditions, jurisdiction, financial and administrative aspects of judicial administration, 4) the role of the judge in a rapidly changing society, 5) the role of the judge in the protection of human rights.

In our commentary, we shall follow the above subdivisions, indicating what were, in our view, the intents and purposes of the Committee in adopting each of the several provisions, as they resulted from the discussions in plenary session and, as far as it appears useful, making suggestions for improvement.

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I. Preamble

In referring to the Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights Act (Art. 14(1)) the Committee's purpose was to underline that the independence of the judiciary is the necessary and implicit consequence of the right of everyone to a fair and public hearing by a competent and impartial tribunal. It, moreover, was mindful, that the Special Rapporteur's mission evolves within the framework of the U.N.'s aims in this field and is based on the fundamental principles resulting from the above-named international instruments. They furthermore aimed at formulating guidelines acceptable to all members of the United Nations, who have adopted by an almost unanimous vote, the Universal Declaration (which defines the aims that the Member-States have thus morally engaged themselves to achieve jointly and separately), and many of whom have ratified the above-mentioned Covenant. Consequently, the Experts wished to assist the Special Rapporteur to achieve his goal, i.e., to submit proposals, and formulate guidelines suitable to be incorporated in a United Nation's declaration on the Independence of the Judiciary, or in a Covenant to be signed and ratified by all Member-States. Such principles would be considered, not unlike the Universal Declaration, as a minimum standard for the existence of an independent judiciary in charge of the fair administration of justice. In case of their violation by a Member-State, citizens of the latter, whose rights to an impartial and fair justice had been infringed, might, by invoking them, address themselves to the international community to ask for redress.

II. Definition

The definition as given in articles 2 and 3 shows the Committee's understanding of what is meant by an "independent judiciary." To all intents and purposes the latter must be separate from the executive and the legislature, that is to say that it must be a third arm of the government. Both the other branches must be prevented by the constitution and by law from interfering with the administration of justice.

III. Qualification, Selection and Training of Judges

Articles 3-7 deal with this fundamental problem. They aim at ensuring that only the best qualified candidates will be appointed to judicial office, and that any discrimination, contrary to United Nations' principles be excluded in the selection of candidates.

To ensure that the appointee will be an individual of integrity, the appointing authority must have the power to investigate the candidate's past. In France,

certain limits are set to this investigating power as is shown by a recent decision of the Conseil d'État, the highest French court in administrative matters. (C.E. 27th January 1982, Dalloz 177.82).

By ministerial decree, the Minister of Justice, the appointing authority for members of the judiciary, prescribed that the file of candidates for entry to the Ecole Superieure de la Magistrature, where future judges are trained for their functions, must contain an extract of their criminal record, called "bulletin no. 1." This bulletin enumerates in detail all entries in the record, even those reporting on minor infringements such as traffic violations. (Art. 774 of the code of criminal procedure). In its paragraph 2, that article declares that bulletin no. 1 may only be delivered to judicial authorities, while bulletin no. 2, much less detailed, may be transmitted to administrative authorities (Art. 776, code of criminal procedure) in charge of candidates for public office. When deciding on admission of candidates to the École Supérieure, the Minister of Justice acts in his administrative capacity and not as head of the judiciary. Consequently, the Conseil d'État, upon request of one of the candidates, annulled article 6 of the ministerial decree insofar as it prescribed submission of bulletin no. 1 of the criminal record.

IV. Posting, Transfer, Promotion

Posting: These measures are dealt with in Articles 8-11 of the draft principles. Such measures may be exercised as a subtle indirect pressure on judges to conform to governmental views or the interest of powerful groups or individuals. That is why the Committee, as explained in the note under Article 8, recommends that assignments of judges within their own court should be determined by the court itself. In France it is the presiding judge of the court, who assigns judges annually at least to a post. In courts composed of several sections, a system of rotation ensures that judges will have the opportunity to take cognizance of all facets of their courts' work. A control of such assignments by a Superior Council of the Magistrature may be useful as a precaution against arbitrary assignments by the chief justice of the court concerned. Recourse to the council's arbitration should, however, be permitted only upon complaint of the judge concerned.

Transfer: Article 9 restates the principle that judges may not be transferred without their consent from one jurisdiction to another. This rule is indeed essential for the independence of the judiciary. Otherwise transfers ordered by the executive may be used as a punitive measure against an unwanted judge. Even promotion to a higher grade in the hierarchy may, and has in practice, served this purpose.

The note under Article 9 authorizes, however, exceptions where a judge in his early years is transferred from post to post to enrich his judicial experience. This

exception to the principle was introduced in the footnote on the request of an expert from a developing country. He explained that it is often almost impossible to find judges or candidates for judicial office willing to accept assignment to remote, isolated or backward areas, where it is imperative for the good administration of justice, that judges should be in direct contact with the local population.

While this certainly may correspond to the need of such countries, such exceptions are nevertheless in conflict with one of the most important safeguards of the independence of judges, i.e., that they may not be transferred to another post without their consent. If admitted, the circumstances where such appointments are authorized should be enumerated by law.

Therefore, it is suggested that an Article 9a should be inserted in the Draft Principles which might read as follows:

> In countries where it is difficult to find candidates for appointment in remote or isolated areas, judges, in the early years of their career, may be exceptionally requested to serve in such areas and to be transferred from post to post within such areas.
>
> The circumstances of such appointments and transfers, as well as the number of years during which the judge may be requested to serve within such areas, shall be fixed by law.

We furthermore suggest that wherever such appointments and transfers are permitted, their necessity and conformity to the law should be ascertained by an independent judicial commission.

Promotion: Articles 10 and 11 of the Draft Principles deal with one of the more serious dangers that may menace the impartiality of judges. The Expert Committee's intent was to draw attention to this peril and to suggest in Article 11 a possible safeguard: an independent commission composed of judges being responsible for promotion. In the note under Article 11 the Committee mentions additional possible safeguards. In the last paragraph, the note again emphasizes the paramount importance of an independent judiciary composed of highly qualified judges, to ensure that respect for the fundamental human rights becomes a reality.

The question may, however, legitimately be asked whether any system of promotion is compatible with complete independence of the judiciary. In any career system, be it administrative, judicial or in private industry, members of the profession concerned will necessarily attempt to progress, and may therefore not be indifferent to suggestions from persons or groups having power to decide upon their career. The members of the judicial commission themselves might sometimes be tempted to use their power to try to influence certain decisions of judges up for promotion.

In our view, the independence of judges is best insured in systems where they

are not encouraged to expect promotion to higher courts or promotions in rank. It is, however, not to be expected that countries where traditionally the judiciary is a career service, which by definition implies a system of promotion, will change it to adopt the rules of countries where judges are normally not expecting promotion. This would indeed represent for such countries and their judiciaries a revolutionary change and might be detrimental to the good administration of justice. It therefore would appear that a judicial commission, as proposed by the Committee, is in fact technically the best means to ensure the independence of judges in countries where the judiciary is a career service. It should be added that the members of that commission shall be elected by their peers and not appointed by the executive, as is the case in France since 1958 for the Conseil Supérieur de la Magistrature.

V. Retirement, Discipline, Removal and Immunity

The provisions regarding retirement, discipline, removal and immunity of judges are contained in Articles 12-17 of the Draft Principles. Each of these measures may, in case of abuse, infringe upon, or even destroy, the independence of the judiciary as a whole, or of individual judges.

Retirement: By Article 12 the Committee intended again to draw attention to the importance of security of tenure for the independence of the judiciary. If indeed it were possible to remove judges ad nutum, the executive would have a powerful instrument of pressure on those judges at least, who intend to serve permanently in that capacity. Furthermore, such power would be detrimental to the prestige of the judiciary as a whole. On the contrary, a judge, who is certain not to be removed until he has reached the age of retirement, will be able to resist outside pressure, and will gain in stature. Obviously, the retirement age should be fixed by law. But, what the law has done, another law can undo. There have been examples where the executive, desirous to remove a troublesome judge, covered by his legal irremovability, has obtained from the lawmakers an enactment lowering the retirement age of all judges belonging to the age group of the judge concerned, on the ground that it was necessary to facilitate the accession of younger members of the judiciary to higher office, and to rejuvenate the entire structure of the judiciary. No doubt such measures are exceptional, nevertheless, the example shows the vulnerability of the principle of security of tenure, even when it is written into the law. A possible remedy would be life tenure guaranteed by the constitution as is the case with federal court judges in the United States.

The Committee suggested that a retirement age fixed by law should apply also to judges appointed by popular election. This method of appointment is in force in a number of federal states in the U.S. Such elected judges must stand from time to time for re-election. According to one member of the Committee, the result is not unsatisfactory. In most cases, judges are re-elected for several terms without difficulty, and their tenure is in fact, if not by law, for life. Nevertheless, it would appear to us, that selection by competitive entrance examination or any other method based on professional expertise of the candidate is more appropriate than popular election, which may induce the candidate to conform to partisan opinions and standards. The remedy suggested by the Committee, e.g., that elected judges should not be required to stand for re-election may in many cases contribute to the impartiality of judges selected by this method.

All things considered, it seems to us that, to protect the independence of the judiciary, judges should be constitutionally entitled to hold their office during good behaviour, as prescribed by Article III of the Constitution of the United States, despite the inherent weaknesses of such tenure, such as prolonged illness or persistent negligence of duty.

Discipline: The disciplining of judges may interfere with their independence, unless appropriate measures are taken to prevent abuse of disciplinary power. To ensure this, Articles 13-15 of the Draft Principles suggest that disciplinary action should be based on standards of conduct promulgated by law, or in established rules of court, and that it should be before a board selected by the judges' peers. An appeal to a court against the board's decision ought to be allowed.

These principles protecting judges against arbitrary disciplinary proceedings on the part of the executive and consequently ensuring their independence will be efficient, provided "standards of judicial conduct" are clearly defined and, as recommended by the Committee, composition and rules of procedure of the board ensure the freedom of its members from outside influence.

The French experience shows that it is not easy to implement these Articles 43-66.1 of Ordinance No. 1270 of 22nd December 1958, containing the Statute of the Judiciary which refers to disciplinary proceedings. Article 43 defines standards of judicial conduct indirectly, by declaring that any violation by a judge of the duties of his office, any dishonourable or indelicate act, and any act contrary to the dignity of the office may be sanctioned by disciplinary proceedings. Seven different grades of sanctions, the most serious of which is removal from office, are enumerated in Article 45.

On the other hand, the rules of procedure applicable to disciplinary proceedings are detailed in Articles 49-58. The "Superior Council of the Magistracy" acts as the disciplinary board. It consists of nine members appointed by the President of the Republic, Chairman of the Board. In case of disciplinary proceedings, however, the Council deliberates in the absence of the President and is

chaired by the Chief Justice (Premier Président) of the Court of Cassation. Two members of the Board are selected from eminent citizens not belonging to the Judiciary. Ab initio, the judge concerned has the right to consult his file. He may be assisted by counsel chosen from among his peers or from members of the bar. In the course of the preliminary investigation he is heard by the rapporteur and after completion of the latter's report, he appears before the Board in plenary session where he, and his counsel, are authorized to speak in his defence. All proceedings before the Board take place in camera. This is to be approved as such proceedings, whatever their outcome, are detrimental to the judge's standing in the eyes of the public. The Board must indicate the grounds for its decision. No appeal against the Board's decision is allowed.

The French system, while on the whole acceptable, may be open to criticism for the following reasons: 1) the mode of selection of the board's members, 2) the lack of precision of the grounds on which disciplinary proceedings may be initiated, 3) the impossibility of appeal.

The two-tier system, functioning in the state of Illinois (U.S.), which was described by a member of the Committee, seems to offer a more perfect protection of judicial independence than either the Committee's Draft Principles or the French law. It consists of a Judicial Inquiry Board having authority to investigate and prosecute judicial misconduct, as well as cases of mental and physical inability. The Board, however, has no power to decide on guilt or innocence. This power belongs to the second tier, the Courts' Commission, which determines whether or not complaints filed by the Judicial Inquiry Board justify the imposition of disciplinary sanctions. The Disciplinary Board consists of two Circuit Judges, four non-lawyers and three lawyers. The Courts' Commission is composed of one Supreme Court Judge, selected by that court, and two Appellate Court Judges designated by that court.

This kind of organization seems to us preferable to those suggested by the Committee or provided by the French enactment. The Inquiry Board will filter complaints so as to avoid harassment of judges by dissatisfied litigants; the deciding authority, the Courts' Commission, will have to deal with a limited number of complaints, where serious grounds exist to believe that the judge concerned might be guilty of misconduct; lay members and lawyers who are not judges, sitting in a Judicial Inquiry Board, will ensure that public opinion may make itself heard. As indicated in the note under Article 15, opinion was divided on whether such disciplinary bodies should include a minority of non-judges. For the reason given above, we are in principle in favour of such an inclusion. Disciplinary proceedings, whatever their outcome, are detrimental to the prestige and reputation of the judge

who is subjected to them. They should therefore, under all circumstances, be held in camera, from their initiation up to the final decision.

Whether the latter should be subject to appeal to a court, is, in our view open to question. Indeed, members of the Board can hardly appeal against the ruling of a body of which they themselves are members. An appeal by the judge concerned is likely to be prejudicial to the prestige of the judiciary as a whole. The two-tier system as operated in Illinois seems to offer an acceptable solution to the problem.

Removal: The rule as stated under Article 16 of the Draft Principles appears unobjectionable. It clearly shows the Committee's intention to surround any proceedings aimed at the removal of a judge from office, with a maximum of safeguards against any attempt by the executive, or other powerful groups, to intimidate the judiciary by means of abusive and recurrent removal procedures. It may be mentioned that in the United States, a federal judge may only be removed by impeachment, a procedure which, unless he should be guilty of a serious crime, has the result that he is, in fact if not in law, irremovable on any other less serious ground. (See Kaufman, "Chilling Judicial Independence," 88 Yale Law Journal 4 (1980)).

Immunity: Article 17 emphasizes the necessity to protect judges against harassment by dissatisfied parties. The note under this provision explains clearly the Committee's purpose in enunciating this principle. It also recalls the right of individuals to be compensated by the State for injury suffered by abuse of authority by a court, and that this right should be implemented by an effective legal remedy.

No particular system of implementation being mentioned, it might be useful to recall that in France, Article 11 of the above-quoted enactment of 22th December 1958, declares that judges are protected in the exercise of their functions against threats and attacks, by the State being obliged to compensate them for any damage they may suffer in consequence. Article 11.1 adds that they are responsible exclusively for personal faults committed in relation to the public service, and that responsibility may only be invoked by the State in a judicial action aiming at recovering from the judge the amount paid to the victim. The action is initiated before one of the civil sections of the Court of Cassation.

The procedure to be followed by the alleged victim of such personal faults or failures is extremely complex. It results in part from Article L.781.1 of the Code of Civil Procedure dealing with the responsibility of the State in case of defective functioning of the judicial service. Only two grounds of action are admissible: gross negligence or denial of justice. Article 506 of the Code of Civil Procedure defines "denial of justice" as the refusal of judges to rule on requests submitted, or neglecting to pronounce on cases ready for judgment. Article 4 of the Civil Code

declares that a judge, refusing to rule on the ground of silence, unintelligibility or insufficiency of the law, may be prosecuted for denial of justice. Article 185 of the Penal Code sanctions such denial by fine and by a prohibition from exercising a public office from 5-20 years. To obtain recognition that he has been a victim of a denial of justice the complainant will have to obtain, before initiating proceedings, permission of the Chief Justice of the Court of Appeal, who will rule on admissibility of the request after consultation with the chief prosecuting officer. In case of refusal, the complainant may lodge an appeal to the Court of Cassation. Should his request be refused, he may be heavily fined. In fact the law providing for strict rules on such complains and allowing for actions only in very obvious cases, and the possibility of a heavy fine in case of final rejection, have successfully done everything required to ensure that a judge, in the words of the Draft Principles, "in exercising his legal authority, should be free to act without fear of consequences to himself . . . ," while leaving to the justifiable victim of a serious fault of a judge or a court, a means to obtain redress and compensation.

As appears from the note under Article 17, there was, however, no unanimity of the experts as to the degree of immunity. We believe that the principle of public accountability is sufficiently met by disciplinary action where necessary. In cases where appeal to a court is admitted, the French procedure, as outlined above, appears adequate to enable alleged victims to obtain compensation, provided they have suffered serious damage by fault of a judge or a court. The mere possibility of such proceedings will suffice to estrain the great majority of judges from succumbing to the temptation of abusing their authority.

VI. Working Conditions, Administrative and Financial Arrangements, and Organization of the Judiciary (Art. 18-19)

Internal Independence of the Judge: Article 18 recalls that in many countries the judiciary is organized in a strictly hierarchical way; it states that difference in grade or rank should not interfere with the right of individual judges to pronounce freely. No doubt, as it is said in the note accompanying the statement, the higher ranking judges, especially if they are requested to recommend a colleague for promotion, may exercise a restrictive influence on the independence of their subordinates. In such a situation, much will depend on the personality of the judges concerned, and it is difficult to find foolproof measures neutralizing the tendency of a particular judge to please his superior, or of the latter to unwittingly exercise subtle pressure, by virtue of the fact that it is his duty to recommend or to refuse to recommend a junior member of his court for promotion.

Certain safeguards have been developed in the course of time. The higher

ranking judge may discuss the question orally with the junior expecting promotion before drafting the note concerning the latter; the note may be communicated before transmission to higher authority to the judge concerned, and the latter be allowed to reply in writing. The final decision to promote or refuse to do so may be the privilege of a Judicial Service Commission. Such safeguards may, however, prevent the higher ranking judge from expressing his opinion freely in writing and induce him to complete it verbally and unfavourably to the promoting authority.

Assignment of Cases: The rule as suggested by the Draft Principles, i.e. that the court itself should be responsible for assigning cases to individual judges, seems unobjectionable. The Chief Justice must obviously have a measure of leeway in assigning cases, in accordance with his appreciation of the ability of special knowledge of the judge or judges concerned, helping them to deal appropriately with the case.

One of the purpose of the rule seems to be to prevent individual judges being bypassed by reason of personal bias of the assigning judge, for example, and to insure that he will have the opportunity to participate fully in all facets of his court's judicial activity. The right of appeal to the court as a whole, on assignment of particular cases, as mentioned in the note, seems to give too much weight to this kind of exception and to complicate too much the whole procedure of assignment.

Specialization of Judges and Tribunals: Again, the rule as drafted by the Committee seems unobjectionable, although one might observe that specialization, if continued for lengthy periods, might be conducive to routine, loss of flexibility (enabling the justices concerned to situate the case in the framework of its political, social and economic environment), and too great a reliance on precedents. Regular rotation of judges as recommended, appears to be an appropriate answer.

Professional Privilege: As drafted, the rule stated in Article 21 is an obvious means of protecting the independence of the judiciary. Judges must indeed not be required to testify on matters of which they have knowledge in their professional capacity. The note explains the specific purpose of the rule, i.e. to prevent any threat to the independence of judges.

Freedom of Association and Expression: Article 22 of the Draft Principles aims at ensuring that judges, like other citizens, may freely express their opinions and have freedom of association and assembly. It also illustrates certain aspects of the duty of reserve. Judges should indeed refrain from public criticism, approval of governmental action, or from commenting on controversial political issues, in order to avoid any implication of partisanship. The note under the article summarizes the various and divergent opinions concerning implementation of the principle discussed by the Committee. Should judges, for example, be permitted to join a political

party in opposition to the government of the day, and participate publicly in the work, campaigns, publications and so on of such a party? A compromise between conflicting rights and duties has obviously to be elaborated. Although, at first sight, one might be inclined to think that to prohibit this kind of activity deprives judges of the exercise of essential political rights, we are in favour of the principle as stated in Article 22. The judge's imperative duty of impartiality necessarily imposes certain restraints on extra-professional activities. Nobody is obliged to become a judge. If one chooses this career, one ought to accept freely the limits imposed on one's freedom of action connected with the profession. In conclusion, we are inclined to share the views of those who recommended that judges, in order both to keep themselves free from possible political pressure and so as not to prejudice their reputation of impartiality, should not in any circumstances be members of political parties. This is no obstacle to their joining associations of judges to represent their collective interests, as well as to express their opinion on problems connected with the administration of justice. This kind of collective action may even be vitally necessary to defend the independence of the judiciary as a whole, or that of an individual judge. It seems doubtful whether a judge should be allowed to be a member of the political party operating in a one-party State, as admitted by the Committee. His association with such an organization will probably be mandatory if he wants to obtain an appointment to judgeship. In addition, his rulings will be, and will have to be, in conformity with the ideology officially dominant in that state. It is difficult to imagine that in such an environment, a court would pronounce against important interests, material or dogmatic, of members of the ruling class; as it is difficult to believe that in a theocratic State, courts would rule in a sense in contradiction with religious teaching. In such a political setup, it is futile to speak of an independent judiciary.

In Draft Principle 22, the Committee recommends that judges should refrain from public criticism of their government's policy or from commenting on controversial political issues. This may go far in restricting freedom of expression and political action of members of the judiciary. This, for instance, is the result of Articles 8-10 of the French law of 22nd December 1958 mentioned above, under which judges may not:

1) hold any other public office,
2) exercise any other remunerated activity,
3) be a member of both houses of Parliament, of the European Assembly, or of the French Economic and Social Council,
4) they may not be assigned to a court situated in a district represented by their husband or wife in Parliament,
5) they may not be a member of a municipal council of any locality situated in the district where their court has territorial jurisdiction or where less than five years before, they have held an elective office,

6) they may not in corpore participate in political deliberation,
7) they may not manifest hostility towards the principle or form of the government, or participate in political demonstrations incompatible with the "reserve" imposed by their judicial function, nor may they by collective action, paralyze or interfere with the functioning of the courts.

Although in France, they may, and do, join political parties, the freedom of political action of French judges is severely restricted by the provisions summarized above. As had been state, we favour abstention of judges from political action in order to avoid any imputation of partiality.

One more word might be said about the so-called "duty of reserve." While it is obvious that members of the judiciary must behave in all circumstances in accordance with the dignity of their office and their responsibilities towards their fellow-citizens, a "duty of reserve" is a vague and elastic concept. It can, and has been, used as a means of intimidation. The judiciary as a whole, as well as its professional associations, should fight vigorously against any attempt to attack troublesome judges, to intimidate them, to limit their freedom to apply the law in accordance with their understanding under the pretext of violations of their "duty of reserve," in fact to set limits to the independence of the judiciary as a whole. Courts and/or boards adjudicating disciplinary cases where infringement of the "duty of reserve" is alleged, should consider the point with utmost care and try to arrive gradually, by their different rulings at a precise definition of what is meant in a legal sense, by the "duty of reserve".

Disqualification from Hearing Particular Cases: The rule that judges should not sit in cases where their impartiality and independence may be questioned is generally accepted. A judge, interested for one reason or another in the outcome of a case, is not fully independent and must request to be relieved from sitting in that particular instance, whether or not he is called upon to do so by one of the parties. The same rule should apply to the prosecution also in countries where the latter is by law one of the parties, and where the court, as in France, cannot sit in absence of its representative. The ability of parties to request such a withdrawal should, however, be restricted by law and the rules of procedure.

Article 341 of the Code of Civil procedure lists the grounds on which a party to the proceedings may ask a judge to disqualify himself. It may be useful to mention them here:

1. If the judge or the judge's spouse has a personal stake in the case under review.
2. If the judge or the judge's spouse is a creditor, debtor, heir presumptive, or donee of one of the parties.
3. If the judge or the judge's spouse is a relative or friend of one of the parties or of the latter's spouse, up to the fourth degree, inclusively.
4. If a lawsuit has been, or is, pending between the judge and one of the parties, or the latter's spouse.

5. If the judge had previously taken cognizance of the case in his capacity as a judge or as an arbitrator, or if he knows one of the parties.
6. If the judge or the judge's spouse is charged with the administration of the estate of one of the parties.
7. If the judge or the judge's spouse is subordinate to one of the parties or their spouse.
8. If there exist links of manifest friendship or hostility between the judge and one of the parties.

The request has to be made as soon as the party concerned has knowledge of the ground for disqualification. The party itself, or its representative, must ask for withdrawal of the judge by written request to the secretary of the court, enumerating the grounds concerned and supplemented by documentary evidence. The request is transmitted to the judge concerned, who, from then on and until final decision, must abstain from sitting on the case. If the judge should reject the request, the court of appeal of the district will give its ruling within eight days. In case of final rejection of the request, the party may be fined. Acts performed by the judge before his being informed of the challenge remain valid. As will be inferred from this detailed regulation, it is necessary in the interest of the administration of justice and of the protection of the reputation of judges, to limit by means of detailed procedural provisions, the possibility of challenging a judge. Unless that is done, parties who, for one reason or another, would prefer to have their cause decided by a different judge, might ask for a replacement on any plausible pretext. The rule established by the Committee aims at the same result as the French procedure summarized above.

Remuneration: Articles 24-26 deal with this important subject. The rules enunciated are sound. Obviously, as is stated in the note under Article 25, an inadequate provision in the budget may bring the judiciary into discredit. The budgetary amount should be sufficient to enable each Court to function without excessive workload, which results in excessive delays in the disposition of the cases under review, which is the cause of justified complaints of the litigants.

The rule, stated in Article 26, on adequate judicial remuneration constitutes an essential condition of the independence of the judiciary. This condition is sufficiently important to be mentioned in Article III of the United States Constitution, which contains a provision similar to that of Article 26 of the Draft Principles summarized above.

Insufficient remuneration for their services may have the consequence that judges must look for other sources of income, or that only members of the wealthy classes enter the judiciary, as was the case until recently in some countries. To be a judge will then be considered a privilege reserved to those classes, and people may be led to believe that there exist two kinds of justice: one for the wealthy and one for the poor, a belief detrimental to the prestige and reputation of impartiality of the judiciary. Also, recruitment mainly from a particular class may make it difficult for judges to understand the needs and situation of ordinary people, and therefore give grounds for doubting their impartiality.

The fact that sufficient remuneration for judges is one of the rights guaranteed by the American Constitution goes far to establish the importance of such remuneration for the administration of justice. Indeed, financial independence and security will contribute to the judge's conviction that he may adjudicate without fear or prejudice according to his understanding of the law. His freeedom from financial threats, from whatever source, will enhance his independence. A pension enabling judges to live independently in accordance with their status is part of the measures necessary to ensure judicial independence.

Not everywhere do judges have a constitutional right to remuneration for their services. In France, Article 42 of the enactment of 22th December 1958 simply declares that judges will be paid a salary, the amount of which will be determined by decree adopted by the Council of Ministers, that is to say the government as a whole. This provision which might be a cause of instability of income of the judiciary and therefore create a feeling of insecurity, of dependence on the goodwill of the executive among judges, allows on the other hand such factors as inflation and the rising cost of living to be taken into account, when determining the level of salaries, and thus to adapt salaries to the rapidly changing economic situation. A rule of this kind might however, in the hands of an unscrupulous government, become an instrument of pressure on the judiciary as a whole.

Physical Protection: Article 27 of the Draft Principles rightly recalls that the State has the duty to protect judges against dangers threatening their lives or the lives of their families. In France, Article 11 of the enactment of 22nd December 1958 provides that the State is responsible for the protection of judges and their families from threats and attacks of any sort in the exercise of their functions. The State will also compensate them for any damage suffered in this way.

VII. The Role of the Judiciary in a Changing Society

Article 28 of the Draft Principles deals with this difficult problem of our times. The Committee intended to give examples of how the judiciary may help to achieve peaceful change in times of revolutionary development, such as ours. The lightening speed of technological progress has already completely transformed the basis of our present-day society. With the mechanization of production great numbers of people have lost, and will lose, their jobs. Large-scale unemployment may become a permanent phenomenon. On the other hand, we are more and more

able, with less and less labour, to cover at low cost the basic needs, if not all the needs, of humanity; on the other hand, the jobless cannot share in the wealth thus produced. The legal foundations of our socio-economic order as it now stands will have to be rewritten, in order to adapt our institutions to a society that has little resemblance to the one that we knew even a few years ago, and in the context of which, ruling laws still in force, have been enacted.

No doubt, the judiciary and the legal profession as a whole have an important part to play in this rethinking process, in formulating new legal institutions taking account of these revolutionary developments. That is what the Committee intended to make clear when it stated in Article 28:

> On the one hand they [the judges] should understand and give due weight to the goals and policies of the changing society when construing legislation or reviewing administrative decisions. On the other hand they must uphold the human rights of individuals and groups which are laid down in the constitution, laws and, where applicable, international instruments, or which reflect the lasting values of the society . . .

By such action, the judiciary will be contributing to peaceful change, a role it has played for a long time already. One must not forget, however, the obstacles of a legal nature judges may meet in the accomplishment of this task, their principal mission being to apply the law, as it stands, according to their understanding. The Committee itself makes this clear in its note under Article 28 where it declares:

> Where possible judges should . . . make clear in their judgments their understanding of the different social and political interests at stake. In some legal systems, however, this is impossible as the law forbids judges to give judgment in this way.

Thus, for instance, Article 5 of the French Civil Code forbids judges "to pronounce general and regulatory provisions when giving their ruling in cases submitted to them," and Article 127 of the penal code sanctions the breach of this provision by a severe penalty.

Changes, however, occur sometimes through complete and violent destruction of the existing order and its replacement by another. Members of the judiciary may then be considered as belonging to the former ruling class, and as such be deprived of their office. New judges, supposed to agree with the revolutionary state will be appointed. They too ought to try in the Committee's words "to restrict limitations on personal freedom, to resist all forms of discrimination" and above all, prevent by their rulings, infringements of human rights. The exercise of this duty may entail grave dangers for the judge concerned. But once the new order is consolidated, the judicary should help to lay its foundations. It should aim at incorporating those rules of permanent validity, e.g. those concerning the protection of human rights, in force in the pre-revolutionary period. Even revolutions will not entirely obliterate long-

standing traditions of a people, the memory of principles of lasting values applied in former times. By its knowledge and experience, the judiciary can do much to adapt these principles to the needs and beliefs of the new society. The results achieved by the napoleonic Conseil d'État in the post-revolutionary period are a memorable example of such constructive and beneficial activity of members of the legal professions.

VIII. Judicial Independence and the Protection of Human Rights

Articles 29-32 of the Draft Principles refer to the judiciary's role in the protection of human rights, particularly important in the penal process. Montesquieu had already drawn attention to this aspect of the judiciary's duties inter alia in his "Esprit des Lois," Livre XII, Chapter II, where he writes:

> La liberté politique consiste dans la sûreté ou du moins dans l'opinion que l'on a de cette sûreté. - Cette sûreté n'est jamais plus attaquée que dans les accusations publiques ou privees. C'est donc de la bonté des lois criminelles que depend principalement la liberté des citoyens.

Freedom from arbitrary arrest and detention, the right to a fair and public trial, and the right to be defended by counsel of one's choice, belong to the most fundamental human rights. Without their scrupulous respect, men are subject to the arbitrary action of their rulers; at any moment they may be deprived of their freedom, and the criminal process is one of the means used by governments to achieve that end, to establish their power and to maintain it. The criminal law must therefore contain rules aimed at the protection of human rights. An independent judiciary is the only means to implement them in criminal cases. The judge's power to interpret the law and his right to refer to international instruments provide powerful means of attaining such an end.

The Committee was justified in drawing attention to the important part played by the prosecution in criminal proceedings. Where its members are acting under the orders of the executive, the prosecution will have the means to exercise an indirect pressure on judges of the bench through influential prosecutors; the latter should, therefore, except in relation to matters specified by law, be independent of the executive power.

Criminal laws are accompanied by rules of criminal procedure and of evidence. These are even more important for the protection of human rights than the substantive criminal law. Article 30 of the Draft Principles alludes to one aspect of such rules, obliging judges to investigate carefully "any allegation made of the violation of the rights of the accused, which is relevant to the issues of the case." In this respect, it is worthwhile to recall that, in most cases, people suspected of criminal action are subject to interrogation by the police in police precincts. In

most countries they have no right to assistance by counsel during this preliminary phase of criminal investigation. Sometimes, unlawful means are used to obtain confessions or admissions. At the trial, the accused may allege that their confessions or admissions are the result of inhuman treatment by the police, and it can hardly be denied that the results of preliminary investigations have great influence on the final outcome. The Committee therefore very rightly asked that judges should inquire fully into such allegations. In this context, it is important to note that the Supreme Court of the United States in Miranda v. Arizona (384 U.S. 430, 86 S. Ct. 1602 (1966)), established stringent rules to be applied in police interrogations, sanctioned by exclusion of evidence obtained by breach of these rules. Even in the absence of stringent rules, judges should always be conscious that one of their foremost duties is to protect and uphold human rights, as stated in the Universal Declaration and the Covenant on Political and Civil Rights. But without adequate guarantee of their independence by Constitution and by law, as well as by the constant vigilance of public opinion concerning the administration of justice, judges will hardly be able to accomplish this noble mission successfully.

Article 31 stresses that judges should implement international instruments relating to human rights, within the limits set by their national constitution and laws. The note under Article 31 recalls, that while in many countries the constitution recognizes the supremacy of duly ratified treaties over national law, in others, laws enacted after the date of ratification prevail. The wording of Article 31 covers both of these situations. In this connection, Article 55 of the French Constitution of 4th October 1958 is worth mentioning. It reads as follows:

> Duly ratified or approved Treaties or Agreements shall, subject to their implementation by the other Party, as from the time of their publication, have authority superior to that of statutes. (Translation supplied.)

It enables French judges to apply such Treaties as the International Covenant on Civil and Political Rights, notwithstanding laws which might be enacted after ratification of the said Covenant, which might be in contradiction with certain provisions of the latter. The French Court of Cassation has upheld the primacy of the Treaty of Rome over domestic enactments passed after the ratification of that Treaty, in In re Cafés Jacques Vabres (Dalloz 1975 pp. 497-507).

With Article 33, the Committee has admitted that in times of war or national emergency, derogations from the principle that the judiciary should have jurisdiction, directly or by way of review, over all issues of a judicial nature are permissible, and in the note under that article it recommends that constitutions and laws should precisely define circumstances and conditions of admissibility, and institute controls to be exercised by the legislature or other appropriate organs.

National emergency is, in our times, only too frequently, a welcomed excuse for the establishment of authoritarian, totalitarian or military regimes. The men in power will then proceed to eliminate troublesome people by imprisoning them and keeping them indefinitely, without any possibility of judicial control. Under the pretext of "National Emergency" the most horrible violations of human rights are perpetrated without any possibility of judicial supervision and redress.

It follows that even in time of war or national emergency, the judiciary should have the ultimate control over deprivations of freedom, regardless of which authority ordered and enforced it. Victims of such measures ought to be authorized to appeal to the courts for review of their case. This is also recommended in a somewhat different form by the Committee in the last paragraph of its note under Article 32.

We therefore suggest replacing Article 32 by a provision reading as follows:

> Even in times of war or emergency, the judiciary shall retain both control over the formation of emergency legislation, and the power to declare null and void clauses of such legislation in contradiction with the Universal Declaration of Human Rights. People deprived of their freedom under administrative orders or by other executive measures, shall have the right to appeal to the ordinary courts for review of their case. The latter shall have the authority to order their release.

We are conscious that such principles may not be adopted, even by the United Nations, for some time to come. But it appears to us preferable to state a rule compatible with the protection of human rights, rather than to possibly open the door to measures violating important tenets of human rights under the pretext of war or emergency.

Conclusion

It is axiomatic that the fundamental rights and liberties of the individual can only be preserved in a society where the judiciary enjoys complete independence and freedom from political interference or pressure. It is also evident that justice will not be obtained in a court committed to the policies of the executive or a particular social group. It is therefore surprising that the independence of the judiciary and the legal professions, while they are being paid much lip service, they are still far from being a reality in the vast majority of nations, members of the United Nations.

The United Nations effort to work out principles, with regard to that independence acceptable to a majority of its members, is therefore not only commendable, but urgent. The adoption of these principles is a vital complement to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The work achieved by the group of experts under the auspices of the International Association of Penal Law and the International Commission of

Jurists, with a view to assisting Dr. Singhvi in the task he has accepted on behalf of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, namely to present a report on the independence and impartiality of the judiciary, jurors and assessors, seems a valuable and useful contribution towards this end. Indeed, as historical experience has shown, without independence of the legal professions, oppression will continue to flourish and impartial justice and a fair trial will remain hollow words. Laying down the law, creating the institution, will be in vain without the support of the people, informed public opinion rising in defence of an independent judiciary and the independence of lawyers, whenever that independence is directly or indirectly threatened.

Chapter 37
TOKYO PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION

A Report of a Seminar held in Tokyo on 17th-18th July 1982 of Lawasia: The Law Association for Asia and the Western Pacific

Introduction

Fali S. Nariman

On 17th-18th July, 1982, the LAWASIA Human Rights Standing Committee met in Tokyo, Japan for the purpose of discussing the application of the principle of the independence of the Judiciary in the context of the history and culture of Asian countries. The meeting of the Standing Committee was held in private.

The Committee was honoured by the presence at its meeting of Chief Justice Chandrachud of India, Chief Justice Fernando of the Phillippines, Chief Justice Samarakoon of Sri Lanka, and President Suchiva of the Supreme Court of Thailand. It was also honoured by the distinguished presence of the Former President of the Supreme Court of Japan, former Judge Ekizo Fujibayashi, former Supreme Court Judge, former Judge Sakamoto and former Judge Takeda, and the former Chief Justice of the Nagoya High Court, former Judge Yorihiro Natio. The meeting was also attended by eminent Japanese lawyers and professors, including the former Dean of the Law Faculty of Tokyo University, Professor Mikazuki.

Having had the benefit of the experience and wisdom of these eminent jurists, and the advantages of their insight into the functioning of different judicial systems, and drawing upon the collective experience of members of LAWASIA in the region, the LAWASIA Human Rights Standing Committee at its subsequent meeting in Tokyo, formulated the following principles and conclusions.

TEXT OF TOKYO PRINCIPLES

1. The judiciary is an institution which has, and is seen to be of the highest value in the societies in the countries of the LAWASIA region.

2. The maintenance of the independence of the judiciary is essential to the attainment of its objectives and the proper performance of its high function.

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