



The Independence of the Judiciary and the Legal Profession in English-Speaking Africa

A Report of Seminars
held in Lusaka from 10 to 14 November 1986
and in Banjul from 6 to 10 April 1987

convened jointly by the

Centre for the Independence of Judges and Lawyers
African Bar Association
International Commission of Jurists

INTERNATIONAL COMMISSION OF JURISTS

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Preface

In 1978, the International Commission of Jurists created the Centre for the Independence of Judges and Lawyers (CIJL) in response to increasingly frequent attacks on judges and lawyers by governmental and para-governmental forces.

The CIJL has focused on activities to protect the independence of the legal profession and the judiciary, acting as a clearinghouse for information about threats to that independence, and using this information to mobilise international support. The CIJL works with bar associations to encourage them to act on behalf of persecuted colleagues, and it disseminates information about measures that may be taken both locally and internationally to protect lawyers and judges from undue government interference.

Perhaps the most important part of the CIJL's work has been the development of international and regional standards for the independence of judges and lawyers. The CIJL was particularly instrumental in the drafting of the Basic Principles on the Independence of the Judiciary and in their adoption by consensus by the Seventh United Nations Congress on Crime Prevention and Control in 1985. These principles, which are set forth in an Annex to this report, were endorsed, together with other Congress documents, by the General Assembly (A/Res/40/32), which then specifically called on governments to respect the Basic Principles and take them into account in their national legislation and practice (A/Res/40/46).

In 1986, the ICJ and the CIJL began a series of regional seminars intended to examine the norms being developed at the international level, discuss how these norms should be applied and adhered to in their regions, and make recommendations for their implementation. As part of this series, the ICJ and the CIJL in conjunction with the African Bar Association spon-

sored a seminar on the independence of judges and lawyers in Lusaka, Zambia (10 to 14 November 1986). The seminar brought together judges, attorney-generals, and practising lawyers and academics from Botswana, Lesotho, Malawi, Mauritius, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. President Kaunda, in his opening address to the seminar, expressed one of the underlying themes of the conference, namely that people and governments "should not shirk from (their) responsibility to establish, nurture and safeguard vital institutions such as the judiciary for there is evidence from all over the world that societies which took matters for granted have at one time or another regretted the results of their lack of vigilance."

A plenary session was devoted to the role of courts and lawyers in society. The participants then divided into four working groups to consider the following topics: the organisation and jurisdiction of the courts, the status and rights of judges, along with the independence of the judiciary and its status as a separate branch of government, and the independence of the legal profession. The recommendations of each working group were evaluated and amended by the closing plenary and subsequently adopted.

A second CIJL-ICJ-ABA seminar was held in Banjul, the Gambia, from 6 to 10 April 1987 with participants from the Gambia, Ghana, Kenya, Nigeria, Sierra Leone and Uganda. After an opening speech by the Vice-President Bakary B. Dardo, and a plenary session on the role of courts and lawyers in society, the seminar proceeded according to the model adopted in Lusaka.

The subjects of the seminars encompass many aspects of the administration of justice and the functioning of the judiciary and the legal profession. Some examples are: the difficulties encountered in attempting to harmonise received and traditional legal systems, the necessity of ensuring broad judicial powers to review executive actions and to uphold the rights of detainees, the importance of guaranteeing adequate facilities and remuneration to judges and their staff, the contribution of an independent legal profession to the protection of human rights, the importance of making legal services available to all sectors of the population and the obligation of governments and the legal profession in finding methods of promoting and asserting their rights. Each of the participants has made a commitment to work for the implementation of the recommendations adopted. Follow-up committees have been established and the ABA has undertaken to be responsible for coordination efforts and for keeping the participants informed of new developments.

The following report on the two seminars contains the recommendations agreed upon by the participants, excerpts from the opening speeches

and some of the working papers presented at the meetings. Inevitably, there was some duplication between the papers submitted at the two seminars. This accounts for the smaller number of documents from the Banjul seminar which have been reproduced. We hope that the authors of the papers at both seminars which have been omitted or shortened will excuse us.

The ICJ and the CIJL are profoundly grateful to His Excellency Kenneth D. Kuanda, President of Zambia, for welcoming the seminar and its members. We also thank Vice-President Bakary B. Dardo of the Gambia. We also wish to thank the African Bar Association, co-sponsor of the seminars, as well as the Law Association of Zambia, and the Gambia Bar Association whose members worked tirelessly to ensure the success of the seminars. Finally, we thank the Swedish International Development Authority, the International Development Research Centre and the Commonwealth Foundation for their financial support which made the seminars possible.

(August) 1988

Reed Brody
Director
CIJL

Niall MacDermot
Secretary-General
ICJ

**Seminar on
the Independence of
Judges and Lawyers**

Lusaka

10–14 November 1986

Opening Speech

by

Dr. Kenneth David Kaunda
President of Zambia

Mr. Chairman, I am delighted to be here today to officiate at the official opening of the joint African Bar Association and International Commission of Jurists Seminar, whose theme is, "The Independence of the Judiciary and the Legal Profession". Please allow me, Comrade Chairman, to begin by warmly welcoming to Zambia, all our foreign dignitaries and participants from within Africa and from abroad.

As Chairman of the Frontline States, let me welcome you to this region. We are grateful that you chose to meet in Zambia at a time when the region is experiencing serious political and economic problems. Those of us who live in this region are convinced that international peace and security are seriously threatened by the policy and practice of apartheid in South Africa and the continued illegal occupation of Namibia by the Pretoria regime.

As I have stated on numerous occasions, apartheid is an evil system, practised by the white minority regime in South Africa, which exploits and denies basic fundamental human rights and human dignity of the black majority and other non-white citizens of that country. Because South Africa has stubbornly refused to abandon the apartheid system which is rejected and condemned by the international community which continues to support the legitimate demands of the black people and other non-whites. We in Zambia do the same. We strongly believe that no one is entitled to oppress and

exploit other people. The principle of fundamental human rights for all, is a universal one.

The theme of this joint Seminar is no doubt a very important one for all those concerned with the rule of law and the well-being of democratic societies. In Zambia, we regard an independent judiciary as a very vital institution in the well-being of any progressive society. Prior to our Independence in October, 1964, the United National Independence Party had recognised the importance of having an independent judiciary and a strong local bar. Indeed, the 1962 United National Independence Party Manifesto expressly stated that:

All Judges shall be independent in the exercise of their judicial functions. All Judicial Officers will have security of tenure and Judges of the Superior Courts shall not be removed from Office except for stated misbehaviour or incapacity. The remuneration of a Judge shall not be reduced during the continuance of his office.

It was the wish of the United National Independence Party that after the transitionary period, we would enshrine in our Constitution provisions to deal with the independence and freedom of the judiciary. We also agreed that a Judicial Service Commission would be established, which would advise on the appointment, promotion and discipline and transfer of judicial officers. I am proud to say, Comrade Chairman, that what was envisaged by the 1962 United National Independence Party Manifesto became a reality when legal provisions were introduced in our independence Constitution to safeguard the independence of the judiciary.

It is worth noting in this respect, that at the time of our Independence, we did not even have five indigenous lawyers in Zambia. Zambia's former colonial administrators – the British – had not considered legal education to be a priority. Consequently, those who wished to study law had to go abroad for this purpose. The result of this British neglect was that the judiciary at the time of independence was run by expatriates who, in most cases, were of Britain origin. The unfortunate result was that in the minds of most of our people, there was a clear identification of the machinery of the law with the machinery of colonial domination. Indeed, at the time of our political independence, the separation of political and judicial functions had hardly started.

Judges of the High Court were, to a reasonable extent, independent and so were a handful of professional resident magistrates. These professionals, however, tried only the more serious cases which formed but a

small proportion of the total number of cases determined. The Magistrates courts in which the bulk of justice was administered and with which most of our people came into contact, were presided over by administrative officers who were responsible for the implementation of colonial policy and laws. The concept of separation of powers always hailed as a hallmark of British legal philosophy, had practically not taken root in the then Northern Rhodesia.

This then was the system we inherited at the time of our independence. But we were determined to build a completely new society – a society based on the Philosophy of Humanism – built on four cornerstones of Love, Truth, Social Justice and Fair Play for all, and cutting across all divisions as artificial as colour, race, religion, creed, ethnic groups or sex.

With this as the basis of our new society, we were very clear as to what system of administration of justice we were to build. We had already resolved that the High Court and Magistrates Courts should remain intact, but we were also firm in our belief that the courts should be presided over by legally trained persons who would be divorced from the provincial or district administrations. The separation of powers and the independence of the judiciary are very important pre-requisites to the establishment, development and maintenance of the rule of law, which is crucial to the development of a truly democratic society. Furthermore, it is not feasible and not easy to maintain peace and stability any country without observing the principles of the rule of law.

Because of our determination to maintain the rule of law, we moved quickly and ensured that the separation of powers, particularly at the lower level of the judicial system was quickly implemented in order to ensure the independence of the judiciary. Provision to secure the security of tenure for judicial personnel was made.

In our efforts to improve the situation, institutions to train lawyers and magistrates were established at government expense. As a result of our efforts over the years, the number of indigenous lawyers has considerably increased and the judiciary of both the Supreme, High Court and Subordinate or Magistrates Court levels has almost been entirely Zambianised.

This clearly shows our commitment to having a judiciary which is not only independent but is also manned by properly trained people. After making a political decision that the judiciary shall be independent, we enshrined the decision in our Constitution and took administrative measures to ensure that what we think and say about the need for an independent judiciary is translated into practical terms. We are in favour of very strong democratic institutions which will serve Man, who is the centre of all activi-

ties in our Philosophy of Humanism.

Permit me to say a few words about the role of the judiciary. As I have said on numerous occasions in the past, judges are a product of their society and of their time. A judiciary which is not in tune with the society it is designed to serve, can not play an effective role in the development of the law and society in general. As I had said in 1970, in an address to the then Law Society of Zambia, I should not be understood to be in any way questioning the principle of the independence of the judiciary. This is one of the most fundamental principles of the rule of law and one to which we in the Party and its government in Zambia are fully committed and determined to uphold but we must be clear as to what this principle means, as there is a danger and tendency in certain quarters to use the expression "Judicial Independence" loosely and, to an extent, beyond its proper legal connotations. The independence of the judiciary is the freedom from interference by executive and legislature in the execution of the judicial function. It should not mean that the judiciary is independent of or stands apart from society.

I am aware that the responsibility for ensuring the independence of the judiciary goes far beyond the enactment of laws which provide for security of tenure for judicial personnel.

It is my considered opinion that in any given country, the independence of the judiciary is preserved much more securely by accepted constitutional practice than by rules of strict law. Indeed, professional tradition, the good sense of ministers, legislators, the judges themselves and the force of public opinion are much more important safeguards than any formal guarantees.

It must, therefore, be clear to all of us that the responsibility for maintaining judicial independence does not lie only with politicians. Quite often the tendency is for people to think that judicial independence can only be shaken by the activities of politicians. This is not true. The independence of the judiciary can only be secured if all concerned, whether judges, magistrates, lawyers or indeed the public in general, are totally committed to sustaining respectable, free and democratic institutions.

Comrade Chairman, allow me now to turn to the legal profession in general. As I had stated earlier, legal education on a large scale in this country appeared on the scene after Independence. I am pleased to state, however, that within the short period of 22 years, the number of lawyers within the Republic has significantly increased.

We have indigenous lawyers serving in government, the parastatal Sector and in private practice. It has always been the Party and its government's wish that the legal profession in Zambia should take an active part in

the formation of policies and laws that govern the country. It has always been the Party's and government's wish to consult the legal profession from time to time on issues which are legal or otherwise and I am glad to say that the profession has responded positively to our various approaches.

Yes, as I have said on many past occasions, the lawyer through his legal training and experience is probably better fitted than most to finding solutions to the social and economic problems of society. Consequently, failure by lawyers to play a full part in the national and local affairs of our developing countries, constitutes a serious abrogation of their civic responsibilities, particularly when one considers that in relative terms, few people in our society have received formal education.

In 1970, I said:

The lawyer in a developing society must be something more than a practising professional man; he must be more even than the champion of fundamental rights and freedoms of the individual. He must be, in the fullest sense, a part of the society in which he lives. And he must understand that society if he is to be able to participate in its development and the advancement of the economic and social well-being of its members. The lawyer must go out beyond the narrow limits of the law, because as I have said, while law is the instrument through which society is preserved, in its shape and character it is the reflection of societies.

Sometimes I wonder whether lawyers in our various societies are adequately discussing matters affecting themselves and the community in which they work, seriously and on a regular basis. It is important that legal problems, as well as community problems should be discussed. There should be a focus for corporate legal life. Regrettably, some lawyers tend to view the whole world purely from the angle of their particular working place and no other. This is not good for the profession. If lawyers can get together and discuss issues, they can, in my view, quickly get to grips with problems and find solutions. It is no use being a very successful lawyer when the profession as a whole does not command the respect of the community.

As this Seminar discusses the independence of the judiciary, it is important to note that the legal profession has an important role to play in securing that independence in that every time a lawyer argues a case, he or she is helping in the administration of justice and in that sense he or she is making a contribution to the judiciary. Standards of professional perform-

ance and integrity should be above reproach. Failure to attain high standards will result in poor quality judgements, undue delays and inconvenience to parties and witnesses. Such a situation attracts public criticism against the judiciary. Once the image of the judiciary is tarnished, it is difficult to restore it in the public's mind. Comrade Chairman, I wish to assure you that we in Zambia will, (as we have always done in the past), continue to see to it that our judiciary remains independent and that our lawyers do their work to the best of their ability in the manner prescribed by law and in a free atmosphere. It is my hope, that your deliberations will be thorough, free and enjoyable and that at the end you will come up with resolutions which will assist all concerned to further strengthen the independence of the judiciary and improve upon the attitudes and performance of the legal profession in general.

It is now my honour and privilege to declare the African Bar Association, the Centre for the Independence of Judges and Lawyers, and the International Commission of Jurists' Seminar on the Independence of the Judiciary and the Legal Profession officially open.

Thank you.

Address of Welcome

by
Rodger Chongwe
President, African Bar Association

I welcome you all to the first of two seminars on the Independence of the Judiciary and the Legal Profession, organised jointly by the Centre for the Independence of Judges and Lawyers, the International Commission of Jurists and the African Bar Association.

I wish especially to welcome you, Your Excellency, and to thank you for accepting our invitation to be here with us today at the opening of the seminar. We are more than aware of your important national commitments, and we are glad that you have nevertheless chosen to be present this afternoon. We are also aware of your personal commitment to the maintenance of the rule of law and to the independence of the courts and the legal profession. By your presence here and at other fora to which we have had the occasion to invite you, you give us inspiration and encouragement in our work and we wish your personal well-being and good health as you continue to chart the destiny of this nation, this region and beyond. I also wish to extend my warm welcome to all of you, our distinguished guests, to whom we extend our hospitality in the true African tradition.

Zambia's concept of justice is based on that justice dispensed by our forefathers under the shade of a tree in the remote villages of our rural areas. The people who dispensed justice were the judges appointed from among the ordinary people in the village, often either the village Headman, the Induna, or the Chief himself. These men were appointed because of their

depth of knowledge and wisdom in the customs and practices of the people. They made independent decisions on issues before them. Thus for a long time on this continent, judicial independence has been viewed as significant for the maintenance of the rule of law.

I would like to draw the attention of the seminar participants to some of the issues in Africa relating to the independence of the judiciary. The following have been identified by a number of scholars and prominent jurists as constraints on the independence of the judiciary:

- a) *Control by government of the budget, salaries and conditions of service of judicial officers.* It is argued that judges should be considered separately from ordinary civil servants, and should be remunerated from a Consolidated Fund, which would not be subject to scrutiny by Parliament. Reasonable remuneration of judges is important as judges should also be removed from financial or business entanglements which are likely to affect the exercise of their judicial function.
- b) *Any action by the executive or any other institution or person which frustrates the execution of judicial judgements.* For example, persons under detention who, through writs of habeas corpus, are freed by the court only to be re-arrested immediately upon acquittal and served with fresh detention orders.
- c) *The erosion of the immunity of judges from suit and other process arising directly from the performance of their legitimate judicial functions.* This is so because immunity from suit and other process gives judges the freedom to perform their duties without fear of reprisals. In the words of the former Master of the Rolls in England, Lord Denning, in the case of *Sirros vs Moore*,¹ "The reason is not because the Judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

I wish to emphasize that the legal profession is there to assist the judiciary in its task of administering justice and interpreting laws. In order to do that, the legal profession must be committed to the dynamic concept of the rule of law. There can be no doubt that in this country it has been the government's policy to encourage the legal profession to be independent – a policy which has been whole-heartedly welcomed.

1) [1973] AELR 776.

Lawyers in Zambia and indeed in other Commonwealth countries in East, Central and Southern Africa are able to counsel their clients and advocate the interest of clients without any pressure, influence or threats from the executive, the press or any quarter whatsoever.

There have been some bad individuals who are only interested in their client's purse and are not at all concerned about his interest and the interest of the community at large. I am glad to say, however, that such individuals have been very few in number.

I will like to conclude my remarks by saying that the judiciary is the watchdog of the fundamental rights and freedoms of the individual as enshrined in the Universal Declaration of Human Rights and entrenched in the various constitutions of democratic societies the world over. The judiciary must act as a bulwark against executive and legislative excesses to ensure that the rule of law reigns supreme. As for the legal profession, everything possible must be done by its members to ensure that the freedom lawyers enjoy in the execution of their duties is protected, in order to aid the judiciary in maintaining the rule of law.

Address of Welcome

by
Ustinia Dolgopol,
Director CIJL

I feel deeply honoured to have been asked to add some words of welcome on behalf of the Centre for the Independence of Judges and Lawyers. The Centre and its founder, the International Commission of Jurists, are devoted to promoting and upholding the rule of law and, in particular, the independence of the judiciary and the legal profession. We all know, Mr. President, that during the struggle for Zambia's self-determination and, since independence, as one of Africa's great leaders, you have consistently made clear by words and deeds your profound commitment to these principles.

The issues to be discussed during this seminar have been of great concern to the International Commission of Jurists for more than 20 years and led it to establish the Centre for the Independence of Judges and Lawyers. The need to promote and protect the independence of the judiciary and the legal profession has been the subject of discussion at ICJ conferences in New Delhi, Lagos, Bangkok and Rio de Janeiro. At each meeting the participants emphasised the crucial role that jurists must play in the development of their societies and "the creation of new legal concepts, institutions and techniques required to meet the challenge of a changing and interdependent world". They also recognised that to carry out this role, lawyers must be able to exercise their professions free from harassment and to speak out on matters concerning the administration of justice. Likewise, bar associations

must enjoy the freedom to speak out and participate in national debates on pressing social issues.

No society can be said to be based on the rule of law if it does not respect the independence of the judiciary and the legal profession. And, as you have stated, Mr. President, "law is perhaps the most important of all instruments of social order because without it the whole structure of society can be inevitably collapse."

Mr. President, only a few weeks ago occurred an historic event for Africa. The African Charter for Human and Peoples Rights came into force on 21 October, ratified by 31 of the 50 OAU States. No other international convention has begun with such a high proportion of ratifications. The importance of the judiciary and the legal profession to the protection of the rule of law is recognised throughout the Charter. Article 3 calls for equality before the law, and Article 6 states that no one may be deprived of his freedom except for reasons and conditions previously laid down by law. The independence of the judiciary is protected in Articles 7 and 26. The latter puts an affirmative obligation on states to guarantee the independence of the courts, while Article 7 lays out basic guarantees for a fair trial, including the right to be tried before an impartial court or tribunal. Article 7 also refers specifically to the right to a defence by counsel of one's choice, a demonstration of the importance of lawyers for the protection of fundamental rights.

Recently, the United Nations General Assembly approved a set of principles on the independence of the judiciary. As stated in the preamble, these principles were "formulated to assist member states in their task of securing and promoting the independence of the judiciary". States have been called upon to respect the principles and to bring them to the attention of judges, lawyers, members of the executive, the legislature and the public in general. Nongovernmental organisations have been urged to assist in their dissemination and implementation. We believe they highlight the ways in which the independence of the judiciary can be strengthened.

At the same time, the General Assembly passed a resolution on the role of lawyers, in which it recognised "that adequate protection of the rights of citizens requires that all persons have effective access to legal services provided by lawyers who are able to perform effectively their proper role in the defence of those rights, and to counsel and represent their clients in accordance with the law and their established professional standards and judgement without any undue interference from any quarter". The resolution then recommended to member states that they provide protection for practising lawyers against undue restriction and pressures in the exercise of their functions, and pointed to the important role bar associations have to

play in the protection of their members and in the maintenance of professional ethics.

These resolutions and principles are an important step forward. We must now strive to incorporate these ideas into national legislation and practice. It is crucial that judges and lawyers learn of the standards, discuss their application to local conditions, expand upon them and work to have them incorporated into the national legal framework.

The experience of the Centre for the Independence of Judges and Lawyers is that violations of these principle exist throughout the world and that due recognition has not been given to the role of the judiciary and the legal profession in upholding the rule of law. In particular, recognition must be given to the role of the judiciary in helping to create societies which protect the dignity of the human being by safeguarding social, economic, educational and cultural rights in addition to civil and political rights.

The Role of Lawyers in Society

by
*Mphanza P. Mvunga**

Introduction

Society's law – like society itself – is dynamic, and not static. The lawyer should be equally dynamic. The role of the lawyer in society should thus be continuously appraised.

The primary (or primitive) society has informal regulation of the law characterised by customary laws that have evolved from the practices of the people. For example, in a society of masters and slaves, the laws characteristically reflect the master/slave relationship. In a capitalist state, the laws reflect class interests, designed to assure the landed gentry of their vested rights. Even in the socialist state the regulatory role of the law is accepted. Indeed, the dictatorship of the proletariat finds expression in the institution of the law. The role of the lawyer can thus be traced in all these evolutionary and at times revolutionary development processes.

Traditional Role of the Lawyer

As the majority of African legal systems are inherited from the colonial Western legal orders, these orders have had the greatest impact on per-

* Legal Counsel, United National Independence Party of Zambia.

ceptions of the role of the lawyer. The following observation succinctly expresses this point:

... generally, the lawyer in the western world has been a defender of the established order and vested interests, for the simple reason that in a society dominated by commerce and industry the individual and corporate owners of property have been the principal clients. Correspondingly, the role of the lawyer has been generally more important in the shaping of private than of public law. Private law was until recently the much more important and dynamic part of the western legal system. With regard to individual liberties the lawyer, especially in criminal and administrative processes, has often been a vital defender of liberties against official arbitrariness.

This traditional role of the lawyer, however, provides the explanation for the predicament of the African lawyer and the negative attitudes which are quite often displayed by the general public towards the lawyer. Due to the influence of western education and culture, the typical African lawyer has often been inclined to maintain the status quo, and has often seen his role as confined to the client or clients who pay him or her handsomely. Generally he may even disfavor law reforms which entail a change in the style and form of legal practice. Indeed, why bother with law reform that may interfere with a lucrative source of remuneration, the lawyer may feel.

Contemporary Role of the Lawyer

Litigation and drafting are, of course, only two aspects of the lawyer's role. The broader role of the lawyer in contemporary society entails service to the public and the nation as a whole. Unless this service is rendered, the very basis on which our profession rests is in danger of disintegration. Political stability and economic development are today the most pressing problems that our countries encounter. The establishment of a viable and stable democratic process cannot be left to the sole control of politicians. Even if it were, the wishes of the politician and the populace at large must invariably find expression in legal instruments. The lawyer is the indispensable artisan of legal expression.

In addition, the lawyer must meet the challenge of economic development by associating himself with national efforts to overcome economic

problems, such as reviewing trade licencing laws that impede the expeditious flow of trading transactions, and reforming outdated planning laws that do not facilitate orderly development.

The message is clear: lawyers should be responsive to those challenges in the development process that are related to their expertise and profession. It is gratifying to note that the Law Association of Zambia appears to have adequately adapted itself to the broader role of the lawyer in society, as seen in the objectives of the Association. These include the need to:

- further the development of law as an instrument of social order and social justice and as an essential element in the growth of society;
- provide means by which lawyers can participate in the development of society and institutions;
- encourage lawyers to join actively in the lives of, and to identify themselves with the people, and to utilise their skills and training in their service.

Conclusion

There is now a consensus that the role of lawyers in society goes beyond their traditional role as defenders of vested rights and of the status quo. The lawyer must rise to the contemporary challenge of development in countries which are confronted with various pressing needs.

But even in the context of development, it is necessary to base these efforts on democratic values protected by the rule of law. In the discharge of their functions lawyers need a congenial environment and guarantees for their independence. This independence must not only be asserted and assured, it must be used effectively and positively. In the discharge of his functions, the lawyer must address his obligations to the public and to society at large, to his fellow professional colleagues and, indeed, to the judiciary.

Independence of the Judiciary and the Legal Profession in Botswana, Lesotho and Swaziland: An Overview

by
P.K.A. Amoah*

Introduction

It has been a hundred years since Dicey raised the basic constitutional problem that appears to have bedevilled statesmen, lawyers and judges and to which Professor Dicey's exposition of the rule of law was directed.¹ That problem may be expressed in the form of the question: what form of justice best ensures the proper harmonisation of public order and personal freedom? To put it another way, in what way does the administration of justice achieve a productive balance between the opposing notions of individual liberty and the public interest? Dicey's solution, embraced in his conception of the rule of law, was intended to achieve efficient governmental administration with due regard for the observance of the law.

In modern times national and international attempts to focus upon this basic problem have emphasized the procedural and human rights aspects of the rule of law to such a degree that the promotion of the rule of law is now subsumed under the promotion and protection of human rights and fundamental freedoms. Efforts by the International Commission of Jurists (ICJ),

* Head, Law Department, University of Swaziland.

the United Nations and regional organisations conducting seminars, studies and concluding multilateral treaties have given great impetus to the international campaign for the observance of human rights. In its 34 years of existence, the ICJ has held several congresses, seminars and conferences to address issues pertaining to the rule of law and human rights.

One of these, the ICJ seminar on Human Rights in a One-Party State, held in Dar-es-Salaam in September 1976, addressed the subject of this paper - the independence of the judiciary and legal profession - a prerequisite to the proper administration of justice, the respect for the rule of law and the protection of human rights. A number of principles were set out which the seminar suggested would facilitate their observance. Among these principles was the following:

The independence of the judiciary in the exercise of its judicial functions and its security of tenure is essential for any society which has a respect for the rule of law. Members of the judiciary at all levels should be free to dispense impartial justice, without fear, in conformity with the rule of law. The independence of the legal profession being essential to the administration of justice, the duty of lawyers to be ready to represent fearlessly any client, however unpopular, should be understood and guaranteed. They should enjoy complete immunity for actions taken within the law in defence of their clients.²

In the light of these ideals expressed over a decade ago, the present paper seeks to provide an overview of the impact of the principles on the independence of the judiciary and legal profession in Botswana, Lesotho and Swaziland. This does not purport in any way to be a comprehensive analysis of the subject. The first part considers broad definitional problems and general issues relating to the subject, including factors militating against the independence of the judiciary and the legal profession. The second part focuses on the application of the principles to the administration of justice in the three states viewed from their colonial experience and post-independence constitutional developments.

A. Interpretative Guidance from International Human Rights Instruments

Without the independence and impartiality of those involved in administering justice, fair trial procedures, upon which criminal justice de-

pend, would be illusory.

In recognition of this crucial point, international human rights law, as codified in declarations and multilateral treaties of the United Nations and regional systems, provide for the independence and impartiality of tribunals in both civil and criminal matters. For example, article 14 (1) of the International Covenant on Civil and Political Rights provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The fair trial provisions of the American Convention on Human Rights and the European Convention are expressed in substantially similar language.

The African Charter provisions go beyond all the others in not only articulating the principle of judicial impartiality but also imposing an obligation on States Parties to guarantee the independence of the courts. Article 7 provides:

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal
 - (c) the right to defence including the right to be defended by counsel of his choice;
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal

Article 26 states:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

The basic assumptions underlying the human rights instruments, such as that human rights may be vindicated in judicial forums, or that fair trial procedures are possible, or that the judiciary should be "independent and impartial" are not universally shared views.

Some writers and critical commentators have described judicial independence and impartiality as a myth and the judiciary as an extension of the executive and ultimately subservient to the government. In his *Politics of the Judiciary*, Professor Griffiths has observed in relation to the British Courts:

It is demonstrable that on every major social issue which has come before the courts in the last thirty years - concerning industrial relations, government secrecy, police powers, moral behaviour - the judges have supported the conventional, established and settled interests.³

Without attempting the rather difficult task of denying these allegations, the present writer believes that a cynical approach to the administration of justice hardly advances the cause of justice. It also misses the point about the principles underlying the independence of the judiciary and legal profession.

Nobody denies that both the judiciary and the legal profession are susceptible to political manipulation. It is precisely because of the risk of manipulation, which, when it happens, reduces their effectiveness that no efforts should be spared to strengthen them against such manipulation. No one has seriously advocated the abolition of the judiciary.⁴ The issue therefore is not that the judiciary and the legal profession must be abolished, but rather, what realistic steps can be taken to strengthen them. The methods of safeguarding judicial independence constitute the crux of the matter.

A number of writers have addressed the meaning of 'independent' and 'impartial' as applied to the judiciary and the legal profession. Professor Harris asks "independent of whom?"

The primary meaning of "independent" is independence from other branches of government in the sense of the doctrine of separation of powers: in particular, a judge must not be subject to the control or influence of the executive or of the legislature.⁵

Similarly, Lord Denning's statement on the principles of English Law governing the independence of the judiciary underscores their significance both in regard to the protection of human rights through proper administration of justice and as an important check on legislative and executive powers:

No member of the Government, no member of Parliament and no official of any Government department has any rights whatever to direct or influence or to interfere with the decisions of any of the judges.

Lord Denning's concluding remarks emphasize the complementary nature of independence of the judiciary and the legal profession:

If a man who is charged with an offence is to have a fair trial, it is essential that he should be able to feel that this case will be put before the impartial judge, by an advocate who will say all that is to be said on his behalf.⁶

The report of the Special Rapporteur on the Independence and Impartiality of Judges, Lawyers, Jurors and Assessors of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, merits serious study. It deals comprehensively with the multifaceted dimensions of this complex subject. Annexed to the report is a Draft Declaration on the Independence of Justice as well as the CIJL/ICJ Draft Principles on Independence of the Legal Profession (see Annex III).

The recommendations contained in the draft declaration are designed to address a number of factors which the rapporteur has identified as militating against independence of the judiciary.

This paper will focus on five of these factors and the corresponding recommendations.

B. Factors Militating Against the Independence and Impartiality of the Judiciary

The five factors selected for discussion are: 1) the appointment, removal, and the security of tenure of judges; 2) denial of jurisdiction of the courts; 3) internal problems within the judiciary itself; 4) increased judicial workload; 5) the problem of sub-conscious prejudice affecting impartiality.

1. *The Appointment and Security of Tenure of Judges*

This paper does not question the right of the highest authority in the land to appoint judges and clothe them with the authority and the dignity

befitting their office. It has been suggested, though, that as a safeguard an independent body be involved in the process of selecting judges.⁷ The problem which emerges is how to ensure that once appointed, either for life or for a specific period, judges can maintain their independence. There are those who would criticize judges for rendering decisions unfavourable to the executive who was responsible for their appointment. For example, Professor John Dugford in his study of the South African judiciary quotes the complaint expressed by two South African Ministers about judges who had rendered decisions against the government: "The trouble about these judges," they objected, "is that they get delusions of grandeur. Having acquired security of tenure, they imagine they were appointed on merit."⁸

The reference to 'security of tenure' raises the issue of "contract judges" - a phenomenon found in a number of countries, including Botswana, Lesotho and Swaziland. To what extent is the notion of independence and impartiality consistent with the appointment of expatriate judges on specific, renewable contracts of two, three or four years? The issue is complex and several factors must be considered, including the particular government's attitude towards judicial independence, its inclination to use the renewable contract as a lever to secure compliance, the strength or weakness of the judge and finally, the particular judge's prospects of securing a judicial appointment elsewhere should he incur the wrath of the authorities and thereby have his contract terminated.

In relation to the latter issue the Montreal Declaration on the Independence of Justice (Annex II) recommends (2.19, 2.20) that "Judges, whether appointed or elected shall have guaranteed tenure ... and ... the appointment of temporary judges or judges for probationary periods is inconsistent with judicial independence." (There is a question as to whether contract judges are temporary judges.)

2. Denial of Jurisdiction of the Courts

Taking away from the jurisdiction of courts over matters of a judicial nature takes a variety of forms. One of the more common forms is through ouster clauses. These take away, by statute, the courts' jurisdiction over certain cases or causes. Another, and more subtle method of interfering with judicial discretion in criminal cases is legislative prescription of minimum sentences. The sentencing power of the judge is severely curtailed and the legislator in effect assumes the judicial role. Similarly, limitations on the court's power of judicial review of legislative and executive acts, or on its

powers to issue writs of habeas corpus, effectively neutralise judicial independence.

The Montreal Declaration recommends that the Judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature. It states in 2.07, (a) "No power shall be so exercised as to interfere with the judicial process."

3. *Internal Problems within the Judiciary*

The responsibility of the judiciary for its own independence cannot be over-emphasized.⁹ Lack of solidarity among judicial colleagues in the face of assaults and threats to judicial independence hardly advances their cause. On a more sinister note, certain types of behaviour on the part of members of the judiciary can subvert judicial independence. Examples are collaboration between judges and other public authorities, such as giving legal advice on the implementation or enactment of certain laws, serving in politically sensitive capacities, preoccupation with prospects for promotion, or enthusiastically taking up judicial positions vacated by dismissed judges.

The UN Basic Principles of the Independence of the Judiciary (see Annex I) declares that: "Promotion of Judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience."

4. *Increased Judicial Workload*

Perhaps by design or perhaps because of the generally poor state of the economy in several African nations, most African Courts are notoriously understaffed. Increased judicial workloads have not only put considerable pressure on individual judges, but have also led to the appointment of high-ranking civil servants as acting judges when the incumbents are on leave or are overwhelmed by their caseloads. Many judges suffer a steady and noticeable deterioration of their health. Judges working under such pressure have been known to be absent-minded on the bench or have not given a fair hearing to both sides of a case.

The Montreal Declaration declares under 2.45:

A judge shall ensure the fair conduct of the trial and inquire fully into any allegations made of the violations of the rights of a party or of a witness, including allegations of ill-treatment.

5. *Sub-conscious Judicial Prejudice Affecting Impartiality*

Judicial impartiality may be affected both positively and negatively by a judge's perception of his role in society.¹⁰

Judge Aguda enumerates the following factors which influence the judge in arriving at his decision:

First, the background of the judge is of importance. The background will include the type of upbringing the judge had, the associations he kept in school, the schools he attended and the company he now keeps. Secondly, the educational and academic attainment of the judge also plays a role in his attitude towards his job. And, of course, the intellectual capability of the judge is a limiting factor in the way he discharges his duties. Every judge has a philosophy of his own. By this is meant the attitude of the judge towards religious, social, economic and political problems of the day and of the country in which he discharges his duties.¹¹

Some of these factors constitute what one might term subjective impartiality. Unlike personal bias or direct pecuniary interest in the outcome of the litigation, which can be established and corrected on appeal, subjective partiality is difficult to prove and therefore difficult to correct. In a small jurisdiction where everybody knows everybody else and where the judiciary is often short-staffed, the problem assumes a special significance. Furthermore, recusal as a matter of judicial conscience, is often difficult to compel once the judge has taken jurisdiction of the matter.

C. *Factors Militating Against the Independence of the Legal Profession*

As the legal profession and the judiciary mutually support and complement each other, factors promoting or militating against judicial independence may very well apply to the legal profession. However, private practitioners may face special problems as they are not part of the institutions of government in contrast with the judges. Some of these problems are worth mentioning.

Threats and intimidation, detention, assaults and the deportation of lawyers subvert the independence of the legal profession. In some cases lawyers coming from abroad to take up cases which local lawyers may have been warned not to handle or are too scared to handle are denied entry visas. There is also a tendency to indentify the lawyer with the cause of his client, both by the Executive and by the general public. All of this results in

lawyers concentrating their efforts in less controversial aspects of the law such as insurance litigation or contract law, while litigation involving issues of citizenship, the legality of executive actions and applications for writs of habeas corpus are avoided.

These problems and others are addressed in recommendations contained in the Special Rapporteur's Draft Declaration on the Independence of Justice and the CIJL/ICJ Draft Principles on the Independence of the Legal Profession.

In the final analysis, the single most important factor affecting the independence and impartiality of the judiciary and the legal profession is the general human rights situation in the country concerned. A deterioration in the protections afforded to human rights leads to confusion and authoritarianism on the part of public officials, and results in the judiciary becoming more executive-minded than the Executive. This point has been succinctly expressed by the UN Special Rapporteur, Dr. L.M. Singhvi:

The ultimate safeguard of the independence of lawyers lies in the legal system and in society ... In a society and a legal system in which the rule of law and human rights do not find the pride of place, lawyers are relegated to an inferior position and their independence, honour and dignity can be violated with impunity. Equally, an independent judiciary is an essential guarantee of an independent legal profession. The independence of the judiciary and the independence of lawyers are interdependent and complementary.¹²

Part II

Background in Botswana, Lesotho and Swaziland

A brief overview of the historical development of the three legal systems, including the court system and the legal profession is appropriate.

A. The Colonial Background

In all three countries Orders in Council issued in Britain during the late nineteenth century established the authority of the British Government.

Provision was made for the High Commissioner responsible for the territories to legislate by proclamation and for the reception of the Roman Dutch Common Law and certain statutes in force in the Colony of the Cape of Good Hope or the Transvaal in South Africa.¹³

Certain characteristics of the colonial period which militated against the independence of the judiciary and legal profession must be briefly noted. These are: the dual court systems, the absence of a locally developed legal profession, the authoritarian nature of colonial rule and lack of security of tenure of colonial judges.

1. The Dual Court System

Two separate legal systems were created, one based on received Roman-Dutch Law, the other, based on customary law. This led to the creation of a dual system of courts. The colonial courts administered the Roman-Dutch Common Law and statutes passed by the colonial administration, while the customary law courts settled disputes arising within the indigenous populations, as customary law applied only to them.

The judiciary in the colonial courts could not be considered independent, since there was no separation of powers; executive and judicial powers were vested in administrative officers. The Resident Commissioner and the Assistant Resident Commissioner held court and exercised judicial functions. It was only in 1938 that reforms were effected and the former Resident Commissioner's court was changed into the High Court; the Assistant Commissioner's courts were transformed into the subordinate courts. Even after 1938 the policy of the colonial administration was to maintain the parallel judicial systems.

2. The Absence of a Locally Developed Legal Profession

Although legal provisions were made early in the colonial period for the admission of legal practitioners to practise in the courts of Botswana, Lesotho, and Swaziland, no attempt was made to train any local lawyers until about the last ten years of colonial rule.

The legal profession in Botswana has its origins in the early days of the

British protectorate. As early as 1892, provision was made for the admission of legal practitioners who had been admitted in the United Kingdom or the British territories of South Africa. Following the division of the profession into advocates (barristers) and attorneys (solicitors) in Britain and South Africa, it was provided that although attorneys could not ordinarily function as advocates, they could do so if there was a shortage of available attorneys. However, in 1923 legal practitioners were banned from the customary courts.

In Swaziland, a 1904 Proclamation provided that the Chief Court (High Court) could admit advocates, attorneys, conveyancers and notaries. Subsequent legal enactments were directed at permitting legal practitioners in the Transvaal to have the right of audience in the common law courts of Swaziland.

It would appear that unlike Botswana and Swaziland, no statutory provision was made for the admission of legal practitioners in Lesotho until 1921. A Proclamation of that year made provision for a limited right of legal representation. The language was clearly inconsistent with modern notions of the independence of the judiciary and the legal profession. It provided:

No plaintiff or defendant in any civil case in any court in the territory shall be entitled to appear and conduct his case by means of any other person except with the leave of the court, and the granting or withholding of such leave shall in every case be within the discretion of the court.

In 1938, however, the High Court Proclamation of each of the three territories permitted rules to be made for the admission of legal practitioners. The rules provided that practitioners could be admitted as advocates or attorneys if they had been admitted as such in Britain, South Africa and Southern Rhodesia (Zimbabwe).

The rules were consolidated in the Legal Practitioners Proclamation of 1955. There was no provision, however, for a law society or other organization of lawyers which would be self-regulating and would protect the independence of the profession. Instead, the Attorney-General of each territory was given the responsibility for supervising and maintaining disciplinary control over legal practice. A variety of acts constituting professional misconduct could be investigated by the Attorney-General, and if a lawyer were found guilty, he could be removed from the roll of legal practitioners.

3. *The Authoritarian Nature of Colonial Rule*

The vesting of wide judicial powers in administrators to act as magistrates and the lack of separation of powers during the colonial era were mere symptoms of the general authoritarianism. Several writers suggested that an independent judiciary was not possible under this system.

One of the earlier writers, drawing on data concerning the functioning of the colonial courts and the appointment of judicial officers, argues that since the colonial courts were staffed by administrative officers their function was to maintain law and order, facilitating all forms of exploitation at the expense of justice to the individual.¹⁴

4. *Lack of Security of Tenure of Colonial Judges*

Security of tenure, a key safeguard for judicial independence and impartiality, was inapplicable to colonial judges. *Terrell v Secretary of State for the Colonies*,¹⁵ the court made clear that colonial judges were appointed of the pleasure of the crown. The Act of Settlement¹⁶ which guaranteed security of tenure and other conditions of service, was held inapplicable to colonial judges.

Professor Seidman notes that "judges did not even wear the mask of independence. The District Officer as administrative official prepared the case for prosecution, then climbed behind the bench and heard it as magistrate."¹⁷

Prior to independence, constitutional conferences were held in London during which discussions concerning the future structure of the judiciary took place. The participants, conscious of the colonial experience, expressed a desire for a strong and independent judiciary. Judges were to be given security of tenure and were not to be removed from office except for inability or misconduct. Separation of powers, a concept not fully embraced in British constitutional practice, was to be enshrined in the constitutions of the three countries, and a judicial service commission was to be established. These ideas were incorporated in the "independence constitutions" and further protections were given in the various Bills of Rights.

At independence the court systems retained their dual structure; customary laws courts operated along side the modern courts - i.e. the Court of Appeal, the High Court and the Magistrate courts.

The elaborate constitutional safeguards in respect of fundamental human rights and the independence of the judiciary have been aptly com-

mented on by Professor Seidman as follows: "When the independence African constitutions created judicial independence, they went far beyond the colonial position, and even beyond the English system."¹⁸

The "independence constitutions" did not contain explicit guarantees for the independence of the legal profession. However, it could be argued that this was not necessary in light of the provisions guaranteeing basic human rights such as freedom of expression and association and those guaranteeing judicial independence. These could be invoked to support the independence of the legal profession.

(The author then goes on to describe post-independence developments in each country. This section of the paper is printed in CIJL Bulletin 19-20.)

NOTES

- 1) In his Introduction to the *Study of the Law of the Constitution* (1885), A.V. Dicey argued, inter alia, in support of the absolute supremacy of regular law as opposed to the influence of arbitrary power, and the subjection of all persons to the ordinary law of the land administered by the ordinary courts. Although his exposition has been subjected to much criticism, the basic tenets of his thesis have survived and have been linked to the modern notion of human rights.
- 2) Human Rights in a One-Party State International Seminar on Human Rights, their Protection and the Rule of Law in a One-Party State: Convened by the International Commission of Jurists (London: Search Press, 1978).
- 3) J.A.G. Griffith, *The Politics of the Judiciary* (end ed.), Glasgow; Fontana (1981). pp. 239-240.
- 4) A story is told of King James I of England who, in the days of Chief Justice, attempted to try his hand as a judge. After hearing both sides of a case, he is said to have been so perplexed as to which side was right that he abandoned the attempt in despair.
- 5) Harris, "The Right to a Fair Trial in Criminal Proceeding as a Human Right," 352 at 354-56; Quoted in R. Lillich "Global Protection of Human Rights: Civil Rights" in T. Meron (ed.), *Human Rights on International Law: Legal and Policy Issues* (Oxford, Clarendon Press, 1984), p. 141.
- 6) A.T. Denning, "The Independence and Impartiality of Judges," 71 *South African Law Journal*, 354, 358. In the same article Lord Denning refers to the House of Commons Debates, 23 March, 1954, Col. 1061 where Prime Minister Sir Winston Churchill reportedly stated:
The principle of complete independence of the judiciary from the executive is the foundation of many things in our island life. It has been widely imi-

tated, in varying degrees throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule. The only subordination which a judge knows in his judicial capacity is that which he owes to the existing body of legal doctrine enunciated in years past by his brethren on the bench, past and present upon the Laws passed by Parliament which have received the Royal Assent. The judge not only has to do justice between man and man. He also - and this is one of his most important functions considered incomprehensible in some large parts of the world - has to do justice between the citizens and the state.

- 7) African Conference on the Rule of Law, Lagos, Nigeria, January 3-7, 1961. A report of the Proceedings of the Conference, Geneva: International Commission of Jurists (1961), Recommendation 3(a), pp. 19-20.
- 8) J. Dugard, *Human Rights and the South African Legal Order*, Princeton University Press, Princeton, N.J., 1978, p. 285.
- 9) As judge Hayfron-Benjamin has observed, the maintenance of judicial independence is primarily the function of the legal profession and more particularly of the judges themselves. R. Hayfron-Benjamin, *The Courts and the Protection and Enforcement of Human Rights in Africa*. CIJL Bulletin No. 9, p. 43.
- 10) P.K.A. Amoah, "The Courts and Democracy - Judicial Protection in Botswana, Lesotho and Swaziland". Paper presented at the 4th Biennial Conference of the African Bar Association Nairobi July 26 August 1 1981. p.4.
- 11) Quoted in J.S. Read; "Bills of Rights in Third World: Some Commonwealth Experiences". 21 *Verfassung Und Recht in Ubersee* (1973) p.30.
- 12) Report of the Special Rapporteur L.M. Singhvi on the Sub-Commission study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, at p. 64.
- 13) In respect of Botswana, the reception of the Roman-Dutch Law was embodied in section 19 of the General Law Administration Proclamation of 10 June 1891. See A. Molokome, "The Reception and Development of Roman-Dutch Law in Botswana in 'Lesotho Law Journal' Vol. 1 (1985) pp 121-134. For a discussion of the reception statutes of all three countries see J.H. Pain, "The Reception of English and Roman Dutch Law, with reference to Botswana, Lesotho and Swaziland". *Comparative and International Law Journal of Southern Africa*, Vol II (1978), pp 137-167.
- 14) J.P.W.B. Mc Auslan, *Prolegomenon to the Rule of Law in East Africa*, East African Institute of Social Research Conference Proceedings, Kampala, Uganda, 1964.
- 15) (1953 2Q.B 482: (1953) 2 All E.R. 490.
- 16) The Act of Settlement, 1700 (now section 12 of the Judicature Act, 1925). Suupreme Court of Judicature (Consolidation) Act, 1925 (15 x 16 Geo. V c. 49).
- 17) R. Siedman. *The State, Law and Development*, (New York: St Martin's Press, 1978) p.207.
- 18) Ibid.

Prolegomena on Judicial Independence in Kenya, Tanzania and Uganda

by
Abraham Kiapi*

1. Introduction

Courts of law play a very important role in any civilised society. Resolving disputes between one citizen and another and controlling anti-social behaviour in the community is one of the most important functions of every government. It is through the courts that governments are able to maintain peace within their realms. If courts were not to exist a wronged individual would resort to self-help and vengeance, which are the hallmarks of the law of the jungle.

2. Who should be judge over the others?

It is essential that those appointed to judge others should be individuals of the highest integrity. They must be able to listen patiently to both sides of the case, and must be able to sift facts and weigh them. They must be impartial, and they must be well-trained in substantive and procedural law. The constitutions of the East African countries lay down the minimum

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legal requirements.

In Kenya a person qualifies to be appointed a Judge of the High Court of Appeal if:

- a) he is, or has been, a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or in the Republic of Ireland or a court having jurisdiction in appeals from such a court; or
- b) he is an advocate of Kenya of not less than seven years standing, or
- c) he holds, or has held for a period of, or periods amounting in the aggregate to, not less than seven years, a qualification as barrister-at-law of England or Northern Ireland, or he is a legal practitioner in any Commonwealth country.¹

The requirement in Uganda is different. Judges need not come from the Commonwealth. An advocate who has been enrolled for a period of not less than five years, qualifies for appointment, even if he has not been practising law.² Consequently, civil servants with legal qualifications have been appointed judges of the High Court of Uganda.

The Tanzanian constitution provides that High Court judges must have been registered as advocates of Tanzania for a period of not less than five years. However, the President is authorised to waive this requirement if he is satisfied that the person has ability and knowledge and he is suitable in every respect to be given powers of a judge of the High Court and valid reasons exist for his appointment.

3. Who appoints the judges?

In all three countries judges are appointed by the President. In Kenya and Uganda the President must act in accordance with the advice of the respective Judicial Service Commissions. In Tanzania the President appoints judges after consultation with the Chief Justice. In all three countries, however, the Constitution vests the power of appointing the Chief Justice in the President.

4. Retirement

In Kenya and Tanzania a judge of the High Court must retire at the age of 55.³ In Uganda the retirement age is 65.⁴ However, in all three coun-

tries even if a person has reached the age of retirement, he may carry on his work until he has finished the preparation and delivery of all pending judgements or until he has finished all other business concerning cases which he had already started to hear.

5. Resignation by judges

Should judges be allowed to resign? This permits the possibility of a judge resigning to take up employment with an organisation which had appeared before the judge. A judge may also find himself in a situation which compels him to resign.⁵ That is probably why the constitutions of Kenya and Uganda are silent on the question of judicial resignations. In Tanzania a judge may retire or resign from his work at any time after reaching the age of forty-five, but the President may refuse to grant such requests for resignation.⁶

6. Judges on contract

Another important issue in East Africa is whether judges should be appointed on contract. Experience in Uganda has shown that this is undesirable. Successive governments refused to renew the contracts of judges because of the views they expressed in their judgments. For example, Chief Justice Udo Udoma's contract was not renewed because he insisted on taking precedence over Prime Minister Obote. Mr. Justice Jones had to flee the country because his life was in danger as a result of his report on two missing Americans. Chief Justice Allen's contract was not renewed because of judgements he rendered against the government. It is the considered view of the present writer that all judges (citizens and expatriates), must be appointed for permanent terms so that they do not have to fear the displeasure of the authorities when rendering their judgements.

7. Security of tenure

One way of ensuring judicial independence is to guarantee security of tenure. Judges and magistrates in East Africa cannot be removed, except for cause and after a thorough investigation of the allegations made against

them. The various Constitutions provide that if the question of removing a judge of the High Court or of the Court of Appeal arises, the President must appoint a judicial tribunal composed of judges or persons who qualify as judges to investigate the conduct of the judge in question. The president is required to act in accordance with the recommendations of the tribunal.⁷

8. Remuneration

Another factor ensuring judicial independence is the remuneration of judges. Judges of the High Courts and of the Courts of Appeal receive fixed salaries which are not incremental. Their salaries are paid out of the consolidated fund. This means that their salaries are not subject to annual approval by the legislature; they must be paid as a matter of law.

9. Judicial control over court administration

Another important guarantee for judicial independence is giving responsibility for court administration to the judiciary. Though politically the judiciary falls under the portfolio of the Minister responsible for legal affairs, in the day-to-day administration of the courts, the judiciary in East Africa is completely independent. For example, the responsibility for allocating duties to judges is vested in the Chief Justices. Magistrates are supervised administratively by the chief registrars of the high courts, who also have the power to transfer magistrate from one area to another. The chief registrar and their deputies also from time to time inspect the courts of magistrates to ensure that they carry out their duties with efficiency and speed.

10. The position of the Chief Justice in Uganda

The most insecure job in Uganda is that of the Chief Justice. The Constitution provides that the Chief Justice "shall be appointed by the President." Successive presidents have assumed that on taking office they can appoint a new Chief Justice, and they have indeed done so. Under Sir Edward Mutesa the Chief Justice was Sir Udo Udoma, a Nigerian. After Milton Obote usurped power in 1966, Sir Udo Udoma went to Nigeria to settle family problems, and Obote would not allow him to return to the country.

Obote then appointed Sheridan to succeed him. After Idi Amin overthrew Obote, he appointed Benedicto Kiwanuka as Chief justice. Kiwanuka was taken by unknown persons from his chambers and has not since been seen. William Wambuzi took over as Chief Justice. When he was elevated to the Presidency of the Court of Appeal for East Africa, Amin appointed Justice Saied to succeed him. When Amin's forces were routed by Tanzanian troops in April 1979, and Lule assumed power, he brought back Wambuzi as Chief Justice. In 1980, Paulo Muwanga, the Chairman of the Military Commission that overthrew Godfrey Binaisa, appointed Goerge Masika Chief Justice, without first dismissing Wambuzi. After Tito Okello overthrew Obote, he appointed Peter Allen as Chief Justice. When his contract expired, Museveni's government refused to renew it, and Wambuzi is now back in the saddle.

Under the Constitution, a judge of the High Court can be removed only after his conduct has been investigated by a judicial tribunal. Article 83(2) provides that judges of the High Court "shall be the Chief Justice and such number of judges as may be prescribed by Parliament." As he is a judge of the High Court, the Chief Justice should only be removed in accordance with the procedures set out in Article 83(2).

11. Whittling away the powers of the courts

Laws in East Africa give the respective high courts unlimited jurisdiction over all matters arising within the borders of the country.⁸ However, there are some laws which attempt to restrict these powers of the courts. Some of these restrictions are derived from the common law and others are statutory in origin.

A. Act of State

During the colonial days one of the principles limiting the right of the individual to sue the colonial government was the concept of the Act of State. This was an act done on behalf of the Crown in respect of which no action could lie, although if done by a private person it would have been actionable. An Act of State was an act done outside H.M. allegiance against an individual or his property with either the prior authorisation of the Crown or its subsequent ratification as an act of state. Once it was pleaded

that an act was an Act of State, the jurisdiction of the municipal courts was removed. Redress could only be obtained through diplomatic channels. As Lord Fletcher Molton put in *Salaman v. Secretary of State*.⁹

Its sanction is not that of law, but of sovereign power and whatever it might be, municipal courts must accept it without question. But the courts can determine whether the act was truly an act of state, its nature and extents.

Because of the Act of State doctrine, colonial officers in protectorates could act in an arbitrary manner, and the so-called British protected person went without any remedy. For example, in *Ole Njongo v. Attorney General*,¹⁰ the British colonial administration entered into an agreement with Masai Chiefs in which the former undertook not to annex any more Masai land. When sued for violating the agreement, they successfully pleaded this doctrine. Again, in *Katikiro of Buganda v. Attorney General*.¹¹ when the Kabaka government brought an action for a declaration on an article of the Buganda Agreement, 1955, the High Court of Uganda refused to entertain the suit when the protectorate government pleaded act of state.

Has the doctrine of Act of State any application in East Africa today? Let us look at the countries one by one.

Under article 122 of the Constitution of Uganda,

any rights, powers, prerogatives, privileges or functions which were vested in the Crown and were exercisable by Her Majesty personally, vest in the President, and all other rights, prerogatives, powers, privileges or functions which were vested in the Crown vest in the Republic of Uganda.

The prerogative powers and other rights formerly exercised by the British Crown with respect to Kenya have been vested in the Government of Kenya by section 16 of the Constitution of Kenya (Amendment) Act, 1964. The same powers, rights, prerogatives and privileges were inherited by the government of Tanzania by virtue of section 7 of the Republic of Tanganyika (Consequential, Transitional and Temporary Provisions) Act, 1962.

Since the Act of States doctrine was one of the rights enjoyed by the British Crown in all three countries, it can be argued that the three governments can plead the doctrine if their officials commit civil wrongs against foreigners outside the borders of the country.

B. *The Prerogative Powers of the President*

The above quoted statutes also indicate that the President of each country has inherited the prerogative powers of the British Crown. As prerogative is derived from the common law, it is the common law that determines its existence, and defines its nature and extent. Therefore, if an individual disputes the validity of an act done under the prerogative, the courts can investigate whether the alleged prerogative exists. However, when the existence and the extent of the power under the prerogative is established, the court cannot question the manner of its exercise. Consequently, there is no legal means of controlling the exercise of prerogative powers.

In *Shabani Opoloto v. Attorney General*,¹² for instance, the High Court of Uganda refused to question the dismissal of the plaintiff from the Uganda Armed Forces once it was established that he was dismissed by the President under prerogative powers, which the Crown had held with respect to public servants in Uganda. The Court of Appeal for East Africa confirmed the decision of the High Court.

C. *Ouster Clauses*

While the Act of State doctrine and the prerogative powers of the President are of common law origin, ouster clauses are created by statute. Attempts have been made by the executive, through the legislature, to oust the jurisdiction of the courts from reviewing administrative action. This may be done by giving powers to the executive in subjective terms, such as "if he has reasonable grounds to believe", "as he thinks fit" and "if he is satisfied". Finality clauses such as "final and conclusive" and "shall not be questioned in any court" are also in vogue, particularly in Tanzania. The court's power to review the legality of ministerial acts may be limited by legislation, which delegates authority to ministers and clothes their acts with legislative authority by using such phrases such as "as if enacted in this act".

When the courts are confronted with such phrases they are guided by four principles. The first is the presumption against ousting the jurisdiction of the courts. While the courts agree that the legislature is competent to exclude matters from their jurisdiction, this must be done in clear terms. The second principle is that when rights are created by statute and some specific tribunal has been created to enforce them, recourse must first be had to that

tribunal. No court has the jurisdiction to decide the matter prior to this. The third consideration is the nature of the subject matter. If the issue concerns executive policy the courts tend to shy away from it. A good example is security in times of national emergency.

Lastly the words used may be crucial in determining whether the courts will interfere or not. They will look into cases where the words give the executive subjective powers. One of these is the phrase "as he thinks fit". However the courts do not consider their jurisdiction ousted by this phrase. They can interfere if the public authority acts unreasonably in reaching a decision. The courts insist that the executive must "reasonably think fit".¹³

A statute may also provide that a public authority may take a course of action "if he has reasonable grounds to believe" something. At first the courts were of the opinion that it was he who holds the power to determine for himself the grounds upon which he could reasonably believe something. It was not for the courts to ascertain whether in fact grounds did exist for him to form the belief. This was the view expressed by the House of Lords in *Liversidge v. Anderson*.¹⁴ However, the Privy Council modified this interpretation in *Nakuda Ali v. Jayaratne*.¹⁵ A statute provided that the controller of textiles may cancel the textile licence of a textile dealer "if he has reasonable grounds to believe" that the dealer was unfit to hold the licence. The Privy Council were of the opinion that such a phrase was designed to restrict the exercise of an otherwise arbitrary power. Grounds must exist for the textile controller to come to his belief. The courts therefore have the power to ascertain whether or not grounds exist for the public authority to form his belief.

The East African courts have followed *Nakuda Ali*. The preventive laws of Uganda¹⁶ and Tanzania¹⁷ provide that "where it is shown to the satisfaction of the President or the Minister of Home Affairs [in the case of Tanzania] that any person is behaving in a manner prejudicial to the defence or security" of the state, the President may order the detention of that person. In *Kyesimira v. Attorney General of Uganda*,¹⁸ the applicant was arrested and detained at a police station. He successfully applied for a writ of *habeas corpus*. He was re-arrested outside the high court building and served with a detention order. The Court of Appeal for Uganda held that his subsequent detention was unlawful as there was no evidence that he actually conducted himself in a manner prejudicial to the security or defence of Uganda. "How could he conduct himself in such a manner at a police station?" the court asked.

In the Tanzanian case of *Dhirani v. Republic*¹⁹ the court took it for granted that a detention order signed by the wrong authority or otherwise

ultra vires could be reviewed by the High Court under the provisions of the Prevention Detention Act.

One of the phrases used by the legislature to oust the jurisdiction of the courts is "final and conclusive." Following Lord Denning's decision in *Re Gilmores Application*²⁰ the High Court of Tanzania held that such a phrase never ousts the jurisdiction of the courts. It has been taken to mean "without appeal." It makes the decision final on the facts but not final on the law. Certiorari can still issue for excess of jurisdiction or for errors of law on the face of the record.²¹

There are some statutes in East Africa which provide that the decision of the President or the Minister "shall not be questioned in any court". In *Re Milling Ordinance*, the High Court of Tanzania held that such a phrase did not bar the court from granting certiorari if the President or the Minister acted without jurisdiction or otherwise did not follow the requirements of the statute. Similarly, in *Dhirani* the High Court held that such a phrase did not bar the court from enquiring into the legality of the action of the executive if the action was taken by the wrong authority. A series of cases decided by the High Court of Uganda are to the same effect.²²

Thus we see that in East Africa the judges have circumvented attempts to oust their jurisdiction. Justice of the common law has rectified the commissions of the legislature.

12. Corroding the Morale of the Judiciary

There are, however, some practices by the executive and the legislature which are calculated to corrode the morale of the judiciary. These practices include forestalling cases *sub judice*, invalidating court decisions and flagrant contempt of court by the executive.

A. Forestalling Cases Sub Judice

Kenya amended its Constitution in 1966 to provide that any member of Parliament who changed his political allegiance after election must seek a fresh mandate from his electors. Some members of Parliament who were required to vacate their seats after crossing the floor to the opposition instituted court proceedings asking for a declaration that the amendment applied only for future crossings and not to those who had crossed the floor

before the act was passed. Parliament then passed an act which declared that the constitutional amendment of 1966 applied retroactively and that even those who crossed the floor before it was passed had to vacate their seats.²³ The act effectively nipped the case in the bud.

In Uganda, Balaki Kirya was charged with treason. The trial lasted for over six months. Just before judgment the government withdrew the case against the accused because from the evidence it appears he would have been acquitted. While the Director of Public Prosecutions can withdraw cases at any time before judgment, in this case, the accused was taken back to prison and no further charges were made against him. He was released by General Tito Okello Lutwa after Obote was overthrown.

B. Invalidation of Judicial Decisions

One of the most authoritarian practices in which any government can engage is the invalidation of judicial decisions. Such a practice corrodes the morale of the judges and destroys public confidence in the administration of justice. Tanzania and Uganda have been guilty of this sin in particular. In Uganda, during the 1966 constitutional and political crisis five ministers and three chiefs were dismissed, arrested and detained under the Deportation Act of Uganda. The detainees applied for a writ of habeas corpus on the ground that the Deportation Act was unconstitutional because it provided for detention without trial, contrary to Section 28 of the Constitution.

The writ of habeas corpus was issued and the release of the detainees ordered.²⁴ Soon after, a special act was passed making the Government immune from all penalties and exonerating it from all liabilities arising out of the making or the carrying out of the deportation order. The Act also provided that the Government was not to pay any costs in respect of the proceedings by way of habeas corpus.²⁵

In 1960, the Chagga people of Northern Tanzania decided to abolish the post of paramount Chief which they created in 1951. Soon after, the Central Government issued an order abolishing these posts throughout Tanzania. One of the chiefs whose services had been terminated sued the Chagga Council for wrongful termination of employment. An award for a substantial sum of money was made to him by the High Court of Tanganyika.²⁶ Soon after, the Parliament of Tanganyika enacted a law invalidating the decision and making the local authorities immune from liability for the termination of the services of the chiefs. Even orders of the courts were not to be executed without the consent of the President.²⁷

13. Operation of the Courts

It is trite that justice delayed is justice denied. Judges in East Africa take a long time to finalise cases. There are many reasons for this, but some can be eliminated. For example, judges use the British practice of writing the record of the proceedings word for word. This is both time-consuming and tiresome for judges. Is it not better to use a recorder and then have the record of the proceedings typed for the judge to consider when writing his judgment?

Another cause of delay is that judges have to read all the authorities cited by counsel and verify their relevance and correctness. Judges act as their own secretaries and research assistants. It is time that the judiciary in East Africa adopt the American system whereby a young lawyer is attached to the office of a judge to do research for him.

14. Conflicts of Interest

Cases have arisen in Kenya and Uganda where judges had to be party to civil proceedings before the High Court. Two such cases involved commercial transactions. To ensure the independence of the judiciary, judges must avoid indulging in ventures that may compromise their positions. They must avoid events which may bring them into conflict with members of the public. Nor should judges become too familiar with potential litigants. For this reason judges must not frequent social places. The State should establish a special club, exclusively for judges, so that they do not rub shoulders with potential accused persons or litigants.

NOTES

1. Constitution of Kenya, Art. 61(3).
2. Constitution of Uganda, Art. 84.
3. Constitution of Tanzania, Art. 110; Republic of Kenya, Code of Regulations, Section G.
4. Constitution, Art. 85(d).
5. As it happened in Kenya and Uganda.
6. Constitution of Tanzania, Art. 110(2).
7. Kenya, Art. 62; Uganda, Art. 35; Tanzania, Art. 110(6) and 110(7).

8. Kenya: Judicature Act, 1962; Uganda: Judicature Act, 1967; Tanzania: Magistrate Courts Act, 1963, Schedule 6.
9. (1906) 1 K.B. 613.
10. (1913) E.A.P. L.R.I.
11. (1958) E.A. 765.
12. (1969) E.A. 631.
13. *In Re on Application by Bukoba GymKhana Club*
(1963) E.A.478.
14. (1942) A.C.200.
15. (1951) A.C.66.
16. Public Order and Security Act, 1967.
17. Preventive Detention Act, 1962.
18. Court of Appeal, Civil Appeal No. I of 1981.
19. (1979) LRT No. I.
20. (1957) I.K.B.574.
21. *In the Matter of Section 24 of the Military Ordinance* (1954) 2 T.L.R.(R) 192.
22. *Amos Mugisa v. Uganda* (1979) H.C.B. 271.
In Re Batinola (1979) H.C.B.LLS.
In Re Bob Musoke (1979) H.C.B.222; *In Re Muwanga* (1979) H.C.B. 255
Kyesimira v. Attorney General.
23. Constitution of Kenya (Amendment) (No. 2) Act, 1966.
24. *Ibimgira & Others v. Uganda* (1966) E.A. 306.
25. Deportation (Validation) Act, 1966.
26. *Morealla v. Chagga Council* (1963) E.A.131.
27. Chiefs (Abolition of Office and Consequential provisions) Act, 1964.

Judges and Lawyers in Africa Today: Their Powers, Competence and Social Role with Special Reference to the Organization and Jurisdiction of Courts

by
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1. By way of introduction: Putting "Honourable Justices" and "Learned Gentlemen" in historical and class context

The central task of my talk is to examine the independence of judges and lawyers through the organisational and jurisdictional aspects of judicial processes. I consider it fundamental, however, to make some preliminary observations in order to put our work in the correct historical and social context. The overwhelming majority of judges and lawyers in capitalist societies, whether in imperial states, colonies, or neo-colonies, have tended to treat the institutional and professional independence of judges and lawyers as an end in itself rather than a means to fulfilling the *primary duty of all of us who live in class-divided societies: to be consciously partisan in class struggles* on the side of social equality, freedom and justice. This leads to serious contra-

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dictions when, on the one hand, the human side of us sees clearly that laws cannot be interpreted and applied outside of their social, historical and class content, while, on the other hand, one yearns to promote the narrow institutional and professional ideals that contradict the former.

There are a number of historical and social factors that have led mainstream lawyers to believe in and try to institutionalise the concept of independence of judges and lawyers without reference to class considerations. Early lawyers were members or confidantes of the ruling aristocratic class. They were part of the rich exploiting families. The bourgeois revolution democratised society by tearing apart most of the feudal privileges, and this led to new salaried professionals specialising in law and its administration. A few members from the middle classes and even fewer from the peasantry and the working class joined the old lawyers from the ruling classes. These "outsiders" became more or less paid servants of the capitalist ruling classes.

Thus, law courts and the judicial process were commoditised – ready for purchase and sale by those with economic power who could enjoy and benefit from the services of "independent" judges and lawyers. No matter how much philanthropic *pro deos* and *in forma pauperis* work the cynical bourgeoisie and other honest "friends of the people" engaged and engage in, the inequality of legal justice under capitalism remains chained to social inequality in the control of production and distribution of material wealth under capitalism.¹

In case the need to purchase legal services is not enough of a burden on the majority of the working and unemployed people, the content of law itself reflects and reinforces social inequality. Special legal language, complicated formalities, exacting procedural requirements such as rules of evidence requiring certain degrees of proof and different levels of proof in criminal and civil cases, restrictions on parties who may participate in adjudication of disputes and the threatening appearance of judges and lawyers in wigs and robes, all contribute to the tyranny and dictatorship over the masses. It is no wonder, then, that when a people's revolution takes root² and progresses³, not only is the bourgeois-controlled wealth liberated and new relations of production instituted, but a new people-based judicial system evolves and is progressively consolidated.

From purely liberal positions, scholars have now fully exposed the class role of the judges in advanced capitalist societies.⁴ To try and demand reforms to make them "independent" without transforming society socially serves only to strengthen their effectiveness as agents of the minority ruling class under capitalism.

**2. The handling of matters of a judicial nature
by "apolitical", "professional" judges
and ordinary courts of law:
implications for the independence of judges**

One of the most surprising beliefs by advocates of the traditional, as opposed to the revolutionary, doctrine of independence of the judiciary, is that which views judges as "professionals" and, by implication, removes them to a large extent from the political process in their work. This belief ignores the reality that in practically every other constitution of independent African countries, whether inherited from the former colonizing power or locally promulgated, judges at the higher levels are appointed by political leaders such as Presidents, Prime Ministers or Party Central Committees, with or without the advice of Judicial Service Commissions, themselves composed of political appointees.⁵ Judges are creatures of politics, and attempts, through law⁶ or otherwise, to claim that they can, distance themselves from politics is not realistic. The real question is *whose politics* and not whether they ought or ought not to participate in politics. Since politics are concrete expressions of class struggles, the class in power will decide the politics of the judge.

Judges must depend on the political ruling forces, not only because they are appointed by them and share their class values, but also because the enforcement of legal decisions within a state is assigned to organs other than the judiciary. The effectiveness of law, therefore, depend on unity of purpose of the judicial and executive organs of the state. Judicial observations in two recent Zimbabwean cases demonstrate this point. In a case where the Commissioner of Police refused to give protection to a messenger of court while he served an order of eviction on squatters occupying under-utilized privately owned land, Mr. Justice Waddington said:

If the Messenger were not to be entitled to help from the police to give effect to writs and other process of the Courts in cases where he alone cannot do so, it would be quite pointless for an aggrieved citizen or visitor to Zimbabwe to seek the protection of his rights by the State through the medium of the Courts.⁷

In *Minister of Home Affairs and the Director of Prisons v. J.V. Austin and K.N. Harper*, Chief Justice Dumbutshena said:

When the Executive ignores the orders and judgements of the Courts there is the inevitable break-down of law and order, resulting in uncivilized chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of judgement.⁸

3. Ordinary courts, special courts and professional judges and lawyers

Having said that the role of judges is really political and class-determined and that the independence of the judiciary should be viewed in this context, the question then becomes whether ordinary courts and "professionally" trained judges are the only proper organs for dispensing political and class-based justice. This question is, naturally, contentious. Most societies have departed in practice from the view that traditional law courts and judges are the best institutions to rule fairly on disputes of a legal nature, and have established institutions such as labour (industrial) relations boards and tribunals,⁹ which act as both lower courts and high courts in disputes between employers and workers, and the ombudsman.¹⁰

Also of significance is the fact that in many jurisdictions, the lower courts (where most legal disputes are determined and finalised) are not presided over by adequately "professional" personnel. This was true of these courts during colonial rule¹¹ and has continued since independence.¹² Although financial considerations may affect the staffing of lower courts, society accepts this as normal and believes that this problem does not affect the quality of justice. This illustrates that what is acceptable in society is historically determined. It is not simply a professional question, although it is important that those who administer the law know the law and the class nature of the society in which the law operates.¹³

However, attempts to improve the "professional" level of the lower courts should not increase the alienation of the people from the judicial process. We have already seen how "professional" courts terrorise the masses through language complications, intricate procedures, intimidating appearances of judges, etc. This should not only be corrected in the higher courts but efforts should be made to ensure that lower courts do not stoop to the present level of the higher courts.

More importantly, all courts must be revolutionised, along with the rest of society if "the independence of the judges and lawyers" is to have a positive and beneficial meaning for the masses. There is a tendency of movements for independence to try to re-discover the customary past and

in the process to forget that the majority of customary laws were class-based. Most societies in Africa were divided into classes long before formal colonization, although the classes were not of a capitalist nature. Traditional customary law and courts must not be used to revive past exploitative and oppressive practices. They can only play progressive roles if they are used to fight past systems of inequality and to promote the values that are consistent with the future we want to build.

Indeed, the non-court dispute settlement institutions, the ordinary courts, lay persons and professional lawyers who sit in these institutions and courts can only be with the masses and for the masses when the masses have captured political power – as they did in Mozambique¹⁴ – and become the ruling force in society. It is then that the ordinary courts and special institutions with a judicial character can reflect the needs and interests of the majority.

In other words, the organization and reorganization of the courts should be geared towards the discussion of the promotion of society's well-being and the eradication of poverty and social inequality. This demands popularizing the judicial process by making judges and lawyers accountable to the people and also ensuring that more and more people are involved in dispute settlement processes, not simply the litigants in civil cases or the accused and prosecutors in criminal cases or narrowly defined witnesses. It also demands putting an end to the idea that the role of these individuals in the courtroom is divorced from the society in which they live and work.

4. Courts, petitions for personal freedom and security of individuals, and the independence of judges and prosecutors

The ordinary courts in capitalist-oriented African States that deal with most criminal cases have, by and large, used every occasion possible to assert what they consider to be their primary role, namely upholding ideals of personal freedom and individual security of as well as protecting private property. It is in this regard that judges and many ideologues of the traditional doctrine of the independence of the judiciary have tried to distance the courts from the executive and legislative organs of the State, even though, as we have seen, the courts are themselves political creatures of those very same organs.

In Zimbabwe, since independence, the High and Supreme Courts have

tended to interpret the law and to assess situations in ways that favour individual freedom and the protection of private property much more than the courts did during the colonial times.¹⁵

The courts in Zimbabwe have consistently asserted the right to handle judicial matters touching on personal freedom, the security of the individual, and private property, even in cases where the Executive has not been pleased with¹⁶ or has proceeded to ignore,¹⁷ (sometimes justifiably) court decisions in such circumstances.

A relatively higher level of independence is displayed by the judiciary in Zimbabwe than in Kenya, but in both cases the courts carry out their functions by defending the ruling classes and the existing capitalist economic system.

The reason why the Kenyan courts have tended to march to the tune of the political leaders more than the Zimbabwean courts is that those seeking protection from the Courts are identified as enemies of the existing neo-colonial capitalist economy, which both the judges and the executive organs of the state want to preserve. Thus, the executive only rarely uses preventive detention to silence resistance, preferring to use the courts to bring trumped-up charges against its intended victims. Hundreds of Kenyans today languish in jails as *political prisoners* although the State alleges that they are criminals, justified only by the fact that their incarceration is sanctioned through the courts.

It is important to point out then that when courts are not accountable to the masses, there is a danger that they will easily lose their adherence to the law and will be manipulated by political leaders bent on perpetuating neo-colonialism. In such circumstances, attempts to use the processes such as *habeas corpus* and *mandamus* become useful as political education exercises only. Whenever the state rejects these processes, the regime in power becomes more and more distanced from the people. Similarly, misuse of these processes to secure freedom for those determined to protect and perpetuate the social system of exploitation and inequality can only bring disrepute to the courts and hence turn the independence of the judiciary into a tool for promoting social and political injustice.

5. Promoting independence of judges and lawyers by protecting the fairness of proceedings

One of the most challenging tasks in capitalist-oriented societies concerned about their behavior towards those who do not own or control soci-

ety's wealth, is to dispense equal justice in a society where inequality is institutionalised and protected by law. This dilemma is faced daily by lawyers who, as judges, prosecutors or defence attorneys, are caught up in cases where only one party in a dispute has legal representation. For the judge, is it possible or desirable to be independent in a case where one party has legal representation while the other side does not? Is it just to observe rules of procedure and decide a case purely on the basis of the submissions of the parties, where one side has specialised legal representation and the other side does not?¹⁸ Indeed, even the philanthropic efforts to provide free legal aid is not an answer as these lawyers are sometimes disinterested and poorly remunerated while forced to oppose lawyers whose pockets are filled with money from wealthy clients. This does not lead to equality of representation.

The only way to make courts and the judicial process just for the majority of society is to change the material conditions that create inequality; to restructure legal professions in such a way that private practice is discouraged; to make procedures and language simple and comprehensible to the people; to guarantee that all cases requiring legal assistance receive it; to involve the people in dispute settlement; and to ensure that the legal rights being defended, i.e. the content of the law, are not designed to protect any form of oppression.

6. By way of conclusion

I have attempted in my contribution to the seminar to reveal the class bias that underlies the doctrine of the independence of the judiciary and the legal profession. In doing so, I have suggested that the doctrine requires re-evaluation in light of the revolutionary demands of the masses who have suffered for centuries under colonial capitalism and who, since independence, continue to suffer under neo-colonial capitalism, which prevails in most of our societies in Africa. The capitalist system makes commodities out of virtually all material goods and social services. And legal services have not been the exception.

Without undertaking major transformations in material conditions, institutions or ideological orientation, our quest for the independence of judges and lawyers can only mean independence to allow the anti-social work of lawyers to be perpetuated. The minority ruling class, however, benefits from the existing order of things and will necessarily oppose our efforts to join the masses and create new, more socially beneficial conditions

in the law and its administration. We must choose which side we are on: I have chosen which side I am on and I have made my contribution from that partisan position.

NOTES

1. S.B.O. Gutto, "The political Economy of Legal Aid and Advice Services", *Z L. Rev.*, Vol. 3, 1985 (Nos. 1 and 2).
2. See, generally, A. Sachs (ed.) *Principles of Revolutionary Justice* (London, Mozambique, Angola and Guinea Information Centre, 1979).
3. Gita Honwana-Welch, "Legal Pluralism in the Perspective of Popular Justice: The Mozambican Experience" (Unpublished Paper, 1985); A. Sachs, "Changing the Terms of the Debate: A Visit to a Popular Tribunal in Mozambique", 1984, *JAL*, Vol. 28, Nos. 1 and 2, p. 99.
4. See, for example, Griffith, *the Politics of the Judiciary*, 2nd Ed., Fontana, 1981; Paterson, "Judges: A Political Elite?" (1974) Vol. 1, No. 2, *British Journal of Law and Society*, 118.
5. See, for example, *Constitution of Zimbabwe*, Articles 84-85, 90.
6. See legal provisions directed at prohibiting all judicial officers from participation in politics in Zimbabwe, Public Service (Officers (Discharge and Misconduct) (Amendment) Regulations) 1985 (No. 2), S.I. 135/1985 made under Article 75 of the Constitution of Zimbabwe.
7. Cited with approval by Gubbay, J.A., in an appeal in *The Commissioner of Police v. R.S. Rensford and Messenger of Court, Gweru*, Judgement No., S.C. 30/84, Civil Appeal No. 341/83, Cyclostyled copy (unreported) p. 5.
8. *The Minister of Home Affairs and the Director of Prisons v. J.V. Austin and K.N. Harper*, Judgement No. S.C. 79/86, Civil Appeal No. 237/86, June 1986 (Unreported).
9. See, for example, *Labour Relations Act*, No. 16, 1985 (Zimbabwe) Parts XI and XII.
10. Articles 107 and 108 of *Constitution of Zimbabwe* and the *Ombudsman Act* No. 16, 1982.
11. *Rhodesian African Law and Tribal Courts Act*, Chap. 237; *Magistrates Court Act*, Chap. 18.
12. *Zimbabwean Customary Law and Primary Courts Act*, Act No. 6 of 1981.
13. S.B.O. Gutto, "Law and legal education in the period of transition from capitalism to socialism", *Z. L. Rev.*, Vol. 1 and 2, (1983-84) 158, at 166.
14. Notes 2 and 3, above.
15. John Hatchard, "Breach of Constitutional Safeguards in Preventative Detention Cases", *Z.L. Rev.*, vol 3 (1985).

16. See, for example, speech delivered on 13 July 1982, to the House of Assembly on the Renewal of the State of Emergency by the then Minister of Home Affairs, Cde. H. Ushewokunze.
17. See Notes 2, 11 and 12, above; In the *Renford case* (note 11) the executive organ of the state, acting under legislative powers vested in it by the legislature, promulgated regulations which allowed the squatters to remain on the land they had illegally occupied with the State paying compensation to the land owner and by so doing preserving the sanctity of private property and the right of owners of private property to seek judicial remedies upon infringement of their property rights (Emergency Powers (Resolution of Disputes Over Occupation of Rural Land) Regulations, 1984, S.I. 243 A of 1984).
18. See, Gutto, Note 1, above; J.S. Read, "The Advantage of Counsel" (1971) Vol. 7(2) East African Law Journal; Hwacha, Report on *Legal Aid in Zimbabwe*, 1983 (Unpublished).

The Rights and Duties of the Legal Profession in Africa

by
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The Duties of the Legal Profession

(i) The public responsibility of the Legal Profession

The claims of the legal profession to independence and freedom carry with them the duty to be responsible to the public. Henry S. Drinker stated that upon admission to the bar, the lawyer is charged with certain obligations to the public, including:

- (1) to ensure that individuals who are admitted to the bar are properly qualified by character, ability and training, and that those who thereafter prove to be unworthy of these privileges are deprived of them;
- (2) to ensure that able and upright judges are chosen and that any who prove manifestly unworthy or unfit are removed from judicial office;
- (3) to represent without charge those unable to pay;
- (4) to refrain from encouraging litigation; and
- (5) to refrain from assisting the unauthorized practice of the law.¹

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These five responsibilities sum up the most important duties that the legal profession owes to the public in the practice of the law.

In addition, the profession must make its skills available to the State as well as to the individual. Even governments most sympathetic to the legal profession will expect to see that the first priority of the profession in developing countries is to identify itself with the development efforts of the state. They expect the profession not to be concerned primarily with gain through litigation between wealthy individuals or corporations, but rather to place its skills at the disposal of ordinary people in their everyday legal problems arising from the effects of social change. They also expect lawyers to offer their services to the State in the conduct of its international affairs, including treaties, international lending and borrowing and other commercial activities.

The political leadership of most African countries is not likely to accept the lawyer as purely professional and a champion of the fundamental rights and liberties of the individual. Tension will arise from the different priorities of political leaders and the profession. At one end of the spectrum, political leaders may emphasise the importance of economic and social development over respect for civil liberties; at the other end, the profession, while acknowledging the necessity for accelerated economic development, is nonetheless anxious to see that individual rights are respected and protected in the process of such change. The challenge to the legal profession in Africa is to find ways in which these conflicting demands may be accommodated without doing violence to one another. The profession will also need to provide leadership and courage in maintaining the rule of law and in checking the growth of corruption and nepotism in the State. It will have to fight tirelessly to uphold the inviolability and integrity of the Constitution, and it must be seen to be on the side of constitutional democracy in order to encourage the peaceful transition of power if the temptation of military and police intervention is to be kept within bounds.² This challenge requires courageous lawyers of the highest ethical standards in order for the profession to win the confidence of the public. It also requires imaginative lawyers who are not only able to administer and operate the law as it is, but who are able to put forward proposals for reform where necessary to harmonise the law and the expectations of society.

The disruption of civil life in many African countries as witnessed by military take-overs and the presence of huge numbers of refugees on the continent are evidence that the development efforts of Africa's political leaders have false foundations, in that they are not accompanied by respect for the rule of law and the fundamental rights of the individual. Lawyers in

Africa must, therefore, feel that it is their duty to participate fully in the political life of their countries, to help mould the national character of the state.

(ii) *The duty to be responsible*

The duty of the legal profession to be a responsible profession is, perhaps, the most important of all duties, since its behaviour determines its credibility in the public eye. The duty to be responsible arises from the trust placed by the public in the legal practitioner by virtue of his membership in the bar. It follows, therefore, that every member of the profession must discharge his duties to the Court, his client, members of the public and to his colleagues with honesty, candour and honour. If he does not, it becomes the solemn duty of both the legal profession and the courts to disbar him. The duty to be honest imposes upon the lawyer the obligation to inform the court of any relevant decided cases, even where the decision is against him. He is, however, entitled to distinguish any such case.

The duties outlined above apply to law officers as well, since they too are officers of the court. In their function as prosecutors, the duty of law officers is to see that justice is impartially and fairly administered and not to secure a conviction at all costs. It is thus unprofessional for any law officer to suppress evidence that is favourable to the defendant. The duties of officers of the court further require that any witnesses which the prosecution do not wish to call because his evidence would contradict its case should be made available to defence counsel.

The duties of honesty and fairness are especially called for in Africa, where the majority of the clientele are unsophisticated and thus easy prey for unscrupulous legal practice.

Where a legal practitioner is accused of misconduct, his case should be investigated by a properly constituted tribunal. In Malawi, the Legal Education and Legal Practitioner Act vests disciplinary control over the activities of legal practitioners in the High Court. Complaints concerning the conduct of a legal practitioner are heard by the Chief Justice sitting alone or with such other judge or judges as he may direct. The legal practitioner has the right to be heard in his defence. The High Court may either of its own motion or on an application made by the Attorney General make an order suspending any legal practitioner or striking any legal practitioner off the Roll, or may admonish any legal practitioner in the circumstances outlined in the Act.³

(iii) The duty to offer effective representation

A client has the right to expect effective representation from his counsel. The right to legal representation is, as has been observed above, recognised under the African Charter on Human and Peoples' Rights, Article 7(1)(C). But for its realisation the right imports a duty first on the state to make available the means for effective representation.

(iv) The duty to provide legal services to the poor

The provision of legal services to the poor presents one of the greatest moral challenges to the legal profession in Africa. Many legal practitioners in Africa, emulating the often wealthy western practitioner, have expectations of a wealthy career ahead of them and are satisfied to serve only the wealthy. They are often unmindful of the needs of the poor, the majority of our people, who cannot afford to pay for the services of a lawyer. Yet in very many cases the majority of the poor people are in as much need of legal services as the rich. The profession should realise that by its exclusive right to practice law, advise clients, and represent them in court, it has the duty to provide legal services not only to those who can afford to pay but also those who cannot afford the fees.

Since the legal profession is essentially a private profession, it would be futile to expect that lawyers, who regard their profession as a means of livelihood, would always put their skills at the disposal of the poor without a fee. On the other hand, the majority of our Bar Associations and Law Societies do not possess sufficient financial resources to organise and administer a legal aid scheme, as is the case in some of the more developed countries. The financial difficulty might be overcome, to some extent, if the legal profession and the state were to work in a partnership where the State would make money available to the profession to organise and administer a legal aid scheme and pay the services of any lawyer undertaking representation of an indigent litigant or defendant. Many countries in the Commonwealth have opted for this solution to the problem; and the schemes have met with some success.⁴

Another alternative would be for the State to take over the whole responsibility for providing legal services to the poor. This is the solution chosen by Malawi as early as 1964 with the Legal Aid Act.⁵ Under the Malawi scheme a Legal Aid Department was established, organised under the aus-

pices of the Ministry of Justice and run by funds voted for the Ministry of Justice by Parliament. The Department is headed by a Chief Legal Aid Advocate who is legally qualified and has other Legal Aid Advocates below him. All these are employees of the Ministry of Justice and are liable to be transferred to other departments of the Ministry.

The Department is administratively controlled by the Principal (or Permanent) Secretary in the Ministry of Justice (who is either the Attorney General or Solicitor General) and ultimately by the Minister of Justice as the political head and responsible for policy matters. But in the discharge of their professional duties the Chief Legal Aid Advocates and his professional colleagues are independent of the Principal Secretary's or the Minister's control. The Chief Legal Aid Advocate decides which cases to assist in the provision of legal aid and how much contribution, if any, the litigant or defendant is to make towards the legal expenses incurred on his case.⁶

The Malawi scheme has so far operated successfully although it cannot be pretended that it reaches more than a relatively small part of the population. At present the scheme is operated from only two offices situated in Blantyre and Lilongwe, the two principal cities of the country, and with about eight professional staff. But it is hoped that the scheme will be expanded in the near future by opening a third office in Mzuzu, in the northern part of the country. One hopes that as the scheme develops and becomes better known, more people will take advantage of it and the Government will in turn increase the professional staff. For these reasons, it is submitted that the Malawi option is the better one because it directly involves the state in the provision of legal services to the poor and thus alleviates, to a large measure, the financial and administrative problems discussed in the first alternative.

Looking Ahead: What Needs to Be Done

The need for continuing education

Too often legal practitioners are satisfied with their daily routine of drawing conveyances or conducting litigation. They are content to use the old colonial forms of precedents, which have long since been abandoned in their countries of origin, and to uncritically cite the same old authorities irrespective of their relevance for the prevailing conditions. We suggest that Bar Associations and Law Societies in Africa think seriously about introduc-

ing mandatory refresher courses. These courses would be useful in helping to keep members of the profession abreast of new developments in the law and to initiate and discuss reforms.

The need for legal education

In many of our Universities, especially in small jurisdictions, law programmes suffer from staff shortages due to inadequate funding. The result is often that little attention is paid to the practical aspects of the law. Law Schools are often criticised by the experienced practitioners for turning out law graduates that are not really ready for practice. The criticism is that the young graduates do not know how and where to file a writ of summons, or how to address the presiding judge or magistrate in Court or how to take down proofs of evidence and organise witnesses. In other words the criticisms relate to matters which would be taught by the very people who are criticising, namely, the experienced practitioners themselves.

It is clear that this position must be corrected if the legal profession is to give quality service to the public. Experienced and long standing legal practitioners ought, as a matter of duty, to take it upon themselves to tutor young graduates in the practical meaning of the ethics of the profession and ought to offer their leadership.

Law Reform

Finally, the legal profession must take the lead in law reform. Many of the laws on the statute books have been carried over from colonial laws. Twenty or more years of independence must surely have revealed many problems which are peculiar to the African situation and which require an Africa solution. Yet it is a sad experience, if not an affront to the intelligence and ability of the local legal professions, that whenever an occasion arises to reform a particular area of the law, no use is made of the local practising or academic lawyers; instead, experts are imported from overseas, often charging high consultancy fees, to study and make recommendations on steps to be taken to reform the law.

The profession must ensure that the law is easily accessible in our codes and law reports. Furthermore, the profession should encourage our judges to rely less on European or other received laws and instead to address themselves imaginatively to the problems of their local jurisdictions.

The profession should encourage our judges to have an African outlook and apply an African perspective to the legal problems. In this regard, the legal profession itself will have to change its attitude towards customary law from indifference to a positive desire to salvage its remains, and to strive to integrate it into the general law in order to make it relevant to today's conditions.

NOTES

1. Henry S. Drinker, *Legal Ethics* (Columbia University Press, New York, 1961, reprint), p. 59.
2. L.C.B. Gower, *Independent Africa: The Challenge to the Legal Profession*, (Harvard University Press, Cambridge, Mass. 1967), p. 133.
3. For an illustrative discussion of the consequences of a dual legal system, see B.P. Wanda, "The Role of Traditional Courts in Malawi", P.N. Takirambuode, ed., *The Individual Under African Law*, University of Swaziland, Swaziland, 1981, p. 76-94.
4. For a general discussion on developments in legal aid schemes in the Commonwealth, see "Recent Developments in Legal Aid Schemes" (Covering Nigeria, Australia, Canada, Malawi and India) in *Proceedings and Papers of the Sixth Commonwealth Law Conference*, (Lagos, Nigeria, 1980), pp. 327-404.
5. Cap. 4.01 of the Laws of Malawi. This Act replaced the Poor Prisoners Defence Ordinance, 1945, under which provision of legal aid was confined to the poor persons charged with criminal offences only.
6. For a detailed discussion of the Malawi Legal Aid Scheme, see B.P. Wanda, "Legal Aid Services in Malawi", in *University of Washington, Law Quarterly*, 1975(i), pp. 113-145.

The Status and Rights of Judges: Their Training and Education, Appointment, Discipline, Tenure of Office, Removal, Transfer, Remuneration, and Professional Immunity

by
L.S. Shimba*

1. Preliminary Remarks

It is now roughly a quarter of a century since the majority of Commonwealth African Countries gained independence. During this period independent African States have experienced dramatic political, economic, social, and cultural transformations.

The net result of these changes is that a peculiar set of political, economic, social and cultural problems have arisen. The legal institutions operating in newly independent African States were mechanically transplanted from the former colonial metropolitan territory. Furthermore, lawyers, whether Africans or expatriates, were themselves trained in the legal traditions and jurisprudence of the common law or, in former French colonies, the civil law -- that is, in the former colonial master's legal traditions. The colonial master's models of political, economic, and social institutions were im-

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posed on practically all newly born African States.

It was therefore a wise gesture on the part of many African States to have embarked on a comprehensive program of restructuring the institutional framework bequeathed to them by the departing colonial powers. African States have decisively rejected any further mechanical transplantation of Euro-American political or legal institutions and values. Africa has its own peculiar conditions and circumstances which are radically different from those of England and America. Both political and legal institutions must be oriented to deal with, and to solve, problems generated by the circumstances of the African situation. This calls for a radically different outlook on the part of those who plan and manage state affairs.

While African politicians have proven that they are able to adjust to the pressures, needs and requirements of the new State, other state functionaries, because of the nature of their professional training and their work, may not have found it as easy to adjust. One such body of professionals is lawyers, and more specifically judges.

2. Focus of the Paper

This paper discusses the dilemmas and predicaments confronting an African judge in his attempt to assert his status and rights in society, as his attempts discharge his duties free of interference from external influences. The basic question is how best to redefine the traditional status and rights of a judge within the politico-economic and socio-cultural framework of a developing country, characterised by many potential areas of conflict among government organs *inter se* and between government officials and ordinary individuals.

Fortunately one thing is clear: progressive African leaders have affirmed their faith in the rule of law and in the independence of the judiciary, and have visibly striven form the corner stone of their respective political and constitutional systems.¹ This is reassuring for judges, whose sense of security in their jobs and their consciousness of their independence in discharging their functions is crucial to the maintenance of the Rule of Law and the preservation of individual rights.

3. Definition and Scope of the Principle of an Independent Judiciary

"Independence of the judiciary" is best defined as:

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- (a) 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
 - (b) 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.²

It must also be added that in a *de jure* one-party state, independence of the judiciary also includes independence from the influence or pressure of the powerful functionaries of the 'Party' – for the 'Party' in a one-party state is officially the fourth organ of the State. In the case of Zambia and Tanzania, the 'Party' is the Supreme Organ of the State elevated above other institutions in the land.

The other aspect of judicial independence is independence from any unofficial organization or group within society. The judge must not be influenced by his own church or his tribal group, or groups such as trade unions. He should not be influenced even by his fellow judges or by his spouse.

No doubt this definition of independence with its consequent do's and don'ts for judges in the dispensation of justice has been greatly influenced by the traditions of analytical jurisprudence. This approach to the study of law teaches that law should be 'pure,' uncontaminated by any extra-legal materials. But can a legal system in the third world afford not to import extra-legal considerations in the application of law; can it still remain viable if it does not? I think that the legal realist and an eminent judge of the U.S. Supreme Court, Mr. Justice Holmes, is on firm ground when he observes:

The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the actions and corollaries of a book of mathematics.³

Given the conditions in developing countries, judges should bear in mind the realities of social life in these countries and be alert to the conflicting interests of the component groups and individuals. The judge must understand clearly the policies and economic and social goals of the nation,

its economic and political pressures, and the social stresses that exist within the society. Only then can his decisions contribute effectively to the sustenance of that society and in reducing areas of conflict.

4. The Status and Rights of Judges

In any society that has respect for the rule of law, judges are held in high esteem as the appointed agents in the administration of justice. They are seen as the 'sentinels' in the protection of human rights for ordinary individuals.

The "quality" of justice is a reflection of the professional integrity and calibre of those appointed judge. To obtain the respect of the public judges must be persons of moral uprightness, professional honesty and intellectual sharpness. To ensure that those selected as judges have the requisite professional integrity and ability, guarantees concerning their education and training, their selection, promotion and professional immunity, as well as safeguards against improper removals or disciplinary action must be clearly defined.

In addition, security of tenure is essential if judges are to carry out effectively their roles as guarantors of the rights of the individual. Guarantees must exist to prevent judges from becoming political victims as a result of their decisions.

Safeguards for judicial independence, including provisions for the "rights" of judges, must be made part of our constitutions. Below is a discussion of the extent to which these safeguards exist in the legislation and constitutions of independent Africa and, in those countries where they do exist, their effectiveness.

A. Training and Education

It is of cardinal importance that judges have a sound education and training, supported by a wide experience in legal work, either in private practice or on the bench.

In most African States, an aspiring lawyer must obtain a law degree either from the National University or from any recognised University of a Common-law jurisdiction, following which he or she would receive further training at a local Law Practice Institute.

The need for a sound education and proper training is important in the African context and deserves emphasis. An African judge must grasp the issues confronting his or her society. Education and training can assist the judge by developing in him a broad-minded outlook and a capacity to find meaningful solutions.

The issues and tensions confronting African Societies are vast and complex. A judge, as the appointed reconciler of conflicting interests must be creative in order to be able to chart his or her way through the maze. He must weigh each situation intelligently, and know when to uphold a societal value, a governmental economic or social measure or policy and when to turn down in the public or national interest a claim by the individual that his constitutional right has been infringed. These are issues whose skilful handling by the judiciary serves to diffuse tensions in society and helps to promote national harmony. Only a judge of calibre with intellectual acumen can succeed in these endeavours. Unlike his counterpart in the Western countries, an African judge has very few or no precedents to guide him in many novel cases, and he has before him no properly articulated democratic tradition to guide his responses in cases of political significance.

There must also be a deliberate attempt to inculcate in the minds of law undergraduates in African Universities principles of constitutional and administrative law, of human rights, and of the rule of law.

B. Appointment of Judges

It is important that no considerations should enter into the appointment process other than the moral quality, social habits, conduct of and personal integrity of the candidates.

In Commonwealth Africa the predominant method of appointment is for the head of Executive, in his sole discretion, to appoint the head of the judiciary, the Chief Justice. In Zambia, Supreme Court justices are also appointed by the President in his own discretion. However, judges of the High Court and other judicial officers are appointed by the President on advice of the Judicial Service Commission. In many other African Commonwealth countries, justices of Supreme Courts (or of Appellate Courts) together with puisne judges and other judicial officers are appointed by the executive on the advice of the respective judicial service commissions. In Tanzania, judges are appointed by the President after consultation with the Chief Justice.

In African States the responsibility for the appointment of judges thus rests predominantly with politicians. The institution of judicial service commissions in practically all the African Commonwealth countries was used by the departing colonial power as a way of removing purely political considerations from the appointment of judges.

The effectiveness of the commissions in moderating political forces in the selection of judges lies in their composition. If, because of their membership, the judicial service commissions are controlled by the executive the justification for their existence disappears. The Zambian case is instructive here. At the time of independence, the Judicial Service Commission, authorized by the independence Constitution, was largely comprised of the Chief Justice (Chairman), a judge of the Court of Appeal or High Court designated by the Chief Justice, the Chairman of the Public Service Commission, and another member nominated by the President but who was serving as a judge of the Court of Appeal or the High Court. Thus, there was only one non-lawyer member of the Commission.

However, by constitutional amendment in 1974,⁴ the Secretary to the Cabinet was substituted for a judge of the Supreme Court (formerly called the Court of Appeal) or High Court, and the politician Attorney-General was brought in as a new member of the Commission. Furthermore, the requirement that the other presidential appointee be a judge or a former judge was deleted. The Chief Justice is thus left as the only judicial member of the five-person Commission with the other four controlled by the executive. Can such a body be blind to politics in its consideration of potential judges or promotions to higher judicial office?

This leads to the question whether political considerations should be entirely separate from the process of appointing judges.

(i) Political Considerations

The former Chief Justice of Tanzania, Telford Georges, said on this subject:

What is important ... is not necessarily the complete absence of any "political" consideration, but a positive commitment to the choice of professionally competent persons of proven integrity. No one should be appointed a judge for purely political reasons when he is not otherwise fitted for the office".⁵

One can go further and argue that to remove politicians entirely from

the process of appointing judges would be to subvert the authority of judges. It is often forgotten that it is vitally important for the judiciary to command the confidence of the government and that the support of the latter is crucial to the operations of the courts and the administration of justice. Political confidence in the judiciary and political support requires that politicians participate in the selection of at least senior judicial officers. Through this process, politicians would be more inclined to acquiesce in decisions that prove unfavourable to the government. The executive is at least psychologically prepared to work and to cooperate with a judiciary whose personnel it has appointed.

(ii) Other considerations in heterogeneous societies

While professional competence and integrity should be of primary importance, there may be other issues, such as making the judiciary representative of the major ethnic groups in society, that must be taken into account. In the context of African societies, it may be necessary to avoid a situation where all the judges come from a particular tribal group or groups. Otherwise, the judiciary may come under suspicion and be regarded as the tool by which such groups are able to entrench their sectional interests. If the judiciary is ethnically representative, its "political innocence" will be enhanced in the eyes of the public.

C. Tenure of Office, Discipline, and Removal

Proper provisions for the discipline or removal of judges are crucial to the preservation of the independence of the judiciary.

Practically all African independence constitutions stipulate that judges can be removed only for inability to perform the functions of their office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour. And a judge cannot be so removed except by a procedure specified by the Constitution. Briefly, the procedure in almost every country is that the head of the executive appoints a tribunal consisting of a chairman and at least two other members who hold or have held high judicial office. The tribunal inquires into the matter and reports back to the head of the executive, advising him whether the judge ought to be removed from office for inability or misbehaviour.

For our purposes, a salient feature about these removal procedures in Commonwealth Africa to note is that the initiative to secure removal of a

judge is at the instance of the executive. The head of the executive in Africa is very strong, particularly since most of these countries are one-party states without parliamentary opposition. There is no articulate public opinion whose weight on the matter can be seriously taken into account. In these circumstances, a determined executive bent on seeing a particular judge removed can probably achieve its objective. These constitutional provisions thus need to be complemented by other controlling democratic mechanisms such as the existence of an alert public opinion, a vocal and independent press, and a watchful legal profession determined to confront the executive where inroads into the independence of the judiciary are imminent. Furthermore, and perhaps most important, it is the genuine commitment of the political leadership to ensure that the principle of the independence of the judiciary works, and that the rule of law is the supreme law of the land. A government that does not have faith in these principles will always find a way to flout the Constitution, even though such guarantees may be well entrenched in the constitution.

D. Transfer and Remuneration of Judges

(i) Transfer

The accepted principle in any society with respect for the independence of the judiciary is that a judge should not be transferred from one jurisdiction or function to another without his freely given consent.

(ii) "Transfer" out of the Judiciary

What is even more unacceptable and dangerous is to transfer a judge to another entirely different function in government, for example, to a post as Minister or Central Committee Member of the Party. The appointing authority will, of course, request the individual judge to resign as judge. This will be construed as the consent required to be assigned to another job. But can the concerned judge in this situation be said to have exercised his volition in accepting the new assignment? It would be extremely naïve for the judge to refuse a new appointment offered to him by the appointing authority, in most cases the Head of State. The consequences of such a refusal are clearly understood.

There exists a blameless practice in developing countries of affording judges an opportunity to enhance their understanding of the nature of the

problems confronting a new nation by having them work in a legal department of government. The practice has an inherent danger, however, that unscrupulous politicians may at some future date abuse the practice as a way to punish an independent and courageous judge. Once a judge is appointed as a minister he forfeits his security of tenure and is vulnerable to dismissal as a minister at any time.

(iii) Remuneration

Virtually all Commonwealth African constitutions contain a stipulation that the emoluments or remuneration of a judge are not to be diminished during his time in office. The reduction of remuneration can be used as a weapon to punish a judge who has embittered the executive or an executive-controlled parliament by passing a judgment against the government, particularly in constitutional cases.

The problem of remuneration of judges in Africa is a serious one whose effect on the independence of judges is apparent. No African Constitution obligates the government to pay judges at rates which are commensurate with their status. A special rate should be fixed for paying judges, a rate which is not applicable to equally important government personnel in the public service. In Zambia, at least, the rates of salaries of judges are related to the general salary structure in the public service.

African judges are not recruited from wealthy families. Most of the African judges are, on appointment, relatively young men and women who finished their education between 15 and 25 five years before becoming judges.

A combination of factors such as the general recessionary nature of African economies, deterioration of standards of living and inadequate salaries may tempt judges to seek other sources of income. Particularly in the case of junior judicial officers, such as magistrates, prosecutors, and even police officers, corruption is likely to occur.

African governments should consistently review the salaries of judicial officers, from the highest to the lowest, protect against the temptations of corruption through reasonable remuneration.

E. Professional Immunity and Privilege

Judges should, of course, have immunity from civil suit for acts done in their official capacity. Practically all African constitutions contain this

safeguard. Independence of the judiciary would be seriously affected if judges were held responsible for what they said or did while discharging their official duties. Judges would not feel free to conduct their judicial work. A judge enjoys immunity from criminal prosecution for any act done by him in the execution of his judicial functions. A judge also enjoys immunity from civil action. He is protected by professional privilege from answering questions regarding his own conduct in court while exercising his judicial functions.

The purpose of this immunity is not the personal aggrandisement of judges but to enable them to do their work with complete independence, free from fear of actions against them or any other similar consequences. It is intended to make them free in thought and independent in judgment.

In *Sirres v. Moore* the Court of Appeal held that an action could not be maintained against a judge for making an illegal order of detention of the plaintiff. The Court of Appeal said:

Ever since the year 1613 if not before it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of jurisdiction orders which he gives and the sentences which he imposes cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy hatred and malice and all uncharitableness, he is not liable to an action. The remedy for the party aggrieved is to appeal to a Court of Appeal or to apply for a habeas corpus, a writ of error or certiorari or take some such step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however a judge is not liable to action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden, CJ, in *Garnett v. Ferrand* (1827) 6 B & C 611, 625.

This freedom from action and question at the suit of an individual is given by the law to the judges not so much for their own sake as for the sake of the public and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment as all who are to administer justice ought to do.

NOTES

- 1) The point will be re-emphasized *infra* in connection with the discussion on the introduction of one-party States in Tanzania and Zambia.
- 2) Draft Principles on the Independence of the Judiciary, adopted at Siracusa, Italy, May 1981. Reprinted in CIJL Bulletin No. 8 and as U.N. Doc. E/CN.4/Sub.2/18/Add.6.
- 3) The *Common Law* (Boston, 1923) p. 21 quoted in *Jurisprudence*, by E. Bodenheim (Harvard University Press, Massachusetts, 1962) pp. 116-117.
- 4) Constitution of Zambia (Amendment) Act, 1974, S.9.
- 5) Quoted by R.W. James in F.M. Kassam, *Law and the Administration in a One-Party State* (East African Publishing Bureau, Nairobi, 1973).

**CONCLUSIONS
and
RECOMMENDATIONS
of the Lusaka Seminar
on the Independence of Judges and Lawyers**

**I. Recommendations Concerning
the Organisation and Jurisdiction of the Courts**

Organisation of the Courts

1. The courts should be organised hierarchically, integrating the institutions of both the traditional and the received law. Further, there is need to re-assess and re-evaluate the approaches and assumptions on which the subject matter jurisdiction of various courts is based.
2. The courts at the lowest level should be presided over by legally qualified persons trained in customary law, assisted by lay members. Informal methods of settlement of disputes should be encouraged.
3. Consideration should be given to including, in appropriate cases, lay members in higher courts exercising original jurisdiction.
4. Legal practitioners should have a right of audience in all courts.
5. Informal methods of dispute settlement should be encouraged.

Jurisdiction of Courts

6. Although the High Court or the Superior Court of first instance should have unlimited jurisdiction in criminal matters, they should, as far as possible, hear only the most serious criminal cases.
7. There should be a right of appeal without payment of court fees in all criminal cases.
8. In civil cases, subject to the decision of the court to which the appeal lies as to whether or not there are merits in the appeal, such appeal shall lie. In the case of a litigant in a civil case who wishes to appeal and has no means to pay court fees, the court to which the appeal lies should have the power to waive payment of such fees.

Petitions of Habeas Corpus

9. The superior courts in each country should be given the right on the application of the aggrieved party to inquire into all matters of arrest and detention.
10. Detention without trial should be abolished, except where there is justification for exercising emergency powers. Such detention should be subject to review by the courts, the detaining authority having to furnish justification for continued detention.

Fairness of Proceedings

11. The courts should have the unfettered right to grant or refuse bail. The bail conditions must be reasonable and where bail is refused, adequate reasons must be given by the court.
12. As legal aid should be universal, courts should ensure that unrepresented persons are treated fairly and given all possible assistance by the court in the presentation of their case.
13. It is proper for judges and magistrates to ensure that both prosecutors and defence counsel conduct court proceedings fairly and speedily. Further-

more, judges and magistrates should treat all parties and counsel appearing before them with fairness and courtesy. In like manner, parties and counsel appearing before the courts must give due respect to the judges, magistrates and the court generally.

14. Neither the courts nor the prosecution and the defence should be victimised because of the conscientious discharge of their functions.

Mistreatment of Prisoners and Detainees

15. Judges and magistrates should visit prisons and detainees within their jurisdiction on a regular basis and should be free to make enquiries into the conditions of prisoners and detainees.

16. Prisoners and detainees should be given the liberty to speak to the visiting judge or magistrate freely and out of the presence or hearing of a prison officer.

17. Visiting judges and magistrates should have the power after due inquiry to give directions regarding the conditions and treatment of prisoners and detainees. These directions should be addressed to the relevant authorities, who should be required to inform the court within a specified period as to what remedial measures they have taken with regard to such persons.

18. Where a prisoner or detainee has been released by the court on the merits of his/her application, the executive should not re-detain that person on the same grounds.

19. Where any matter is pending before a court, or is likely to come before a court, neither the government nor any other authority or person should take any action which would frustrate or interfere with the process of the court.

20. Detainees and persons awaiting trial should not be treated as though they were convicted prisoners.

Special Courts

21. While there is need for administrative courts or tribunals, there

should, however, be a right of appeal from these courts or tribunals to the ordinary courts of law, and the right to legal representation should be assured throughout.

22. The state should not establish special courts to usurp the jurisdiction of the ordinary courts. This does not apply to duly constituted courts martial trying military personnel.

Resources

23. The executive should ensure that the courts are adequately supplied with judicial officers and supporting staff.

24. The courts should, as far as possible, make use of modern aids to simplify and accelerate court proceedings, and governments should be urged to provide, as far as possible, adequate funds to the judiciary for this purpose.

25. In countries where a sufficient number of lawyers are available, judges should be assigned lawyers as legal assistants.

Attire

26. The question of the type of attire to be worn by judicial officers in court should be considered and rationalised.

II. Recommendations Concerning the Status and Rights of Judges

The Rights of Judges

27. Principles 8 and 9 of the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles, see CIJL Bulletin No. 16), concerning judges' freedom of expression and right to form associations, should be implemented at the national level.

Transfer

28. The power to transfer a judge from one court to another should be vested in a judicial authority.

Qualification, Selection and Training

29. Principle 10 of the UN Basic Principles providing for the non-discriminatory selection of judges of integrity and ability should be implemented at the national level.

30. A qualified judicial service commission is an appropriate mechanism for the selection of persons for appointment to judicial office, and the membership of such a commission should reflect the various fields of the legal profession.

31. With the exception of the person holding the office of Attorney General, it is undesirable that a member of the executive be a member of such a commission.

32. Judges, along with other judicial officials, should promote the establishment of institutions for professional training for various cadres of judicial officers locally or on a regional basis.

Conditions of Service and Tenure

33. Principle 11 of the UN Basic Principles providing that "The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law," should be implemented at the national level.

34. Appointments to judicial office should not be dependent upon membership in a political party or parties.

35. The government as well as the political parties should respect the independence of the judiciary.

36. Principle 12 of the UN Basic Principles calling for guaranteed tenure should be implemented at the national level.

37. A judge, other than a contract judge, who retires early or otherwise should receive adequate pension or other terminal benefits.

38. Principle 13 of the UN Basic Principles calling for promotion of judges based on ability, integrity and experience, should be implemented at the national level.

39. The institution of temporary judges should not be encouraged.

40. A judge should refrain from involving himself in business.

42. Principle 14 of the UN Basic Principles making the assignment of cases to judges an internal matter of judicial administration should be implemented at the national level.

Professional Secrecy and Immunity

43. Principles 15 and 16 of the UN Basic Principles guaranteeing professional secrecy and providing for personal immunity from civil damage actions should be implemented at the national level.

44. No legal action should be commenced against a judge without the leave of the High Court.

Discipline, Suspension and Removal

45. Principles 17 to 20 of the UN Basic Principles, guaranteeing a judge a fair confidential disciplinary hearing in accordance with established standards of judicial conduct, providing that suspension or removal shall only be imposed for incapacity or misbehaviour, and providing for independent review of disciplinary decisions, should be implemented at the national level.

III. Recommendations Concerning the Independence of the Judiciary: Its Status as a Separate Branch of Government

The Judiciary as a Separate Branch of Government

46. An undemocratic system of government is not conducive to the fullest realisation of the independence of the judiciary. A political system which does not allow for a separation of powers enshrined in a constitution does not promote judicial independence. States should therefore strive to establish and uphold constitutions which incorporate the principle of separation of powers and democratic values.

47. Abuse is being made of acting appointments with regard to judges. In that regard, where a vacancy for appointment to a substantive post of judge exists, the appointment of a judge in an acting capacity in such a way as to give an impression that the judge is on probation, thereby creating the possibility of currying favour with the executive, should be avoided. Under no circumstances should civil servants be appointed to act as judges while retaining their substantive positions. Secondly, the appointment of contract judges should as far as possible be avoided, especially where there are suitably qualified local candidates for the job. Every government should create the necessary conditions which would encourage qualified local citizens to take up permanent appointment in the judiciary. In no circumstances should nationals of a country be appointed to the judiciary on contract where the possibility of permanent appointment does exist. The salaries and conditions of service in the judiciary should be such as to induce nationals of a country to join the judiciary and thereby remove reliance on expatriate and contract personnel.

48. Noting the special position of the judiciary, judges should be accorded the respect and dignity that they deserve in view of their high office. At the same time this entails a responsibility on the part of lawyers and judges in safeguarding their independence. A measure of self-restraint is called for and conditions should not be created that might invite reprisals from the executive and the public at large which will seriously undermine the independence of the judiciary and the legal profession. Under no circumstances should conditions be created whereby the lives of judges and lawyers and those of members of their family are placed in jeopardy.

Administration of the Courts

49. The judiciary, being a separate branch of government, should fall under the sole responsibility of the Chief Justice. Problems may arise where the judicial branch is considered as a department of a Ministry. Conditions should therefore be created whereby the judiciary has a greater say in the allocation of funds to the judiciary.

50. Assignment of cases should be left exclusively within the province of the judiciary. The judiciary should therefore not be interfered with in any way with regard to the assignment of cases to individual judges and judges should discharge their functions competently and diligently so as not to create room for interference.

The Role of Lawyers and Judges in the Protection of Judicial Independence

51. Both lawyers and judges have a crucial role to play in the promotion and protection of judicial independence. Lawyers can, for example, involve themselves in the measures which are taken for the enhancement of judicial independence. Judges are to guard against the erosion of their independence.

52. Judicial independence is meaningless without access to the courts. In order to ensure the provision of legal services, including legal education, to ordinary people:

- Lawyers' associations should be enabled to participate in the establishment of judicial services and other measures whose purpose is to enhance judicial independence.
- Judges should be vigilant and guard against action which erodes judicial independence regardless of whose action it is.
- The provision of legal services should be seriously considered by States. The provision of legal services should involve the organisation of various available resources in the public and private sector for the provision of such services. This means the involvement of governments, lawyers' associations and other specialised non-governmental organisations.
- Educational programmes for informing the public about judicial inde-

pendence and human rights should be instituted as part of the process of educating the public about democratic values.

- Legal services and educational programmes should be taken to the people in rural areas instead of being centred in urban areas away from those they are intended to serve.

Freedom of Expression – the Judiciary and the Legal Profession

53. Basic human rights relating to freedom of expression and association for judges and lawyers are necessary conditions for the preservation of their independence. The judiciary and the legal profession have a responsibility to associate and speak out in support of their independence. However, the executive and the judiciary sometimes make certain controversial pronouncements which invite undesirable public response. Restraint on the part of the executive and the judiciary is therefore important to avoid unnecessary controversy between themselves and between the judiciary and the public.

54. Lawyers everywhere and, in particular, those from South Africa and Namibia, who are persecuted in their determination to uphold the human rights of their clients and the legal profession deserve special assistance in countries where they might seek asylum.

55. As an undemocratic system of government is not conducive to the independence of the judiciary, the abolition of the system of Apartheid is a precondition to the existence and promotion of the independence of the judiciary.

IV. Recommendations Concerning the Independence of the Legal Profession

Right to Effective Legal Representation

56. What are often described as the rights of lawyers in the present context are essentially the rights of their clients – the lawyers only have those rights for and on behalf of their clients. Accordingly, those rights must be exer-

cised responsibly and with care and in accordance with strict ethical standards. Further, the privileges and status of lawyers should be earned by their adherence to these standards and the quality of their service to the community.

57. The duties of lawyers in this regard can be placed into three broad categories:

- competence
- honesty, integrity, fair dealing, and ethical standards;
- understanding of the social environment and acceptance of their social responsibilities.

58. While the question of competence is dealt with under "education and training of lawyers" and while general ethical standards are fairly well understood, the issue of social responsibility needs amplification. This involves an understanding of the lawyer's social environment without which he is unable to provide competent and effective legal services. Further, by reason of his special position in society and specialised training, a lawyer accepts the responsibility of providing legal services generally where these are required by the community. While he should be entitled to earn a reasonable living from such work, this is not the only or primary concern. "Legal Services" in this context means the provision of legal advice, legal representation, and public legal education. The unmet requirements of the needy, in particular those in rural areas, must not be overlooked. The principles set out in paragraphs 29 to 32 of the Draft Principles on the Independence of the Legal Profession formulated at Noto, Sicily, in May 1982, are to be supported.

59. Three factors militate against the independence of the legal profession and deny justice to the people:

- threats and intimidation, actual detention, assault and deportation of lawyers and improper use of other laws or procedures to hamper or restrict their legitimate activities on behalf of those whose human rights are abused;
- the tendency by the public and the executive to identify the lawyer with the cause of his client, particularly in an unpopular cause, or the view that such defences are conducted "purely for pecuniary reasons" rather than in the interest of justice;

- unnecessary bureaucratic formalities, disorganised and inefficient administration (not necessarily deliberate) of some courts and public services and, indeed, of the legal profession itself at realistic costs in time and resources leading to the inability of the lawyer to effectively assist the client.

60. Private legal practice is often unpopular in developing countries because of what is perceived (rightly or wrongly) as a tendency for lawyers to overcharge and/or to fail to accept or acknowledge the social responsibility placed on them as trained and privileged persons in such countries. This has in some instances led to, or nearly to, nationalisation of the legal profession or abolition of the right to private practice.

61. Nationalisation is a step in the wrong direction, creating more problems than it solves, in that in conflicts between the individual and the state, the origin of most basic human rights violations, there is even less protection for the individual under a nationalised bar than under a private bar (however weak it may be), and executive action will be unchecked.

62. Without an independent and courageous legal profession (in both the private and public sectors) to conduct cases before the courts an independent judiciary would be almost totally ineffective in enforcing basic human rights since it has by its very nature an exceedingly limited right of free action.

63. The Draft Principles on the Independence of the Legal Profession formulated at Noto, Sicily in May, 1982 should be progressively implemented at the national level and steps taken to ensure their general observance.

Customary and Traditional Courts

64. In many of the countries in our region lawyers are often barred from appearing in traditional or customary courts. This is essentially a denial of the basic right to legal representation (see recommendation No. 4). For the time being, however, and bearing in mind the ability of such courts to provide swift justice in appropriate cases, such provisions should not be considered as encroaching on human rights, provided that certain safeguards recommended below are met.

65. The jurisdiction of customary or traditional courts barring legal representation should be restricted to the resolution of customary law disputes and where such courts are given criminal jurisdiction, this should be limited to petty cases. Further, there should be full rights of review and appeal to the general courts of the land where legal representation is permitted and disputes relating to the jurisdiction of such courts should likewise be resolved in the general courts.

Education and Training of Lawyers

66. Effective representation and advice is not possible without competent lawyers. At least three requisites, the details of which would tend to vary from country to country depending on needs and resources, are necessary to ensure the independence of lawyers as a means of protecting human rights:

- a broad-based training in law and legal principles;
- effective practical training in the art of lawyering; and
- training in professional and social responsibilities, to include an appreciation of the lawyer's environment.

67. It is vital that such principles should be introduced into the curriculum at an early stage so as to ensure, *inter alia*, that law students are under no illusions as to their future responsibilities.

The Role of Bar Associations/Law Societies

68. The role of Bar Associations in relation to the independence of the legal profession falls into six broad categories:

- monitoring observance of basic human rights generally and taking up violations with the responsible authorities;
- supervising and controlling and giving direction to members of the profession with the dual objectives of protecting the profession itself and of protecting the public;
- monitoring the state of the law generally and recommending changes where appropriate;
- monitoring and participating in both pre-professional and continuing legal education and training;

- involvement in public legal education; and
- involvement in legal aid.

To these ends a bar association should have the same rights of criticism and free expression as an individual while observing the usual constitutional qualification that freedom of association is restricted to "lawful purposes". In no circumstances should membership in a bar association be deemed unlawful.

V. Follow-Up

To ensure that the recommendations of the seminar are given the widest possible distribution in the hope that they will be incorporated into the law and practice of the region, the participants:

69. Decide that each participant should circulate among his or her colleagues at the court, in the Ministry of Justice, the Attorney-General's Chambers, the Bar Association and the University, and should make available to law journals and the press, the resolutions and recommendations of this seminar.

70. Call on the African Bar Association to transmit to relevant government officials, the Chief Justices, judges of the Supreme Courts and High Courts as well as local court magistrates and judges and University officials copies of the final report of the Seminar.

71. Call on law professors to bring the final report of the seminar to the attention of their students and to ensure that it is available in university libraries. Also call upon them to continue to study problems facing the judiciary, the legal profession and the system of the administration of justice and to co-operate with bar associations in bringing about necessary improvements.

72. Call on law societies and bar associations to take up the resolutions and recommendations, and to co-operate with academics in identifying steps to be taken in furtherance of their implementation.

73. Call on the Centre for the Independence of Judges and Lawyers to give

wide publicity to the final report of the seminar, including its resolutions and recommendations and to bring the report to the attention of the United Nations Committee for Crime Prevention and Control.

74. Call on the Organization of African Unity, the African Bar Association, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers to publish and give wide publicity to the text of the African Charter on Human and Peoples' Rights.

75. Call on the African Bar Association as well as national bar associations and law societies to work with their governments to ensure that the text of the Charter is implemented at the national level.

76. Call on all governments to publish the text of the Charter in their law gazettes as well as local newspapers and to have the text of the Charter translated into local languages.

77. Call on all governments that have not yet ratified the Charter to do so.

78. Urge all governments to complete the reports called for in resolution 1986/10 of the Economic and Social Council concerning implementation of the Basic Principles on the Independence of the Judiciary, and to utilise, if necessary, the expert and other assistance which the Secretary-General of the United Nations has been asked to provide pursuant to the same resolution.

79. Call on Bar Associations to give assistance to their colleagues in South Africa, Namibia and elsewhere who are being harassed or persecuted because of their professional activities.

80. Decide to form a follow-up Committee which will be charged with:

- a) bringing to the attention of governments, the press, non-governmental organizations and bar associations the conclusions and recommendations of this seminar;
- b) inquiring from the participants what efforts they have undertaken to publicise the report of the seminar;
- c) consulting with academics on issues requiring further research;
- d) reporting back to the African Bar Association on their activities and progress made in implementing the report.

The Committee membership is as follows:

A.R. Khan, Botswana
W.C. Maqutu, Lesotho
G.M. Ntaba, Malawi
K.P. Matadeen, Mauritius
L. Malinga, Swaziland
C.M. Ngalo, Tanzania
A.M. Hamir, Zambia
A.R. Chigovera, Zimbabwe

81. Call on the African Bar Association to inform the Centre for the Independence of Judges and Lawyers of any progress made and further call on the Centre for the Independence of Judges and Lawyers to give wide publicity to the information supplied by the African Bar Association.

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**Seminar on
the Independence of
Judges and Lawyers**

Banjul

6–10 April 1987

The Independence of the Judiciary in West Africa

by
*Berthan MacCauley**

In all the West African States, the Head of State is a political appointment. He has either been elected or has assumed office as a result of a military coup. In West African countries belonging to the Commonwealth, judges are nominally appointed by the Head of State acting on his own. Sometimes, this is done with the advice of a Judicial Commission or a Judicial Service Commission, whose advice the Head of State must accept. The assumption is made, in some quarters, that a judge so appointed becomes independent. However, the manner of appointment is not a criterion of the independence of judges. In certain constitutions, the Executive Head of state is given the power to require a judge to retire at a certain age, even though he has not reached the age of retirement. This makes it possible for political action to be taken when a judge's decisions do not go in favour of the Executive.

Judges who are appointed by an elected head of state may or may not be members or sympathizers of the Head of State's party. When a party member or a party sympathizer is nominated to be a judge, it is uncommon that he not be appointed. These judges tend to give decisions favourable to the party in power. In fact, extremists will go so far as to rebuke advocates

* Queen's Counsel.

who appear before them when they argue vehemently against the party in power. Some judges, generally expatriates, are appointed on contract, variably for two years. Some of them are independent and give decisions fairly and in accordance with the law. Others feel that they owe it to the appointing power, the present government, not to give decisions against the government in any case in which the government has an interest. Even those who are independent may not have prospects of employment after the expiration of their contracts, inspiring some of them to change their position and to give judgements in favour of the government to ensure the renewal of their contracts.

When judges are partial to a party in a civil suit or criminal matter they tend to use techniques to interpret the law in favour of one party to the detriment of the other. These demonstrations of partisanship can arise for several reasons. They may be socially motivated. The party is of the judge's own social class. Another reason is the jealousy some judges feel towards practising lawyers who make a lot of money. In a big case they may try to belittle the lawyers. Another reason is bribery. It is not unknown in legal circles in West Africa for some judges to accept bribes.

The physical security of judges is also an important issue to consider. In Ghana and Uganda, judges have been assassinated by unknown persons for judgements which went against the executive. Aware of these events, some judges, fearing for their physical safety, would be inclined to give a judgement which does not offend the executive.

The Role of Lawyers in the Protection of Human Rights

by
*ANM Ousainu Darboe Esq.**

The inclusion of human rights provisions in a constitution is utterly futile unless there is an independent legal profession. Lawyers unlike judges do not hold offices which are protected by the Constitution: for them, there is nothing like security of tenure which would ensure their independence. The oath, declaration or affirmation that a lawyer subscribes to on being admitted to practise is the foundation stone of his independence. It is by virtue of his independence that the lawyer performs his duty to his client fearlessly raising every issue, advancing every argument, and asking any question, however distasteful which he thinks will help his client's case. To perform properly his role, the lawyer must be courageous and not timid; he must be in a position to ignore threats from any quarter, and, however distasteful to the public his actions may be, he should not deter in the execution of his duties.

If a lawyers is to represent his client faithfully, he must be independent from all kinds of impediments in the form of pressure, duress, threats, intimidation, inducement and conflict of interest, whatever the source or mode of such impediments, and where there is a conflict of interest between

* Basangsang Chambers, Banjul, Gambia.

the lawyer's representational role and the interests of justice, it behoves the lawyer to side with the interests of justice and not those of the client.

The independence of the profession is also of great importance for those members who are in government service. They are often subjected to subtle threats and intimidation by the governments they serve. They must avoid becoming instruments for the realisation of the political fortunes of the government.

As governments can be responsible for violations of human rights, the state law officer should provide advice that would avoid violations. State law officers should be able to advise the executive that a particular course of action is indefensible under the law and that if the executive persists in pressing such action, he will be unable to represent the executive before the courts and will inform the court of his inability to collaborate in the action. Similarly, legal draftsmen should have the courage to advise the government that a particular piece of legislation is not in the interest of the society. Where the profession lacks independence, whether by reason of threats, intimidation or sheer disregard for the standards of the profession, individual members of society are bound to be put in a position of disadvantage. Administrative, legislative and executive acts that violate the rights of the individual may go unchallenged and this may produce a state of anarchy and lawlessness. Instead of individuals seeking redress through the medium of the law, they resort to clandestine activities for the purpose of putting an end to violations of their rights; this invariably leads to instability and disorder. Capricious human rights provisions have been entrenched in many constitutions so as to ensure against action on the part of the government which would deprive the individual his basic human rights.

However, the existence of a mechanism for the enforcement of individual rights is of no consequence if the individual has not been given standing to enforce such rights. The theory of locus standi or sufficiency of interest has in many cases prevented lawyers from fulfilling their role as protectors of human rights. Ethical rules prevent the lawyer from seeking clients for the purpose of challenging executive acts and, unless he is personally affected, the lawyer cannot institute proceedings in his own name.

Therefore, in order to translate these constitutional protections into reality, lawyers must organise themselves so that they can work to protect human rights without violating the ethics of their profession. Bar Associations and Law Societies should have standing to undertake litigation concerning the violation of human rights in their own name. In particular, they should be able to challenge the constitutionality of legislation which violates fundamental rights, such as the right to refuse to incriminate oneself, or

which protects government officers who have committed human rights violations. Often those affected by such legislation lack both the knowledge and financial resources to challenge it. Another method for improving the protection of human rights is to provide legal aid to those who cannot afford the services of a lawyer. This would ensure that the disadvantaged ones are not deprived of their basic rights.

The role of the lawyer in the protection of human rights in a normal situation does not assume a different character in an abnormal situation. Thus, lawyers in Africa have challenged the appropriation of a citizen's property (Lakanmi's case in Nigeria), the unconstitutionality of certain government acts (Sallah's case in Ghana) and unlawful detention pursuant to State of Emergency Regulations (Taal's case and N'Dambu Drammeh' Case in The Gambia). The importance of the lawyer's role in any of these cases is not to be measured by the success of their arguments, but rather by the realisation of the fact that there exist in society a group of individuals to whom society can look up for the purposes of achieving redress.

Lawyers can also advance the cause of human rights by suggesting changes to the law. As practitioners are in every-day contact with the law, they are bound to come across laws that inhibit the adequate enjoyment of human rights: when such a situation occurs it behoves the lawyer to bring such a fact to the attention of the Law Reform Commission, along with proposals for reform.

The academic lawyer's role in the protection of human rights is equally important. He is entrusted with the duty of training future members of the profession who will one day shoulder the responsibility of protecting human rights. In order to effectively perform such a role, it has been suggested that law lecturers should discuss:

- (a) the process through which the law can evolve and be used to promote orderly and significant changes in the social and economic organisation of society, leading ultimately to improved living standards;
- (b) the principles, institutions and proceedings necessary for safeguarding and protecting individual and collective rights;
- (c) the fundamental principles of the rule of law, emphasising the need for social justice. Law lecturers should also assist their students to develop the personal qualities necessary for upholding the profession's noble ideals and securing the necessary enforcement of the rule of law.

Thus, the lawyer – whether private practitioner, law lecturer, or member of a Law Reform Commission – has a crucial role in the protection of

human rights and such a role is fulfilled by him by reason of his independence.

Much needs to be done to educate the public about the importance of an independent legal profession. Many members of the public view the lawyer as the slave of his client. Litigants on the opposing side may use family connections and friends to deter a lawyer from the faithful discharge of his duties. The public must be taught that such interference can only lead to injustice, and that it is not in their interest to have injustice perpetuated because the legal profession is docile and timorous.

Whilst there is complete agreement on the need to educate the public about the importance of an independent legal profession, there are substantial hurdles to overcome. The vast majority of our populations are illiterate: consequently, it is the minority who are able to read. Even that minority does not have access to the periodicals in which debates on such subjects such as the independence of the legal profession, take place. This conference itself provides ample testimony to the fact that the lawyers confine the discussion of these issues to themselves. I will be presumptuous and say that at best, we are re-educating ourselves about the importance of an independent legal profession. On order to impart to the public the need for such independence, it is imperative that the Bar Associations and Law Societies organise symposia on such topics and conduct them in the major local languages of their country.

To reach the entire nation, the appropriate media would be radio. This can be used to tell the public of the indispensable role that the lawyer can play in society as a legislator, advocate as community leader. Such programmes could help to dispel the view that lawyers are conspirators or heartless creatures who make their fortunes from the mistakes and misfortunes of others. People must come to believe that when they enlist the aid of a lawyer, whether or not they succeed, that justice has been done.

An Evaluation of the Independence of the Judiciary in Nigeria

by
*Professor Ebere Osieke**

Introduction

An important feature of contemporary democratic government is the guarantee in a written constitution or other fundamental law of individual rights.

Since the breaches of these fundamental rights may give rise to a dispute between an individual and the Government or one of its organs, these provisions must be backed by effective enforcement mechanisms.

Also, the government and its organs take measures which affect individuals in the community. Where such activity results in a justiciable injury to an individual, it is essential that the resulting dispute be determined objectively through an impartial process.

In Nigeria, the Constitution¹ not only stipulates that "the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of the courts of law and of judicial tribunals" in the country, but also prohibits national and state assemblies from enacting any law "that ousts or purports to oust the jurisdiction" of the courts². However, the courts will be unable to discharge their functions and

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responsibilities objectively and effectively unless they are independent and insulated from political control and pressures from the legislative and executive branches of government.

The 1979 Constitution of Nigeria contains provisions aimed at securing the independence of the Judiciary, but to what extent have these measures attained their objectives? The purpose of the present paper is to examine and evaluate the relevant constitutional provisions in the light of the actual practice of the courts.

Measures to Secure the Independence of the Judiciary

The traditional approach of constitutions is to attempt to secure the independence of the judiciary through the process for the selection of judges, the procedure for their removal, the payment of their salaries, and the security of their tenure. The Nigerian Constitution of 1979 contains provisions on all these matters.

The Appointment of Judges in Nigeria

In 1979, Nigeria adopted a Presidential Constitution similar to that of the United States of America. Under this constitution, the President was given the power to appoint superior federal judicial officers in accordance with certain provisions, the most important of which is that the appointment of the highest judicial officers at both the Federal and State levels is the collective responsibility of both the executive and legislative organs. Responsibility for the appointment of junior judicial officers is shared between the executive heads and the judicial service commissions.

The President of the Republic and the Governor of a State are both political officers, and the national and state assemblies are political organs. It follows therefore that the senior judges are appointed by political entities. While it is true that these entities are distinct in character, and may not always act in unison, where the President or the Governor belongs to the majority party in the Senate and the State House of Assembly, the legislative body may become a rubber stamp for the appointments made by the executive heads of their nominees.

It is, however, difficult to accept a situation where the Executive is denied a say in the appointment of senior judges. Presumably a better proce-

ture would be that the President makes the appointments on the recommendation of the Federal Judicial Service Commission. But even in this case, the degree of objectivity will depend on the composition of the Commission. Under the 1979 Constitution of the Federal Republic of Nigeria, the Federal Judicial Service Commission is composed of the Chief Justice of Nigeria as Chairman; the President of the Federal Court of Appeal; the Attorney-General of the Federation, and two persons, each of whom have been qualified to practice as a legal practitioner in Nigeria for a period of not less than 15 years from a list of not less than four persons recommended by the Nigerian Bar Association; and two other persons, not being legal practitioners, who, in the opinion of the President, are of unquestionable integrity. The presence of the Attorney-General, who is a minister appointed by the President, and two other appointees of the President in the membership of the Federal Judicial Service Commission means that the Commission is also not free from political influence.

Another important problem in the appointment of Judges in Nigeria is the issue of decentralization. The fact that State governors have the power to appoint judges of State High courts may introduce an element of favouritism and political control over the activities of the judges.

It may be better to centralize the appointment of all senior judicial officers in the country. All the appointments should be made by the President of the Republic or Head of State on the basis of seniority, merit and competence on the recommendation of the Federal Judicial Service Commission, taking account of the need and special interests of the states in the appointments. In this regard, the composition of the Federal Judicial Service Commission should be reviewed to include some of the Chief Judges of the States on a rational basis. The President should not be allowed to appoint personal representatives in the Commission as at present. The appointment of magistrates should continue to be made by the State Governor on the recommendation of the State Judicial Service Commission.

Removal of Judges in Nigeria

The provisions for the removal of judicial officers were also contained in the 1979 Constitution. The President was empowered under S. 256 to remove the Chief Justice acting on an address supported by two-thirds of the Senate, on the grounds of his inability to discharge the functions of his office or appointment (whether arising from infirmity of mind or of body) or for misconduct or contravention of the Code of Conduct. The Governor of a

State was also given the power under the same section to remove the Chief Judge of the High Court of a State, Grand Kadi of a Sharia Court of Appeal or President of a Customary Court of Appeal of a State, acting on an address supported by two-thirds of the House of Assembly of a State, for the same reasons as in the case of the removal of the Chief Justice of the Federation.

The other judges at the Federal and State levels were to be removed by the President or the Governor of a State as the case may be, on the recommendation of the Federal Judicial Service Commission or State Judicial Service Commission on the same grounds as the senior judges.

These provisions do not appear to adequately protect the judges from improper and arbitrary removal from office. The Constitution stipulated that judges could be removed for "misconduct", yet there is no definition of "misconduct" in the Constitution. It was therefore left to the President, or the Governor of a State, and the legislature to determine what constituted "misconduct" in particular cases.

Another difficulty with the provisions is that it is not clear whether judges were entitled to protection under Section 33 of the Constitution, which relates to fair hearing and due process, before they could be removed from office. There is no doubt that they should be so entitled. Under S. 33 of the Constitution, every person (including public officers and judges) is entitled to a fair-hearing within a reasonable time by a court or tribunal. In one recent case where the Chief Judge of a State was removed by the Governor on the recommendation of the State House of Assembly, without being given the opportunity to defend the charges leveled against him, the Court held that the removal was illegal and ultra-vires.³

In order to safeguard judges from arbitrary removal from office, it is suggested that they be appointed for life, or until the age of retirement, and that they should only be removed from office by the President or Head of State on a motion supported by a two-thirds majority of the two houses of the National Assembly, solely on grounds of inability to perform the functions of office as a result of proven misconduct or infirmity of mind or body.

Salaries of Judges and the Expenditure of the Judiciary

In accordance with the provisions of S. 78 and S. 116 of the 1979 Constitution, judges' salaries and allowances are charged to either the Consolidated Revenue Fund of the Federation or the State. This means that judges' salaries are not subject to a vote in either the National or State Assembly, as the case may be. Although the judges' salaries are thus secured under the

Constitution, the general expenditure and budget of the Judiciary, both at the federal and state levels, is subject to the general control of the Executive, and the latter may use the threat of reduction in expenditure to influence the judiciary, thereby eroding its independence.

Tenure of Office and Pension Rights of Judicial Officers

Under S. 255 of the 1979 Constitution, a judicial officer may retire when he attains the age of 60, but he must cease to hold office when he attains the age of 65.

The compulsory retirement of judges at the age of 65 has given rise to some controversy in Nigeria. There is a strong feeling in the country that judges should be allowed to continue in office until they attain the age 70 or even 75. In fact, only recently was it stated in the Nigerian press that the former Chief Justice, Mr. Ayo Irikefe, had applied for an extension of his term, but this did not receive the blessing of the Federal Military Government which announced the appointment of Justice Bello as the new Chief Justice of Nigeria two days before Justice Irikefe turned 65.

The contention that judges should be allowed to retire at the age of 70 or more appears to be reasonable, because many of the judges are still very alert, and active at the age of 70 or over. This is supported by the practice in the United Kingdom where judges are allowed to remain in office until over 70 years of age. In fact, Lord Denning continued in office as the Master of the Rolls until he was 80 or older. Similarly, judges at the International Court of Justice at the Hague are allowed to remain in office until they are well over the age of 75.

Another factor supporting the extension of the retirement age for judges is that their wealth of experience, accumulated over many years on the Bench, will not be lost to society. If, in fact, it is not possible to extend the retirement age for judges, then a way should be found for retaining their services on a contractual basis.

Another problem relates to the pension paid to judges. At the present time, a judge who has held office for a period of 15 years is entitled to a pension for life if he retires at the age of 65, at a rate equivalent to his last annual salary in addition to any other retirement benefits to which he may be entitled. This means that he will continue to receive his salary for life.

When a judge has held office for less than 15 years, upon his retirement at the age of 65, he is entitled to a life pension at a rate fixed according to the percentage of the required 15 years he has actually served (thus if he

has served 10 years he would be entitled to two-thirds of the pension fund). Alternatively he is entitled to any pension and other retirement benefits specified by the terms and conditions of his service, whichever is the higher.

In all other cases, the judge will be entitled to such pension and retirement benefits as regulated by an Act of the National Assembly or by a Law of a House of Assembly.

The present pension arrangement for judges appears to be unsatisfactory. A better arrangement would be to allow judges who have held office for a period of fifteen years or more to receive their last annual salaries for life. This is all the more important since judges are not allowed to go into private legal practice after they have ceased to be a judge for any reason whatsoever.⁴

Erosion of the Independence of the Judiciary in Nigeria

Having examined the constitutional measures adopted to secure the independence of the Judiciary, it seems appropriate to consider the factors which have led to an erosion of that independence, namely, the exclusion of the jurisdiction of the courts and other political factors in the administration of justice by the Judiciary.

The Exclusion of the Jurisdiction of the Courts

One important element which has resulted in an erosion of the independence of the Judiciary in Nigeria is that the courts are sometimes denied jurisdiction to enquire into various matters – an “ouster of jurisdiction of the courts.” For instance, S. 170(10) of the suspended Constitution of the Federal Republic of Nigeria 1979, barred the courts from entertaining any proceedings on whether the House of Assembly of a State had acted properly or constitutionally with respect to the impeachment of the Governor of a State. When the Kaduna House of Assembly impeached Balarabe Musa in 1981 in a manner not in strict conformity with the express provisions of the Constitution, the Kaduna High Court held that it had no jurisdiction to entertain the proceedings instituted by the impeached Governor.⁵

Following the example of the Constitution, since January 1984, the Federal Military Governments have enacted a number of Decrees in which the courts are denied jurisdiction and power to deal with any complaints or allegations relating to the matters covered by the Decree. A good example is

the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1984 (Decree No. 13), enacted by the Federal Military Government in 1984 to prevent the Lagos High Court under Mrs. Rosaline Omotosho from entertaining proceedings on whether or not the Special Military Tribunal on the Recovery of Public Property had jurisdiction to try the three former Unity Party of Nigeria (U.P.N.) Governors. They were charged with giving the proscribed party the sum of 2.8 million Nairas from a public contract fund while they occupied the governorship posts – offences allegedly committed before 31 December 1983. Despite the brave and laudable efforts of Justice Omotosho to assert the inherent jurisdiction of the courts, she was unable to determine the issue before her as a result of the provisions of Decree No. 13.⁶

It is clear that no society can expect to have an effective judiciary if the courts are denied the opportunity to enquire into complaints and allegations of breach of the law by the main organs of Government – the executive or the legislative branch. Why should the courts not be allowed to determine whether the provisions of the Constitution have been complied with by the House of Assembly in the proceedings to impeach a State Governor? Why should the courts not be allowed to determine whether a Military Tribunal possesses jurisdiction to deal with matters submitted to it, or in fact whether such a Tribunal had exceeded its powers? To deny the courts jurisdiction to determine any matters involving the government or individuals is a denial of justice within the society and an erosion of the independence of the judiciary.

Political Factors in the Administration of Justice by the Nigerian Judiciary

Another factor which has eroded the independence of the Judiciary in Nigeria is political pressure. The Courts in this country appear to be generally reluctant to give judgements against the Government in what may be regarded as “political” cases or cases with “political” content.

In *D.P.P. v. Chike Obi*,⁷ for example, Dr. Chike Obi published a pamphlet entitled *The People: Facts that You Must Know*, which contained, inter alia, the following statement:

Down with the enemies of the people, the exploiters of the weak and oppressors of the poor... The days of those who have enriched them-

selves at the expense of the poor are numbered. The common man in Nigeria can today no longer be fooled by sweet talk at election time only to be exploited and treated like dirt after the booty of office has been shared among the politicians...

He was charged and convicted for seditious libel under S. 51 of the Criminal Code, read along with S. 50, despite the fact that S. 24 of the 1960 Constitution guaranteed freedom of expression.

There was also the case of *Ransome Kuti v. Attorney-General of the Federation*.⁸ The plaintiff's driver refused to obey the orders of a soldier and drove into the plaintiff's house. Soldiers then surrounded the house, cut down the wire fences, moved into the compound, set the plaintiff's house on fire, burning it to the ground. The soldiers locked and beat up the occupants of the house and assaulted the women indiscriminately. The plaintiff, the well-known Fela Ransome Kuti, brought an action in the High Court of Lagos State, claiming the sum of 25 million Naira against the defendants. The High Court, Court of Appeal and the Supreme Court, all dismissed the action on the ground of State immunity, in other words, on the grounds that the Government enjoys immunity from legal action and could not be sued in the courts for the tortuous acts of its servants.

A critical examination of these cases generates a feeling of disappointment in the Nigerian judiciary. Why, it may be asked, did the Court think it necessary to jail Dr. Chike Obi for expressing views which represented the opinion of a substantial number of people in the society at the time? Why did the Court have to hide under the cloak of State immunity to justify a wrong by unruly soldiers of the Government?

The judiciary has failed in these cases because of its dependence on the political organs of society, because of the lack of judicial independence in Nigerian society. In other words, there is a master-servant relationship between the judicial officers and the executive heads of Governments who have the power "to hire and fire" them. In order to remedy this situation, the judiciary should not only be seen as independent, it must be made so.

It should, however, be pointed out that physical arrangements for the promotion of the independence of the judiciary can never constitute a panacea for all the present ills. There is also the question of the *psyche* of the judges. The independence of the judiciary is as much a matter of adequate constitutional provisions as it is of the minds and souls (*psyche*) of the judges. There can be no independence of the judiciary if the judges themselves are not prepared to assert and claim that independence. Thus, when Justice Roseline Omotosho ruled on 22 May 1984 that her Court had juris-

diction to entertain the application for Order to prohibit the Special Military Tribunal, Lagos Zone, from trying the former Governors of Oyo, Ogun, and Ondo States, despite the ouster of the jurisdiction of the Courts contained in S. 1 of the Federal Military Government (Supremacy and Enforcement of Powers), Decree 1984, (Decree No. 13), she was asserting the independence of the Judiciary. According to her,

The courts have power to review executive power exercised under provisions of Decrees and Edicts. It is doubtful whether a legal draughtsman, however genius, can effectively oust the jurisdiction of courts. Regardless of Decree No. 13 the court will continue to assume jurisdiction where executive powers are exercised outside legal orbit. It is a jurisdiction of the courts which cannot be ousted by any legislation.⁹

How many Nigerian judges are at present prepared to assert and promote the independence of the judiciary in the same way as Justice Omosho? Until our judges are prepared to do this, it is difficult for the judiciary to be independent.

Conclusion

A modest attempt has been made in this paper to evaluate both the constitutional provisions relating to the independence of the judiciary, and the factors which erode that independence in Nigerian society at the present time. It is quite clear that the present constitutional provisions are inadequate and cannot effectively secure the independence of the judiciary. It is also clear that other limitations resulting from "ouster clauses" and political pressures make the independence of the judiciary a dream rather than reality. A number of proposals have been made for the strengthening of the present constitutional provisions, but in the end, what matters most is not just constitutional provisions, but the determination and willingness of the judiciary to assert and claim its independence.

NOTES

1. See S. 6 of the 1979 Constitution of the Federal Republic of Nigeria.
2. S. 4(8), *Ibid*.
3. See the case of *Justice Kalu Anya v. The Governor of Borno State and the Borno House of Assembly* (1983).
4. According to S. 256(2) of the 1979 Constitution "any person who has held office as a judicial officer shall not on ceasing to be a judicial officer for any reason whatsoever thereafter appear or act as a legal practitioner before any court of law or tribunal".
5. *Balarabe Musa. v. Speaker, Kaduna State House of Assembly, and Others* (Suite KDH. 171981).
6. See "The Guardian", May 30, 1984, p. 16, Col. 1.
7. (1961) All N.L.R. 469.
8. (1985) 2 N.W.L.R. 211.
9. The Guardian, May 30, 1984, p. 16, Col. 1).

The Judiciary as a Separate and Independent Arm of Government

by
Chief Debo Akande*

Introduction

A nation without an independent Judiciary is not likely to enjoy either the rule of law or true freedom. It is now generally accepted that as far as any Judiciary is concerned the critical test which they must pass if they are to receive the confidence of the people is that they must be *independent of the Executive*.

Britain established the independence of the Judiciary on the theory of separation of powers to all nations of the Commonwealth, but no comparable tradition of judicial independence existed in any of the newly independent states of the Commonwealth. Furthermore, almost all the states had written constitutions which had been fashioned to suit the peculiarities of each situation. Thus the independence of the judiciary in these States, though imitative of the British system in varying degrees, is the result of political theory.

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What is Judicial Independence?

Definitions vary, but it is generally accepted that this implies that courts are not interfered with or influenced by the executive branch, and that they are not prevented from performing their judicial functions by fear or favour.

Certain basic concepts have been recognised and discussed in this connection. These are appointment, security of tenure, removal, remuneration, immunity, protection from improper criticism and prohibition from becoming a member of the executive or legislature.

Appointment

In England, judicial independence seems to be maintained in spite of, rather than because of, the rules governing appointments. Superior judges are appointed by the Crown on the advice of the Prime Minister or the Lord Chancellor; the Prime Minister has often received informal advice from the Lord Chancellor before rendering his advice to the Crown.

There are times when political considerations have influenced appointments, but centuries of a tradition of impartiality have minimised if not entirely eliminated, such appointments.

When Britain granted independence to many of its territories, there remained a presumption against leaving the power of appointment exclusively in the hands of the executive because of the strong incentive to give undue weight to the political inclinations of potential candidates. There is no doubt that judges who have the power to determine the constitutionality of legislation can seriously impede the implementation of political policies; they can become a clog in the implementation of the programme of the government; they can become – albeit unintentionally and unwillingly – protagonists of the opposition. There is a strong case to be made for limiting the range of temptation by denying the executive any voice in making judicial appointments.

Thus, in many of the constitutions of the Commonwealth in particular, the appointment of the Chief Justice is made the duty of both the executive and the legislature. The executive makes the selection, but the legislature confirms or ratifies the selection. Such is the provision of section 210 of the Constitution of the Federal Republic of Nigeria 1979. In some countries, although the executive also makes the selection, the Chief Justice must be con-

sulted before an appointment to an office other than that of the Chief Justice is made.¹

In other situations, use is made of a Judicial Service Commissioner or a Judicial Advisory Committee in appointments to judicial positions other than Chief Justice. Indeed, the Chief Justice is usually the chairman of such bodies.

Although any provision which does not leave the appointment of the members of the judiciary exclusively in the hands of the executive is more acceptable as a means of safeguarding the independence of the judiciary, its practical efficacy is likely to depend on the personal authority and the influence exerted by the Chief Justice as well as on his integrity in protecting his domain against pressures from the other two arms of government.

As a further means of ensuring independence and impartiality, it is not unusual to find provisions in the Constitution specifying the qualifications for judicial appointment. For example, the Nigerian Constitution provides that no person shall hold the office of Chief Justice of Nigeria or Justice of the Supreme Court unless he is qualified as a legal practitioner in Nigeria and has been so qualified for a period of not less than fifteen years.² There are no provisions made for other courts. Such provisions, however, do not ensure that appointments are made directly from the bar, rather than allowing hierarchical judiciaries after the European models to develop with recruitment to the highest offices by way of promotion from the lower ranks. The latter course does not make it easy for the judiciary to preserve the necessary detachment from the executive.

Security of Tenure

It is of great importance that a judge called on to interpret the federal distribution of powers, for example, should not be intimidated by fear of loss of office. Accordingly, a judge should be appointed subject to removal only for inability to discharge the functions of his office (whether arising from infirmity of mind or body) or gross misbehaviour. The determination of whether sufficient proof of misbehaviour has been offered and, whether it justifies the removal of the judge, should be left in the exclusive hands of the judiciary.

In most of the Commonwealth, the procedure for obtaining a judge's removal is initiated by the executive, usually the Prime Minister or the Executive President as in the case of Nigeria,³ the judge may then be suspended from his duties. The matter is next referred to a judicial tribunal,

that is, the Judicial Service Commission. The composition of this body may not be entirely satisfactory because the majority are nominees of the Chief Executive,⁴ but it is certainly preferable to a situation where the removal of judges would be left to either the executive or the legislature.

Remuneration

Charging the salaries of judges to the Consolidated Revenue Funds so that they cannot become the subject of debate on the annual estimates is another provision to ensure the independence of judges. The provision ensures that a judge's salary and terms of office cannot be altered to his disadvantage during the tenure of his appointment. Furthermore, no judicial office may be abolished as long as it has a substantive holder.

Immunity

Powers of contempt are given to judges to maintain the independence and integrity of the judiciary. Anything which ridicules the Judiciary, whether by word or deed, is considered contemptuous. In addition, any attempt to interfere with the administration of justice can constitute contempt.⁵

The immunity of judges from legal liability for words spoken and acts done in the exercise of their functions is also designed to protect judges from unnecessary harassment.

The question which now arises is whether all the requirements have contributed together towards making the judiciary an independent and separate arm of government.

Constitutional Separation of Powers

There is no doubt that the separation of powers is of special importance in the case of judicial independence. Thus the structure of the Constitution, as in the United States and relatively recently in Nigeria, can give judges a large measure of independence by delimiting the area of operation of each branch of government. For example, section 6 of the Nigerian Constitution (1979) vests the judicial powers of the Federation in the judiciary.

Such powers extend (notwithstanding anything to the contrary in the Constitution) to all inherent powers and sanctions of a court of law. The general import of these provisions is that the superior courts are given general powers of adjudication to the exclusion of the other branches of government.

In order to ensure that the judiciary performs these duties fearlessly and impartially, the Constitution may also distinguish it from the other two branches. In order to ensure that no member of the judiciary can also be a member of either of the other two branches of government, the Constitution provides that the judiciary is the only body whose members are not elected. Even in America where election of judges occurs in some States, a lawyer who does not have the support of his profession stands no chance of being nominated for election by his party. In any event, there is no election to the federal courts, and in recent years pressure has been mounting in those states where judges are still elected to substitute an appointing body for election.

Appointment and Removal Procedure

The procedures for appointment and removal of judges have already been discussed. There is nothing intrinsically wrong with subjecting the choice of the head of the judiciary to both the executive and the legislature, but there is always the danger of manipulation of the legislature by a commanding and controlling executive, that is, one that controls the majority of seats in the legislature. Thus, for example in Nigeria, the continuance in office of the Chief Justice may depend upon whether the President can muster a two-thirds majority if he wishes to remove him.⁶ Similarly, in the peculiar situation in Nigeria where appointments to the position of Chief Justice are usually from among serving members of the judiciary, difficulties may arise where the nomination of a particular judge fails to gain the approval of the Senate.⁷ The repercussions for a judge of such a failure may be far from salutary, and the public may well lose confidence in either his ability or his probity.

Remuneration and Financial Independence

It is possible that there is no problem of dependency in charging the salaries of judges to the Consolidated Revenue Fund, but there is a definite

lack of independence when the recurrent expenditure is left in the exclusive control of the executive, to be disbursed as it wishes. The efficient and courageous administration of justice depends upon things other than the salaries of judges, such as, for example, the provision of adequate and comfortable physical facilities, equipment and efficient personnel. Where these are controlled entirely by the executive, the judiciary may be unable to function effectively without executive backing. In such a situation, the independence of each affected judge and thus the judiciary as a whole will be eroded.

A Separate Branch of Government?

At the same time that one calls for greater independence of the judiciary, full recognition must be given to the independence of the other branches of government.

The judicial authority is ultimately more moral than physical. It operates by influence, not by power alone. The executive holds the sword of society and the courts must depend upon executive aid even for the efficacy of judgements. President Andrew Jackson is reported to have reacted to an important decision with the remark: "Well, John Marshall has made his decision; now let him enforce it."

Also reacting to a judgement delivered by Sir Arku Kosah, Chief Justice of Ghana, the President, late Kwame Nkrumah, in a New Year broadcast to the Nation said:

In the performance of their duties, judges are not interfered with by the Chief Executive, and to this extent they exercise the judicial powers of the state independently of the executive. But, under our Constitution, the office of the Chief Justice is not solely judicial. It is also quasi-political. It involves active co-operation and understanding with the President in securing justice, law and order, peace and stability. In other words, the position of the Chief Justice of Ghana is such that the holder of the post must be conscious of his political responsibility.

In the face of such executive retorts, the courts may remain helpless. The Nigerian Supreme Court has accepted the need for the judiciary to concern itself with the political stability of the nation in performing its judicial function, because a constitution is "a constitution for the purpose of promoting the good government and welfare of all persons in our country on

the principles of freedom, equality and justice, and for the purpose of consolidating the Unity of our people."⁸

In spite of the theory of separation of powers, the art of governance cannot be entirely divided into water-tight compartments. The three branches must work in harmony as one government. If the legislature however makes a law which is not authorized by the Constitution, such law will be void and the judiciary must be free to make a declaration accordingly and prohibit its enforcement. Similarly, if the executive exceeds the limit of powers granted it by the Constitution, or through a law legally enacted by the legislature, the judiciary must also be free to declare and prohibit its enforcement.

Conclusion

It is interesting to note here the text of a resolution on the judiciary adopted at the Fourth Biennial Conference of the African Bar Association. It reads:

The position of the judiciary in the realisation of human and democratic rights is of central importance. The judiciary, because of its insecurity, has not satisfactorily played its leading role in the development of the democratic process. The method of appointing judges and other judicial officers is identified as one of the factors leading to the present judicial attitude. The Conference consequently resolves:

- (1) That the judiciary in each member country be more assertive, innovative and hold on fundamental rights issues and that the legal profession in each member country must be represented in each Judicial Service Commission and should play an active role in the appointment of judges.
- (2) That the appointment of judges on contract derogates from and strikes at the very core of democratic process and judicial independence. Judges must therefore normally be appointed on permanent basis and their security of tenure constitutionally guaranteed.

At the end of the World Conference on the Independence of Justice, held in Montreal, Canada, in 1983 and attended by delegates from five continents and over 20 international organisations and professional bodies, a

Universal Declaration on the Independence of Justice was adopted. There is need for a thorough appraisal of this Declaration and a discussion of how to implement it.

Although the judiciary is still regarded generally as the weakest branch, as it controls neither the purse nor the sword, it must be emphasised that the judiciary is posited as the unbiased arbiter between the other branches and the people to ensure that the other branches operate within the limits of their constitutional powers.

It is possible to ensure that in the true spirit of the separation of powers, one arm of government does not interfere with the fulfillment by the others of their constitutional powers. The functions of the judiciary can be made supreme within the limits of its powers. The functions of the judiciary can be completely separated from those of the executive and the legislature. But the implication of the arrangement of powers under the Constitution is that each department operates as a check on the others in order to prevent a breach of the Constitution. For this reason, among others, the judiciary must work with the other two branches of government.

NOTES

1. E.g. India, Pakistan and Malaysia.
2. Sec. 211(3).
3. Section 256 of the Constitution 1979.
4. The composition of a State Judicial Service Commission in Nigeria is (a) the Chief Judge – Chairman (b) the Attorney-General (c) the Grand Khadi (d) the President of the Customary Court of Appeal (e) a Legal Practitioner of 10 years standing and (f) a lay member of the community. The persons holding posts (a) (c) and (d) are all nominees of the Chief Executive.
5. *Godwin Bayo v. Attorney-General of Mid-western State* (1971) 1. All. N.L.R.
6. Sec. 210 Constitution of the Federal Republic of Nigeria 1979.
7. Sec. 256 Constitution of the Federal Republic of Nigeria 1979.
8. *Senator Adesanya v. President of Nigeria* [1981] 2 N.C.L.R. at p. 374. See also *Awolowo v. Shagari* (1971) 6 - 9 S.C. 51.

Terms and Conditions of Services of Judges: A Safeguard to the Independence of the Judiciary

by
*The Hon. Mr. Justice B.J. Odoki**

1. The Independence of the Judiciary

The independence of the judiciary from both the executive and the legislature remains a cornerstone of democratic government but it cannot be absolute. A judge cannot be independent of the law nor can he ignore the social and political issues on which he is asked to adjudicate. Moreover, the antiquated doctrine of separation of powers has never been a correct reflection of politics and therefore there is more of cooperation than separation amongst the three organs of government. As Prof. Friedmann observes;

"it is now increasingly recognised by contemporary jurists that the borderlines are fluid, and that cooperation rather than separation in a constant interchange of give and take between legislature, executive and judiciary reflects the reality."¹

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Indeed, independence of the Judiciary is strengthened through cooperation rather than confrontation. But one thing is clear, the judiciary must preserve its freedom to question, to disagree and to rule independently on all judicial issues.

Each country has its own means of safeguarding judicial independence through its laws, regulations and other provisions. This paper examines one form of these safeguards, which relates to the terms and conditions of service of judges. Included in this aspect is the status and rights of judges, their education and training, their appointment, their discipline, removal and tenure, their transfer, their remuneration, and their professional immunity.

2. The Status and Rights of Judges

The judiciary is a separate but equal organ of government. Judges are the highest officers of the judiciary. They must therefore be accorded a status comparable to that enjoyed by most senior members of the other organs of government, namely the executive and the legislature. The public expects them to enjoy a status commensurate with the heavy responsibilities of their office. In some countries like Uganda, they enjoy a status comparable to that of Cabinet Ministers.

In traditional societies, judges were wise elders who gave counsel to others, were consulted on various matters and resolved disputes within the community. They were respected by the community and their integrity was beyond question.

This traditional attitude to judges has not changed much. Society still expects mature, wise, learned and respectable judges whose decisions are just, final and to be respected. The Government therefore must accord judges proper status by providing for them in a manner befitting their office. The status of a judge is reflected in the salary he earns, the accommodation and transport he enjoys, the security of his tenure and the other facilities made available to enable him to execute his duties efficiently. All these will contribute to enhance the image of the judge.

A judge's status should not be regarded as a power symbol. It is a symbol of high social and professional responsibility. It is not a class status. It is a national status of leadership in society. Judges do not enjoy political leadership or power but they are entrusted with the delicate task of promoting and preserving certain values and goals of society like justice, morality,

law and order, peace and stability, the rule of law, and human rights, by balancing conflicting interests and striking the right balance. They are entrusted with great powers over life and death, of punishment and mercy, of standing between the rich and the poor, the mighty and the weak, the high and the low, of judicial review of administrative action and of interpretation and pronouncements over validity of legislation.

These great powers must however be exercised with a sense of social accountability and professional responsibility. Judges are servants of the people, not their masters. They are merely umpires, not emperors.

In order to be deserving of this high status, judges must act and conduct themselves in a responsible manner. They must observe their code of ethics. They must maintain high integrity. As Bacon wrote:

"Judges ought to be more learned than witty, more reverent than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue."²

Indeed the judiciary must never leave its impartiality, fairness and integrity open to question. Therefore, in all their dealings and conduct, judges must be above reproach. As the *Cannons of Judicial Ethics* of the American Bar Association summarises the judicial obligation:

"In every particular his conduct must be above reproach. He should be conscientious, studious, thorough, courteous, patient, just, impartial, fearless of public clamour, regardless of public praise, and indifferent to private, political or partisan influences; he should administer justice according to law and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."³

He must not exercise these rights and enjoy these freedoms in a manner inconsistent with his judicial office, which might erode or interfere with his independence and impartiality. While he is entitled to hold political opinions, suspicion of political bias will be raised if he becomes an active promoter of the interests of one political party as against another. He may belong to a political party but he should not hold office in the party, nor should he actively participate in purely political activities e.g. by addressing political rallies.⁴

The second matter where the judge should act with some circumspection is with regard to freedom of expression. Every person is free to comment and even to criticise the administration of justice or a particular judge. There are sanctions when judges overstep the limits of fair comment or commit contempt of court. It is not normally the practice for a judge however, to defend himself in the press, lest he descends into political controversy.

The third matter relates to ownership of property and business interests. The general principle is that a judge should refrain from actively engaging in private businesses or enterprises which are likely to involve litigation or which tend to arouse the suspicion that they will bias his judgement. Under codes of conduct, a judge, like other public officers, is required to declare his assets and handover the management of his business or other undertaking to an agent of public trustee to manage them on his behalf.⁵

It is also well established that a judge may not practise law while he is a judicial officer, and in many countries he cannot practice law even after ceasing to hold that office.

3. Education and Training of Judges

The education and training of a judge should equip him with a sound knowledge of the law and practice applied by the courts of the jurisdiction in which he is to serve. The judge should also acquire broad knowledge of world and human affairs in general and of the society around him in particular. The judge should therefore be an eminent lawyer with a long-standing and distinguished career in legal practice. He should possess unquestioned professional and personal integrity.

The basic qualification for appointment as a judge is normally entitlement to practice at the Bar for a substantial period. The minimum period varies from one country to another, between five and fifteen years.⁶

Professor Gower, writing in 1967, raised a number of fundamental issues on legal education:

"In all the new training schemes the private practitioner of the Anglo-American type is taken as the production model. Is this realistic? In East Africa (and for that matter in Central and Southern Africa) initially at any rate new African recruits to the legal profession will not become private practitioners but will go into the magistracy or government service, so will many of those in West Africa. Do they need the

same sort of training as private practitioners? The schemes recognise that administrative personnel may need no further training after the LLB, the courses for which seek to meet their need as well as those of practitioners. But magistrates, public prosecutor, State counsels, parliamentary draftsmen, ..., clearly do need further training. But do they need the same training as those proposing to enrol as private practitioners? Is it correct to assume and encourage a mobility between the magistracy and government legal practice on the one hand and private practice on the other? And how does one ensure that the small reservoirs of well educated man power are not drained to provide an excessive number of private practitioners? Indeed is private practice as we know it what these countries need – at any rate until they have solved overwhelming problems of poverty – which is especially acute in East Africa?"⁷

Despite the opening of new law schools and the reforms of legal education programs in an effort to make them relevant to the needs of their respective societies, some of the problems raised by Prof. Gower remain unsolved. The University curriculum remains basically broad-based offering what is often called liberal education. In most countries there is a further post-qualification programme to equip the lawyer with professional skills before he is admitted to practice.⁸ In both the academic stage and the professional stage, students are not allowed to specialize as magistrates, state counsels or legal practitioners. The reason behind these general programmes of legal education is that the lawyer should be equipped to carry out any legal task that he may be called upon to perform from time to time.

There is a need to inject some measure of specialization into our training programmes both at the academic stage and the professional stage, complemented by career guidance programmes. In addition to purely legal subjects, students should be introduced to relevant social sciences in order to enrich their basis education.

At the professional stage, courses relevant to the judicial process could be included in the syllabus. These could include, for instance, judicial ethics, sentencing, forensic science, human rights, interpretation of statutes, costs and taxation of costs, and the art of judgement. Most of these courses are included in the syllabus of the one year Post-Graduate Bar Course conducted by the Law Development Centre Kampala for those wishing to be admitted to practice in Uganda. But all students on the course are obliged to undertake all the subjects offered. It is thus a general and not a specialized course, but it attempts to prepare the lawyer for any legal task that he may

be faced with after his qualification. Therefore, some of the students are appointed magistrates, others state attorneys while others find themselves in private legal practice and elsewhere.

What about training for the higher bench? Should there be a special preparation for a judge? Apart from the basic legal qualifications, which may consist of a law degree and or a professional qualification, the lawyer must have substantial and distinguished professional experience. In some countries like Britain, judges are recruited from the Bar. In the new Commonwealth countries, judges may be recruited from the Bar as well as from the lower Bench. Selection from the Bar may be from private legal practitioners or lawyers employed in public service, for instance in the Attorney General's Chambers. Selection from the lower Bench, which consists of Magistrates is quite substantial in countries where lawyers in private practice find it difficult to accept judicial appointments due to the unattractive remuneration. In all these cases lawyers do not receive any specialized training before being appointed judges.

While it may not be possible or necessary to mount special training for candidates to high judicial office, it may be necessary to conduct introduction or orientation courses for newly appointed judicial officers of whatever rank. Some of these officers may not have had any judicial experience, and those who have had some experience may be quite ignorant of what is expected of them at that level.

Such programmes could be part of the wide programmes for continuing professional education. These programmes could be geared at increasing the knowledge of judges and broadening their experience through exchange of ideas and experience. The main impediment to establishing and executing these programmes is the lack of suitable personnel to draw up and conduct them and the absence of physical and financial resources to support them.

However existing facilities in law schools or other institutes could be utilized. For instance, a successful five day seminar on the administration of justice was recently organised by the judiciary at the International Conference Centre in Kampala. It was attended by all judges who held useful discussions with participants from the law enforcement agencies, the Ministry of Justice, the Law Society and the law schools. More of these seminars, workshops and conferences could be organised both at local and international level to enable judicial officers to interact and acquire new techniques and values in the administration of justice. An institute for judicial training and administration in each country or at a regional level would greatly assist in uplifting the training of judicial officers.

4. The Appointment of Judges

As has been pointed out above, the qualifications for appointment as a judge are normally spelt out in the Constitution of the country. The minimum requirements are substantial professional experience at the Bar or the Bench. In this connection for instance, Article 84 of the Uganda Constitution provides,

- "(3) A person shall not be qualified for appointment as a judge of the High Court unless,
- (a) he is or has been a judge or a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court; or
 - (b) he is entitled to practice as an advocate in such a court and has been so entitled for not less than five years to practice as an advocate in such a court."

The qualifying period for a Justice of the Court of Appeal is seven years.⁹

The period of five years was fixed at independence 25 years ago when Uganda did not have local facilities for legal education, but for the last fifteen years, the Faculty of Law at Makerere University has produced many lawyers with more than ten years experience. I would suggest that both periods for the High Court and the Court of Appeal be raised to seven and ten years respectively, as in Kenya. I would also include a requirement that the person must be of high moral character and integrity.¹⁰

The procedure for appointment of judges varies from country to country, but there is a similar pattern throughout Commonwealth Africa. As a matter of principle and practice, appointment to the high Bench is normally by invitation rather than application. As Sir Isaac Hyatali, Chief of Justice of Trinidad and Tobago once observed,

"Ideally no man should seek the office of a judge. Like priesthood, only he who is invited should fill it and that only by reason of acknowledged learning in the law, impeccable integrity and wide experience of the affairs of men. To such a person the vocation of a judgeship would necessarily have meant surrender of a lucrative practice. Like priesthood there is attached to judgeship the necessity of a circumspect public and private life. From such a person who accepts the honour sacrifices are necessarily expected."¹¹

Since appointment as a judge is an honour it seems right that no one should be allowed to canvass for it and succeed in getting it on that score. It must be offered after careful observation and assessment of the candidate to ensure his suitability and competence. However, every effort must be made so that any suitable candidate, who would be willing to accept the office if invited, is not overlooked or ignored.

When a candidate has been found, what is the machinery for appointment? The procedure depends on the level and nature of the office. The Chief Justice, who is almost invariably the head of the Judiciary, is appointed by the President in his discretion as in Kenya and Uganda¹² or with approval of Parliament as was provided in the Ghana and Nigerian Constitutions of 1979.¹³ The same procedure may apply to the President of the Court of Appeal and judges of the Supreme Court. But normally the judges of the superior courts, namely the Supreme Court, the Court of Appeal, and the High Court are appointed by the President acting on the advice of the Judicial Service Commission.¹⁴ Other judicial officers of the lower bench are usually appointed by the President acting in accordance with the advice of the Judicial Service Commission or sometimes by the Chief Justice or the Judicial Service Commission.

The Judicial Service Commission is an independent body which does not act on the direction of the Executive or any other authority. The appointed members enjoy security of tenure. The Commission is normally chaired by the Chief Justice with the Attorney General, a Judge of the Supreme Court and several members appointed by the President.¹⁵ In some countries, they are representatives of the Bar Association as in Nigeria and in others they are distinguished lay members like the Chairman of the Public Service Commission as in Kenya. A broad based body is useful in ensuring that appointments take into account all the relevant considerations both professional and otherwise.

The composition of the Commission ensures that its recommendations are objective, impartial, well informed and based on merit. Indeed in Uganda, the Commission is enjoined by law to base its recommendations for appointment on qualifications, experience and merit.

The above discussion reveals that the responsibility for judicial appointments is shared by the Executive, the Judiciary and sometimes the Legislature. The Executive and the Legislature are political organs. The question that may be asked is, what is the role played by political or other considerations? Depending on how one defines political considerations they may well play a part. But I do not believe that they can be purely partisan or sectarian considerations. I think they may be based on the need to have a

judiciary which reflects the national diversity, particularly with respect to ethnic or regional factors. A judiciary that completely excludes sections of society may be looked at as lacking national character and may lose the confidence of such sections. Given proper qualifications and overall suitability for office, I see no reason for ignoring such factors if they are a reality in the national life and politics of the country.

There is a need to insulate the appointment of judicial officers from political pressures. It may be said that participation of the executive or the legislature in the appointment of judicial officers necessarily imports purely political considerations in the process. I think a great deal depends on the weight attached to the consultation or advice received from the Chief Justice or the Judicial Service Commission should serve as a safeguard against the possibility of appointing officers who lack professional competence and personal integrity on purely political considerations.

There is also a need to diversify the professional expertise of judges by appointing not only legal practitioners but lawyers from government service and academicians with professional experience. In Uganda the higher bench is a mixture of judges who have had prior experience on the bench and in private practice. There are others who have had teaching experience while others have worked in government either as solicitors or prosecuting attorneys and even parliamentary draftsmen. Some of the best judges Uganda has had were parliamentary draftsmen. The bench therefore reflects the character of the legal profession and this diversity of experience and specialization tends to enhance the quality of the judiciary.

In Australia there has been a call for a better mixture of reformers and traditionalists, and the inclusion of solicitors, more women, of people who reflect multi-cultural society and ethnic diversity, and of academic and government lawyers. The Chief Justice has not been persuaded by this plea. He is reported to have replied,

"I wonder if those who demand that the Bench be made representative have considered the implication of their statements. It is not the function of a judge to represent any section of society or to advance or defend any particular set of values... If judges were to be chosen for their racial origin, their sex or their social background rather than for their learning experience in practice and moral character, a decline would almost certainly occur in the efficiency of the Bench. It is often complained that there are a few women in Australian Courts, and that is true, but it is hardly surprising since it is only comparatively recently that more than a handful of women practised at the Bar.

It is a demeaning to women as well as it is likely to be detrimental to the Bench to suggest that their sex rather than their professional eminence and ability should be the reason for their appointments."¹⁶

For the reasons I have already given, I am unable to agree with the learned Chief Justice that answering the call made to diversify the Bench would necessarily compromise the integrity of the Judiciary.

5. Discipline Removal and Tenure

Security of tenure for judges is a central pillar of the independence of the judges. It has a controlling influence on the discipline and removal of judges. It ensures that a judge is not removed from office except in accordance with the procedure stipulated in the Constitution.

As has been pointed out above while discussing the status of judges, judges must conduct themselves in a manner befitting the dignity and responsibilities of their office. They should observe their code of ethics. This is another way of safeguarding their status and independence.

Judges are high officers of state and as such they are expected to discipline themselves without the need for constant supervision from any authority, save the Chief Justice or the head of their court. It seems that most judicial service commissions do not have the power to discipline a judge. Most jurisdictions do not have the machinery for dealing with complaints against judges, except as regards removal.

Complaints raised against judges include bribery and corruption, age and senility, rudeness and unpredictability, unlawful conduct such as drunken driving, delay in deciding cases, clash of personal conscience with judicial duty and political and other bias.

In Australia, the Chairman of the Law Reform Commission, Mr. Justice Kirby, has called for improvement in handling complaints against judges. He argued that reliance on the constitutional removal was inadequate. He lamented,

"Always the Constitutional guarantee of independence stands guardian not only of the fearless judge but also of the judge who cannot or will not properly discharge the functions of his office."¹⁷

He however admitted, and I agree that any new system must provide redress to citizens in a way that preserves "judicial independence, including

the protection of the original and unorthodox judge."

The grounds for removal of a judge are normally inability to perform the functions of his office or misbehaviour. For instance, Article 85(3) of the Constitution of Uganda provides,

"A judge of the High Court may be removed from office only for inability to perform the functions of his office, whether arising from infirmity of body or mind or from any other cause, or for misbehaviour and shall not be so removed except in accordance with the provisions of this article."

The procedure for removal varies from country to country, but there are two patterns, one by judicial inquiry as in Kenya and Uganda, and the second by address to Parliament as in England, and in Nigeria under the 1979 Constitution.¹⁸ In Uganda, if the Cabinet represents to the President that the question of removing a judge ought to be investigated, the President is required to appoint a tribunal consisting of a chairman and two members, all of whom must have held judicial office. The tribunal is required to investigate the matter and recommend to the President whether the judge ought to be removed.¹⁹ If the tribunal recommends removal of the judge, the President is obliged to remove him. The President has power to suspend the judge while he is being investigated. In case of removal by address to Parliament, the President acts on an address supported by a majority of two-thirds of Parliament; or of any House of Parliament.

Another procedure of removal is by the President of other State authority like a governor acting on the advice of the Judicial Service Commission.²⁰ This procedure seems to be employed with regard to Judges and other judicial officers of the lower courts.²¹

Removal by Judicial inquiry seems to offer the best safeguards for the judge and for the independence of the judiciary. The judge can be afforded sufficient opportunity to defend himself before his own peers. It is not clear whether these safeguards always exist in a system where removal is by address to Parliament. It seems to me that in certain cases, a combination of both methods might provide necessary safeguards.

In Uganda, as elsewhere, a judge enjoys security of tenure until he reaches his fixed retirement age, usually around 65 years.²² Indeed, his office cannot be abolished while he still holds it. But the designation may be changed, provided his status and grade is not reduced. Normally, a judge is appointed on permanent and pensionable terms so that he is entitled to a pension on his retirement. The pension should be enhanced to enable him to

lead a life commensurate with a retired judge. Ideally, he should be entitled to a pension equal to his last annual salary,²³ and should retire with his other fringe benefits since he is normally not allowed to practise law.

But sometimes judges are appointed as acting judges, either because there is a need to watch their performance or because the nature of the business in the court requires a temporary judge to assist in its speedy despatch.²⁴ Judges may also be appointed on contract either because they have retired from the public service or judicial service as judges after 65 years. Such appointments can be inconsistent with the independence and impartiality of the judge since his performance may be influenced by the urge to satisfy the relevant authorities so as to be confirmed in his appointment or have his contract renewed. Therefore, they should be made only in exceptional circumstances. Acting appointments may be made for retired judges and contract appointments for expatriates.

Judges should be entitled to security of their person, office and home. They should be protected by security guards for 24 hours unless they find such protection unnecessary. This is necessary because of the delicate nature of their duties in resolving sensitive and controversial conflicts in society, which is bound to leave some of the parties, including victims and criminals, disgruntled. Fortunately, in most countries, judges are accorded this security. I would suggest that it be extended to retired judges as well.

6. Transfer

Judges may be transferred from one station to another in the interest of the service, by the relevant authority in the Judiciary. Transfers should not be based on improper motives such as vindictiveness or political or external influences. Judges should accept transfers if they are fairly and reasonably planned and effected.

Judges may change jobs, posting or positions on promotion. In some countries, it is considered improper to have a system of promotions for judges to avoid the possibility of dispensing justice in a manner that is intended to attract promotion. But where there exists a hierarchy of courts at different levels, it is only natural and realistic that judges serving on the lower bench should expect and even aspire to be promoted to a higher bench if they merit consideration. After all, promotions are best on merit and therefore there is no harm in a judge distinguishing himself as a brilliant and capable judge. What is important is that there be a proper assessment of the judge's qualities and abilities and based on objective standards.

In some countries judges may be called upon to serve in some other capacities. They may be requested to serve as Chairmen of Law Reform Commissions or Councils of Legal Education. Sometimes they may be called upon to serve as Attorney General or to chair Commissions or Committees of Inquiry. Some of these assignments may be fulltime, so that the judges suspend the execution of their judicial functions, or they may be only part-time.

There are a number of reasons why judges are called upon to undertake these assignments. The public usually has complete confidence in the impartiality of judges. They possess special skills of impartial investigation because of their ability to sift evidence and assess credibility of witnesses. The findings of judges therefore have weight and credibility.

However, it is not the traditional function of judges to undertake some of these assignments which may be administrative in nature or which may lead to political controversy, or to litigation in Courts of Law. Therefore, the services of judges should be utilized only where their special skills are absolutely required and where the assignment does not compromise the independence and impartiality of the judge.

In Victoria, Australia, there has been a consistent reluctance of judges to accept such assignment basing their objection on the principle contained in what came to be called the "Irvine Memorandum", a letter dated 14 August 1923 by then Chief Justice of Victoria, Sir William Hill Irvine to the Attorney General giving reasons why the Judges of the Supreme Court of Victoria had declined to accept a request for one judge to act as Royal Commissioner in an inquiry. Part of the letter read,

"The duty of his Majesty's Judges is to hear and determine issues of fact and law arising between King and subject, or between subject and subject, presented in a form enabling judgement to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the judiciary. It is mainly due to the fact that, in modern times, at least, the judges in all British communities have, except in rare cases, confined themselves to this function, that they have attained and still retain the confidence of the people supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy. Nor is this salutary tradition confined to matters of actual or direct political character, but it extends to informal inquiries, which though presenting on their face some features of a judicial character, result in no enforceable judgement, but only in findings of fact which are not conclusive

and expressions of opinion which are likely to become a subject of political debate."²⁵

7. Remuneration

The independence of the Judiciary is not only threatened by political interference but by financial anxiety of judges. Therefore, as a general principle, judges should be entitled to salaries, allowances and other fringe benefits commensurate with their status and the judicial functions they perform.

The salaries of judges are normally fixed by law and are charged on the consolidated fund.²⁶ It is well established that a judge's salary cannot be reduced to his disadvantage. In countries which have not been spared by the monster of inflation, however, some salaries have become grossly inadequate.

In many countries judges are entitled to allowances and fringe benefits which may greatly augment their remuneration. Some of the allowances include entertainment allowance, non-practising allowance, responsibility allowance and other allowances received on duty on circuit or abroad. A judge is also normally entitled to a free fully furnished house, with the charges for electricity, telephone and water paid by Government. In Uganda, where a judge lives in his own house, a reasonable allowance should be paid to bring him at par with the amenities enjoyed by those living in government houses.²⁷

Another important fringe benefit accorded to judges is transport. In Uganda, for instance, a judge is entitled to a free chauffeur-driven car for official use. In other countries judges are enabled to purchase vehicles and then paid adequate allowance for maintaining them.

If a judge finds the remuneration due to him insufficient to enable him to meet his family obligations, he faces a dilemma: to resign or find a side income. In some countries, it is an open secret that one cannot survive on a judge's salary: he must supplement it. Where the Code of conduct does not permit a judge to engage in private business, he may have to resign in honour, rather than live in dishonour through unacceptable means. Where there is no such restriction, it may be possible for a judge to invest in some ventures provided they are not incompatible with his office, and he does not personally participate or manage them. For instance, he may own a farm, or real property which he may let out.

The remuneration for a judge must however be sufficient to maintain him without the urge and necessity to look for a side income. Often, governments say that they cannot afford to pay adequate salaries. But, as Sir Isaac Hyatali, Chief Justice of Trinidad and Tobago aptly remarked,

"Any objective analysis of the subject however exposes the fact that the real question is NOT whether the Executive cannot afford to pay adequate salaries, but can the Executive afford not to do so?"²⁸

8. Professional Immunity

A judge enjoys judicial immunity from criminal prosecution for any act done by him in the execution of his judicial functions. In this connection, section 15 of the Uganda Penal Code Act²⁹ provided:

Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by him in the exercise of his judicial functions although the act done is in excess of his judicial authority, or although he is bound to do the act omitted to be done.

A judge also enjoys immunity from civil action in the like manner. In Uganda Section 46(1) of the Judicature Act³⁰ provides:

A judge or other person acting judicially shall not be liable to be sued in any court for any act done or ordered to be done by him in the discharge of his judicial functions whether or not within the limits of his jurisdiction.

A judge is protected by professional privilege from answering questions regarding his own conduct in court while exercising his judicial functions. As the section 118 of Uganda Evidence Act³¹ stipulates:

No judge or magistrate shall except upon a special order of some court to which he is subordinate be compelled to answer any questions as to his conduct in court as such judge or magistrate, or as to anything which came to his knowledge in court as such judge or magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

The purpose of this immunity is not for the aggrandisement of judges but to enable them to do their work with complete independence and free from fear of actions against them or any other similar consequences. It is intended to make them free in thought and independent in judgment.

In *Sirros v. Moore*,³² the Court of Appeal held that an action could not be maintained against a judge for making an order detaining the plaintiff unlawfully. In the course of their judgment the Court of Appeal said,

Ever since the year 1613 if not before it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives and the sentences which he imposes cannot be made the subject of civil proceedings against him.

No matter that the judge was under some gross error or ignorance, or was actuated by envy hatred and malice and all uncharitableness, he is not liable to an action. The remedy for the party aggrieved is to appeal to a Court of Appeal or to apply for a habeas corpus, a writ of error or certiorari or take some such step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear. It was well stated by Lord Tenterden, CJ, in *Garnett v. Ferrand* (1827) 6 B & C 611, 625:

This freedom from action and question at the suit of an individual is given by the law to the judges not so much for their own sake as for the sake of the public and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment as all who are to administer justice ought to do.

NOTES

1. Friedmann, *Law in a Changing Society* (Penguin Books, 1964) pp. 66-67.
2. Bacon in the essay, "of Judicature."
3. Canon 34.

4. For a discussion of the position in a one party state see Mr. Justice P.J. Georges, "The Court in the Tanzania One Party State" in *East African Law and Social Change* (GFA Sawyerr Ed;) (1967) p. 38.
5. For instance, Ghana Constitution 1979 Chapter 24 Articles 205 & 206 Nigerian Constitution 1979, Fifth Schedule Section 11.
6. See Uganda Constitution Article 84 (3) which prescribes 5 years Kenya Constitution Article 6 (3) which prescribes 7 years, Nigerian Constitution which prescribes 15 years for Supreme Court, 12 years for court of Appeal and 10 years for High Court.
7. Gower, *Independent Africa: The Challenge of the Legal Profession* (Harvard, 1967).
8. Eg. The Kenya Law School, the Law Practising Institute of Zambia and The Uganda Law Development Centre.
9. See Judicature Act 1967 as amended by the Judicature (Amendment) Statute 1980, S. 2C.
10. See Constitution of Republic of Ghana 1979 Article 127(3).
11. *Proceedings and Papers of the Sixth Commonwealth Law Conference*, (Lagos, 1980) p. 279.
12. Uganda Constitution Article 84 (1), Kenya Constitution, Article 61(1).
13. Ghana Constitution Article 127 (1) (a) Nigerian Constitution, Article 211(1).
14. See Uganda Constitution, Article 84(2) Kenya Constitution Article 61(2).
15. See for instance Uganda Constitution, Article 90; Kenya Constitution, Article 68; Ghana Constitution, Article 131; Nigerian Constitution, Article 145.
16. *The Commonwealth Lawyer* Vol. 1 No. 2 p. 43 (duly 1984).
17. *Ibid.*, p. 45.
18. Article 256.
19. Article 85 (5) of the Constitution.
20. Nigerian Constitution (supra) Article 256 (1) (b).
21. See Uganda Constitution Article 91 as regards Magistrates.
22. See Uganda Constitution Article 85 (1).
23. As under Nigerian Constitution 1979, Article 255 (2).
24. See Uganda Constitution Article 84 (6).
25. See The Hon. Sir Murry McInerney, "The Appointment of Judges to Commission of Inquiry and other Extra-Judicial Activities" in (1978) 52 A.L.J. 540.
26. See Uganda Constitution Article 97 and The Salaries and Allowances (Specified Officers) Act 1984 (No. 6/84) which sets out the salaries for judges in Uganda and allowances for members of the Judicial Service Commission and other independent commissions.
27. In Uganda a judge is entitled to three domestic servants paid for by the Government.
28. *Proceedings and Papers of the Sixth Commonwealth Law Conference* (supra) p. 279.
29. Laws of Uganda, Cap. 106.
30. Act 11 of 1967.
31. Laws of Uganda, Cap. 43.
32. (1974)3 W.L.R. 459.

**CONCLUSIONS
and
RECOMMENDATIONS
of the Banjul Seminar on
the Independence of Judges and Lawyers**

I. Recommendations concerning the Courts

The Organisation and Jurisdiction of the Courts

1. The highest Court in any country should as far as possible be in that country itself without prejudice to the right of two or more countries to submit to the jurisdiction of a final appellate court they may establish for themselves.
2. The Courts should be organised in a hierarchical arrangement so as, in general, to enable a litigant to pursue his rights from the lowest to the highest court.
3. Lay persons may be judges in the generic sense but only in lower courts with strictly limited jurisdiction.
4. The superior Courts should as far as possible have jurisdiction in all matters.

5. An appellant in a criminal case should be entitled to receive, free of charge, a copy of the record of appeal, to enable him to pursue and prosecute his appeal.

6. In civil cases, within defined limits, there should be a right of appeal from final decisions from the lowest to the highest court; but limitations may be placed on the right of appeal from interlocutory decisions, as for example by the requirement to obtain leave to appeal from the trial Court or, if refused, from the appellate Court.

7. In criminal cases, where the defendant is not represented by counsel, the law should oblige the trial Magistrate or Judge to inform such a defendant of his right of appeal against his conviction or sentence, and the time within which this right may be exercised; in case of failure by the Magistrate or Judge to give such information the expiry of the time for appeal shall not be held against the defendant.

8. Superior Courts ought to be vested with the power and jurisdiction of review over decisions of all inferior Courts in criminal cases, save that in appropriate cases the Chief Justice or his delegates may exercise administrative power to reduce sentences passed but not increase them.

Habeas Corpus

9. A person arrested, detained or otherwise restricted ought to have the right to apply for habeas corpus to test the legal validity of such arrest, detention or restriction.

10. Wherever power is vested in someone to arrest, detain or restrict another person upon the former being satisfied of the existence of certain matters, the Court should have power to inquire into the existence of the matters or of the reasonableness of the former's belief that such matters exist, as the case may be.

Fairness of Proceedings

11. Judges have the right, indeed the duty, to ensure to a litigant his right to a fair trial.

12. A Judge should have the right to inquire into allegations of mistreatment of detainees or suspects and to take the necessary steps, including visiting prisons, and make appropriate orders, to ensure that the human rights of such persons are not violated.

Special Courts

13. In principle there should be no special Courts where, however, for any reason they do exist, there should be a right of appeal from their decisions to the ordinary Courts or a right in the ordinary Courts to review their decisions by certiorari or otherwise.

14. There should be a right of appeal from a decision of a Court Martial to the ordinary Courts which should also exercise a right of review over decisions of such Courts.

Customary or Traditional Courts

15. Customary or traditional Courts should be part of the hierarchy of Courts and should have limited jurisdiction which shall not be exclusive of the jurisdiction of the ordinary Courts.

16. In civil matters the jurisdiction of customary or traditional Courts may cover matrimonial and land matters, succession, inheritance and other civil matters regulated by customary law.

17. Such Courts may have jurisdiction over such petty criminal cases as may be prescribed by law.

18. Where such Courts have jurisdiction over serious criminal cases, accused persons should be entitled to counsel of their choice.

II. Recommendations concerning the Judiciary

Appointment of Judges

19. The appointment of Judges other than the Chief Justice, the President of the Court of Appeal and members of the Supreme Court should always

be made by the executive arm of government on the advice of a body such as a Judicial Service Commission consisting predominantly of nominees of the Bench and the Bar Association.

20. The appointment of the Chief Justice, the President of the Court of Appeal and members of the Supreme Court should be made by the Head of State acting in consultation with the Judicial Service Commission or similar body and, where appropriate, ratified by the legislature.

21. Judges should be appointed by a centralised system on the basis of defined criteria.

22. Every country should strive to have national judges. Where it proves necessary to employ expatriate judges, they should be on a contract basis.

23. Temporary judges may be appointed where necessary, but acting and probationary appointments should not be made.

24. Appointment of judges should be made from all branches of the legal profession without discrimination on ethnic, sex, or other grounds in accordance with the following criteria: integrity and independence of judgement, professional competence, experience, humanity and commitment to uphold the rule of law.

25. On appointment a judge should cease to be a member of any political party.

Tenure

26. The tenure of office of judges should be properly secured by the Constitution or other relevant law.

27. Judges should be allowed to retire at the age of 60 years but a compulsory retirement age should apply in all cases and should not be varied on an individual basis.

Discipline

28. Discipline on minor matters is administrative in nature and therefore a

matter of internal administration on which the Chief Justice could take appropriate action.

Removal

29. Judges should only be removed from office in proven cases of misconduct or for inability to perform judicial functions due to infirmity of mind. There should be clearly defined rules as to what constitutes misconduct.

30. In all cases of removal of judges, whether before Parliament or ad hoc bodies, a small tribunal of either parliamentarians or judicial members should be impanelled by the appropriate authority to enquire into the charges. It should be the duty of the tribunal to determine whether there is a prima facie case for the judge concerned to answer before the Parliament or judicial body. The judge concerned must be accorded to a fair hearing in accordance with established rules and procedures.

Remuneration

31. Judges should be remunerated adequately; in addition they should be provided with such other amenities as will enable them to perform their duties satisfactorily.

Retirement

32. Judges should be given adequate benefits and gratuities during their retirement.

Professional Immunity of Judges

33. In the exercise of his judicial functions a judge should have full immunity.

Education and Training of Judges

34. In view of the need to keep abreast with modern developments of the law and techniques in the performance of judicial functions, there should be

continuing education for judges at both national and international levels through conferences, seminars, workshops, etc.

Administration

35. The Judiciary alone should be responsible for the proper administration of its budget, and for the control of expenditure and administrative personnel.

Civic Responsibilities and Duties of Judges to Society

36. Judges should not undertake any work, position or employment that is incompatible with their judicial office.

37. In discharging their judicial duties and responsibilities to society, Judges shall always regard themselves as holding their office in trust for the community. They should therefore avoid delays, lateness, hostility, bias and discourtesy to litigants, lawyers, and members of the public.

38. To avoid delays the Executive should ensure that the Courts are adequately supplied with Judicial officers and auxiliary staff.

39. The Courts should as far as possible make use of modern facilities to simplify and accelerate proceedings.

40. Lawyers should be assigned to judges as legal assistants to assist them in the discharge of their judicial functions.

41. Judges should be free to form their own associations and take individual and collective action to preserve their independence. They should be free to make comments on legal issues in learned legal journals.

42. Judges should endeavour at all times to conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

III. Recommendations concerning the Legal Profession

Noto Principles

43. Articles 9 through 14, 17, 18 and 29 through 44 of the ICJ Draft Principles on the Independence of the Legal Profession (published in CIJL Bulletin No. 10) formulated at Noto, Italy in May 1982 should be progressively implemented at the national level and steps taken to ensure their general observance.

Rights of the Client

44. The client must at all times have the right to choose freely counsel of his choice.

45. The client must be permitted to instruct his counsel out of hearing of others and in absolute confidentiality.

Education and Training

46. Bar Associations and Law Societies should take an active interest in the academic training of lawyers, the curricula and the development and formulation of the academic content of such courses.

47. The content of legal education should be such as to equip law students to develop courage, proper skills and effectiveness. It should include training in the social sciences and above all it should ensure that the lawyer is knowledgeable about and alive to his societal environment.

48. The training should instill in the lawyer a sense of accountability to his society and community.

The African Charter

49. Bar Associations and Law Societies should direct their energy to ensuring that the African Charter of Human and Peoples' Rights is ratified by their respective countries and made an integral part of each country's municipal laws.

Legal services and the Rural Poor

50. Bar Associations should approach the International Commission of Jurists, the African Association and the All African Council of Churches to assist in the promotion of rendering legal services to the rural people and areas.

Discipline

51. Bar Associations, in promoting discipline among their members, must be seen to deal promptly and firmly with any disciplinary matters.

52. It may be advisable to ensure that disciplinary bodies of Bar Associations are not only composed of lawyers but include laymen.

Arrest of any Lawyer

53. Bar Associations should as soon as possible inform the African Bar Association of the arrest or detention of any lawyer or judge as well as the circumstances surrounding such arrest or detention.

African Bar Association

54. The African Bar Association should establish a network by which all Bar Associations can be informed promptly of any matters that affect the legal profession and judiciary generally.

Bar Associations

55. Bar Associations should ensure that, as far as possible, they are independent of government control.

56. Bar Associations should maintain links and keep in touch with the African Bar Association and other international lawyers' organisations.

57. Bar Associations should circulate, propagate and disseminate the contents of the African Charter as widely as possible within their respective jurisdictions, including in the form of posters, radio and television programmes, booklets, etc.

Support for the independence of the judiciary

59. National Bar Associations should organise themselves in such a manner as to make them more effective in the promotion and defence of the independence of the judiciary.

IV. Follow-Up

To ensure that the recommendations of the seminar are given the widest possible distribution in the hope that they will be incorporated into the law and practice of the region, the participants:

60. Decide that each participant should circulate among his or her colleagues at the court, in the Ministry of Justice, the Attorney-General's Chambers, the Bar Association and the University and should make available to law journals and the press the resolutions and recommendations of this seminar.

61. Call on the African Bar Association to transmit to relevant government officials, the Chief Justices, judges of the Supreme Courts and High Courts as well as magistrates and University officials copies of the final report of the Seminar.

62. Call on law professors to bring the final report of the seminar to the attention of their students and to ensure that it is available in University libraries. Also call upon them to continue to study problems facing the judiciary, the legal profession and the system of the administration of justice and to co-operate with bar associations in bringing about necessary improvements.

63. Call on law societies and bar associations to take up the resolutions and recommendations, and to co-operate with academics and judges in identifying steps to be taken in furtherance of their implementation.

64. Call on the Centre for the Independence of Judges and Lawyers to give wide publicity to the final report of the seminar, including its resolutions and recommendations and to bring the report to the attention of the United Nations Committee for Crime Prevention and Control.
65. Call on the Organisation of African Unity, the African Bar Association, the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers to publish and give wide publicity to the text of the African Charter on Human and Peoples' Rights.
66. Call on the Organisation of African Unity to ensure the implementation of the African Charter on Human and Peoples' Rights particularly the setting up of the commission called for by the Charter.
67. Call on the African Bar Association as well as national bar associations and law societies to work with their governments to ensure that the text of the Charter is implemented at the national level.
68. Call on all governments to publish the text of the Charter in their law gazettes as well as local newspapers and to have the text of the Charter translated into local languages.
69. Call on all governments that have not yet ratified the Charter to do so.
70. Urge all governments to complete the reports called for in resolution 1986/10 of the Economic and Social Council concerning implementation of the Basic Principles on the Independence of the Judiciary, and to utilise, if necessary, the expert and other assistance which the Secretary-General of the United Nations has been asked to provide pursuant to the same resolution.
71. Call on Bar Associations to give assistance to their colleagues in South Africa, Namibia and elsewhere who are being harassed or persecuted because of their professional activities.
72. Decide to form a follow-up Committee which will be charged with:
 - a) bringing to the attention of governments, the press, non-governmental organisations and bar associations the conclusions and recommendations of this seminar;

- b) inquiring from the participants what efforts they have undertaken to publicise the report of the seminar;
- c) consulting with academics on issues requiring further research;
- d) reporting back to the African Bar Association on their activities and progress made in implementing the report of the seminar;

The Committee membership is as follows:

Mr. Joseph Joof, Gambia
Mr. Nutifafa Kuenyehia, Ghana
Mr. Joseph O. Wandago, Kenya
Chief Debo Akande, Nigeria
Mr. Garvas Betts, Sierra Leone
Mr. Remoigius Kasule, Uganda

73. Call on the African Bar Association to inform the Centre for the Independence of Judges and Lawyers of any progress made and further call on the Centre for the Independence of Judges and Lawyers to give wide publicity to the information supplied by the African Bar Association.

List of Participants – Banjul

<i>Name</i>	<i>Position</i>	<i>Address</i>
GAMBIA		
Mr. Olayinka Ayoola	Chief Justice, Supreme Court	Supreme Court Banjul, Gambia
Mr. A.N.M. O. Darboe		Basang Chambers Banjul, Gambia
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Mr. Joseph H. Joof	Attorney	Attorney-General's Chambers Marina Parade Banjul, Gambia
Mr. S.F. Njie	Justice, Supreme Court	Supreme Court Banjul, Gambia
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Justice E. O'Kubasu	Commission of Law Reform	P.O. Box 34999 Nairobi, Kenya
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NIGERIA		
Mr. Mashood O. Adio		Federal Ministry of Justice Marina Lagos, Nigeria
Chief Debo Akande	Senior Advocate of Nigeria; Secretary-General African Bar Association	8/10 Broad Street Lagos, Nigeria
Justice U. Muhammed	Justice, High Court	High Court of Justice Kaduna, Nigeria
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Mrs. P.N. Yat		4 Kutena Close Kaduna, Nigeria
Justice G.A. Ogmtade	Justice, High Court	Lagos High Court Lagos, Nigeria
SIERRA LEONE		
Mr. A.K.A. Barber	Principal State Counsel	Law Officers Dept. 12 Clarence Street Freetown, Sierra Leone
Mr. Garvas Betts	President Sierra Leone Bar Association	Beoku Chambers 36 Goderich Street Freetown, Sierra Leone
Prof. F.C. Tuboku- Metzger	Head, Dept. of Law	Faculty of Law Fourah Bay College University of Sierra Leone Freetown, Sierra Leone
Mrs. Beatrice O.E. Awoonor-Renner	Attorney	14 East Street Freetown, Sierra Leone
Hon. Mr. Justice Sydney Warne	Justice Supreme Court	Superior Court of Judicature Freetown, Sierra Leone
UGANDA		
Mr. R.K. Kasule	Honorary Secretary The Uganda Law Society	P.O. Box 216 Kampala, Uganda
Mr. Henry G. Kayondo	Justice, Court of Appeal	P.O. Box 14210 Kampala, Uganda

Prof. Abraham Kiapi	Professor of Law	Dept. of Public and Comparative Law Makerere University P.O. box 7062 Kampala, Uganda
Mr. Justice B.J. Odoki	Justice, Court of Appeal	Court of Appeal P.O. Box 6679 Kampala, Uganda

ANNEX I

United Nations Basic Principles on the Independence of the Judiciary

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

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

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

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

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

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

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

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

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

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

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

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

Independence of the judiciary

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

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

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

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

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

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

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

Freedom of expression and association

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

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

Qualifications, selection and training

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

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

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

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

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

Professional secrecy and immunity

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

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

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

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

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

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

ANNEX II

Montréal Universal Declaration on the Independence of Justice

The World Conference on the Independence of Justice was held in Montréal, Canada, from 5 to 10 June 1983. The delegates came from five continents and over 20 international organisations and professional bodies, including international courts. The conference was organised by the former Chief Justice of the Superior Court of Quebec, Jules Deschênes.

The following bodies and organizations were represented:

- United Nations (Centre for Human Rights)
- International Court of Justice
- European Court of Human Rights
- The Court of Justice of the European Communities
- Inter-American Court of Human Rights
- International Association of Judges
- International Association of Juvenile and Family Court Magistrates
- Commonwealth Magistrates Association
- International Commission of Jurists
- Centre for the Independence of Judges and Lawyers
- International Union of Lawyers
- International Bar Association
- Young Lawyer's International Association
- Inter-American Bar Association
- African Bar Association
- African Union of Lawyers
- All Asia Bar Association
- LAWASIA – the Law Association for Asia and the Western Pacific
- Union of Arab Jurists
- Arab Lawyers Union
- Consultative Committee of the Bars and Law Societies of the
European Community
- Comisión Andina de Juristas
- International Association of Democratic Lawyers

Mouvement international des Juristes catholiques
Fédération internationale des droits de l'homme
International Law Association
Amnesty International

At the final plenary session, the delegates adopted the Universal Declaration on the Independence of Justice:

- Preamble
- I International Judges
- II National Judges
- III Lawyers
- IV Jurors
- V Assessors

Preamble

WHEREAS justice constitutes one of the essential pillars of liberty;

WHEREAS the free exercise of fundamental human rights as well as peace between nations can only be secured through respect for the Rule of Law;

WHEREAS States have long established courts and other institutions with a view to assuring that justice be duly administered in their respective territories;

WHEREAS the Charter of the United Nations has established the International Court of Justice as its principal judicial organ in order to promote the peaceful solution of disputes between States, in conformity with the principles of justice and international law;

WHEREAS the Statute of the International Court of Justice provides that the latter shall be composed of a body of independent judges, elected regardless of nationality, which as a whole shall be representative of the main forms of civilisation and of the principal legal systems of the world;

WHEREAS various Treaties have established other courts endowed with an international competence, which equally owe exclusive allegiance to the international legal order and benefit from representation of diverse legal systems;

WHEREAS the jurisdiction vested in international courts shall be respected in order to facilitate the interpretation, application and progressive development of international law and the promotion of human rights;

WHEREAS national and international courts shall, within the sphere of their competence, cooperate in the achievement of the foregoing objectives;

WHEREAS all those institutions, national and international, must, within the scope of their competence, seek to promote the lofty objectives set out in the *Charter of the United Nations*, the *Universal Declaration of Human Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political Rights*, the *Optional Protocol to the latter Covenant* and other pertinent international instruments, objectives which embrace the independence of the administration of the justice;

WHEREAS such independence must be guaranteed to international judges, national judges, lawyers, jurors and assessors;

WHEREAS the foundations of the independence of justice and the conditions of its exercise may benefit from restatement;

The World Conference of the Independence of Justice

RECOMMENDS to the United Nations the consideration of this *Declaration*.

- I -

International Judges

I. Definitions

1.01: In this chapter

- a) "judges" means international judges and arbitrators;
- b) "court" means an international court or tribunal of universal, regional, community or specialised competence.

II. Independence

- 1.02: The international status of judges shall require and assure their individual and collective independence and their impartial and conscientious exercise of their functions in the common interest. Accordingly, States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities.

- 1.03: Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.
- 1.04: When governing treaties give international courts the competence to determine their rules of procedure, such rules shall come into and remain in force upon adoption by the courts concerned.
- 1.05: Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.
- 1.06: The ethical standards required of national judges in the exercise of their judicial functions shall apply to judges of international courts.
- 1.07: The principles of judicial independence embodied in the Universal Declaration of Human Rights and other international instruments for the protection of human rights shall apply to judges.
- 1.08: Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.
- 1.09: No reservation shall be made or admitted to treaty provisions relating to the fundamental principles of independence of the judiciary.
- 1.10: Neither the accession of a state to the statute of a court nor the creation of new international courts shall affect the validity of these fundamental principles.

III. Appointment

- 1.11: Judges shall be nominated and appointed or elected in accordance with governing constitutional and statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination dependent on nationality.
- 1.12: Only a jurist of recognized standing shall be appointed or elected to be a judge of an international court.

- 1.13: When the statute of a court provides that judges shall be appointed on the recommendation of a government, such appointment shall not be made in circumstances in which that government may subsequently exert any influence upon the judge.

IV. Compensation

- 1.14: The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

V. Immunities and privileges

- 1.15: Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred upon chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the court concerned may lift these immunities.
- 1.16: Judges shall not be liable for acts done in their official capacity.
- 1.17: a) In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations;
b) States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

VI. Discipline and removal

- 1.18: All measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules of their courts and be within their jurisdiction.
- 1.19: Judges shall not be removed from office, except by a decision of the other members of the Court and in accordance with its statute.

VII. Judges ad hoc and arbitrators

- 1.20: Unless reference to the context necessarily makes it inapplicable or inappropriate, the foregoing articles shall apply to judges *ad hoc* and to arbitrators in public international arbitrations.

- II -

National Judges

I. Objectives and functions

- 2.01: The objectives and functions of the judiciary shall include:
- a) to administer the law impartially between citizen and citizen and between citizen and state;
 - b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;
 - c) to ensure that all people are able to live securely under the Rule of Law.

II. Independence

- 2.02: Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of the law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- 2.03: In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.
- 2.04: The judiciary shall be independent of the Executive and Legislature.
- 2.05: The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature.

- 2.06: a) No ad hoc tribunals shall be established;
b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law subject to review by the courts;
c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts;
d) In such times of emergency
(i) civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts expanded where necessary by additional competent civilian judges;
(ii) detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures so as to ensure that the detention is lawful as well as to inquire into any allegations of ill-treatment;
e) The jurisdiction of military tribunals shall be confined to military offences committed by military personnel. There shall always be a right of appeal from such tribunals to a legally qualified appellate court.
- 2.07: a) No power shall be so exercised as to interfere with the judicial process;
b) The Executive shall not have control over judicial functions;
c) The Executive shall not have the power to close down or suspend the operation of the courts;
d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.
- 2.08: No legislation or executive decree shall attempt retroactively to reverse specific court decisions nor to change the composition of the court to affect its decision-making.
- 2.09: Judges may take collective action to protect their judicial independence.
- 2.10: Judges shall always conduct themselves in such a manner as to pre-

serve the dignity of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.

III. Qualifications, selection and training

- 2.11: Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.
- 2.12: In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.
- 2.13: 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.
- 2.14: a) There is no single proper method of judicial selection but the method chosen should provide safeguards against judicial appointments for improper motives;
b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.
- 2.15: Continuing education shall be available to judges.

IV. Posting, promotion and transfer

- 2.16: 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 judiciary.*
- 2.17: Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, profes-

sional competence, experience, humanity and commitment to uphold the Rule of Law. Article 2.14 shall apply to promotions.

- 2.18: Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.*

V. Tenure

- 2.19: a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment;
b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office where such exists.
- 2.20: The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually.*
- 2.21: a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions;
b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office and be regularly adjusted to account fully for price increases;
c) Judicial salaries shall not be decreased during the judge's term of office, except as a coherent part of an overall public economic measure.
- 2.22: Retirement age shall not be altered for judges in office without their consent.
- 2.23: The executive authorities shall at all times ensure the security and physical protection of judges and their families.

VI. Immunities and privileges

- 2.24: Judges shall enjoy immunity from suit or harassment for acts and omissions in their official capacity.

- 2.25: a) Judges shall be 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;
b) Judges shall not be required to testify on such matters.

VII. Disqualifications

- 2.26: Judges may not serve in an executive or a legislative capacity unless it is clear that these functions are combined without compromising judicial independence.
- 2.27: Judges may not serve as chairmen or members of committees of inquiry except in cases where judicial skills are required.
- 2.28: Judges shall not be active members of or hold positions in political parties.*
- 2.29: Judges may not practice law.*
- 2.30: Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property.
- 2.31: A judge shall not sit in a case where a reasonable apprehension of bias on his part may arise.

VIII. Discipline and removal

- 2.32: A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.
- 2.33: a) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary and selected by the judiciary;
b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a Court or Board referred to in 2.33(a).*

- 2.34: All disciplinary action shall be based upon established standards of judicial conduct.
- 2.35: The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.
- 2.36: With the exception of proceedings before the Legislature, the proceedings of discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to 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.
- 2.37: With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.
- 2.38: A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.
- 2.39: In the event a court is abolished, judges serving on this court shall not be affected, except for their transfer to another court of the same status.

IX. Court administration

- 2.40: The main responsibility for Court administration shall vest in the judiciary.
- 2.41: It shall be a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.
- 2.42: The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary. The judiciary shall submit their estimate of the budget requirements to the appropriate authority.

2.43: The judiciary shall alone 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.

2.44: The head of the court may exercise supervisory powers over judges on administrative matters.

X. Miscellaneous

2.45: A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

2.46: Judges shall accord respect to the members of the Bar.

2.47: The state shall ensure the due and proper execution of orders and judgments of the Courts; but supervision over the execution of orders and judgments process shall be vested in the judiciary.

2.48: Judges shall keep themselves informed about international conventions and other instruments establishing human rights norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

2.49: The provisions of chapter II: *National Judges*, shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless reference to the context necessarily makes them inapplicable or inappropriate.

Explanatory notes to Chapter II

(The figures refer to the corresponding articles)

2.16: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court 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 judiciary or similar body.

- 2.18: 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.
- 2.20: This text is not intended to exclude part-time judges. Where such a practice exists, proper safeguards shall be laid down to ensure impartiality and avoid conflicts of interest. Nor is this text intended to exclude probationary periods for judges after their initial appointment in countries which have a career judiciary such as in civil law countries.
- 2.28: This text is not intended to permit membership of judges in political parties in countries where under law or practice such is excluded, but to lay standards limiting the scope of judicial involvement in countries where such membership is permissible.
- 2.29: See note 2.20.
- 2.33: In countries where the legal profession plays an indispensable rôle in maintaining the Rule of Law and judicial independence, it is recommended that members of the legal profession participate in the selection of the members of the Court or Board and be included as members thereof.

- III - Lawyers

I. Definitions

3.01: In this chapter:

- a) "lawyer" means a person qualified and authorized to practice before the courts and to advise and represent his clients in legal matters;
- b) "Bar Association" means the recognized professional association to which lawyers within a given jurisdiction belong.

II. General Principles

- 3.02: The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.
- 3.03: There shall be a fair and equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.
- 3.04: All persons shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights.

III. Legal Education and Entry into the Legal Profession

- 3.05: Legal education shall be open toll persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.
- 3.06: Legal education shall be designed to promote, in the public interest, not only technical competence, but an awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.
- 3.07: Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.
- 3.08: Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

IV. Education of the Public Concerning the Law

- 3.09: It shall be the responsibility of lawyers to educate members of the public about the principles of the Rule of Law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.

V. Rights and Duties of Lawyers

- 3.10: The duties of a lawyer towards his client include:
- a) advising the client as to his legal rights and obligations;
 - b) taking legal action to protect him and his interest; and, where required,
 - c) representing him before courts, tribunals or administrative authorities.
- 3.11: The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.
- 3.12: Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability. Consequently, the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.
- 3.13: No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.
- 3.14: No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.
- 3.15: It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation

or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

- 3.16: If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.
- 3.17: Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearances before a court, tribunal or other legal or administrative authority.
- 3.18: The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.
- 3.19: Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including:
- a) absolute confidentiality of the lawyer-client relationship;
 - b) the right to travel and to consult with their clients freely both within their own country and abroad;
 - c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;
 - d) the right to accept or refuse a client or a brief.
- 3.20: Lawyers shall enjoy freedom of belief, expression, association and assembly;
and in particular they shall have the right to:
- a) take part in public discussion of matters concerning the law and the administration of justice;
 - b) join or form freely local, national and international organizations;
 - c) propose and recommend well considered law reforms in the public interest and inform the public about such matters; and
 - d) take full and active part in the political, social and cultural life of their country.

- 3.21: Rules and regulations governing the fees and remuneration of lawyers shall be designed to ensure that they earn a fair and adequate income, and legal services are made available to the public on reasonable terms.

VI. Legal Services for the Poor

- 3.22: It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.
- 3.23: Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.
- 3.24: Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:
- the direction of such programmes or organizations being entrusted to an independent board composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
 - recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment.

VII. The Bar Association

- 3.25: There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to

form or join in addition other professional associations of lawyers and jurists.

- 3.26: In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar association.

VIII. Functions of the Bar Association

- 3.27: The functions of a Bar association in ensuring the independence of the legal profession shall be *inter alia*:

- a) to promote and uphold the cause of justice, without fear or favour;
- b) to maintain the honour, dignity integrity, competence, ethics, standards of conduct and discipline of the profession;
- c) to defend the rôle of lawyers in society and preserve the independence of the profession;
- d) to protect and defend the dignity and independence of the judiciary;
- e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;
- f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper procedures in all matters;
- g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
- h) to promote a high standard of legal education as a prerequisite for entry into the profession;
- i) to ensure that there is free access to the profession for all persons have the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
- j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
- k) to affiliate with and participate in the activities of international organizations of lawyers.

- 3.28: Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar association

shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

- 3.29: To enable the Bar association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice of
- i) any search of his person or property,
 - ii) any seizure of documents in his possession, and
 - iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer.

In such cases, the Bar association shall be entitled to be represented by its president or nominee, to follow the proceedings and in particular ensure that professional secrecy is safeguarded.

IX. Disciplinary Proceedings

- 3.30: The Bar association shall freely establish and enforce in accordance with the law a code of professional conduct of lawyers.
- 3.31: The Bar association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar association with a view to its initiating disciplinary proceedings.
- 3.32: Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar association.
- 3.33: An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.
- 3.34: Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

- IV -
Jurors

I. Selection of prospective jurors

- 4.01: The opportunity for jury service shall be extended without distinction of any kind by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.
- 4.02: The names of prospective jurors shall be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction.
- 4.03: The jury source list shall be representative and shall be as inclusive of the adult population in the jurisdiction as is feasible.
- 4.04: The Court shall periodically review the jury source list for its representativeness and inclusiveness. Should the Court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken.
- 4.05: Random selection procedures shall be used at all stages throughout the jury selection process except as provided herein.
- 4.06: The frequency and the length of time that persons are called upon to perform jury service and to be available therefor, shall be the minimum consistent with the needs of justice.
- 4.07: All automatic excuses or exemptions from jury service shall be eliminated.
- 4.08: Eligible persons who are summoned may be excused from jury service only for valid reason by the court, or with its authorization.

II. Selection of a particular jury

- 4.09: Examination of prospective jurors shall be limited to matters rele-

vant to determining whether to remove a juror for cause and to exercising peremptory challenges.

- 4.10: If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual shall be removed from the panel. Such a determination may be made on motion of a party or on the judge's own initiative.
- 4.11: In jurisdiction where peremptory challenges are permitted, their number and the procedure for exercising them shall be uniform for the same type of case.
- 4.12: Peremptory challenges shall be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury.

III. Administration of the jury system

- 4.13: The responsibility for administration of the jury system shall be under the control of the judiciary.
- 4.14: The notice summoning a person to jury service shall be in writing, easily understandable, and delivered sufficiently in advance.
- 4.15: Courts shall employ the services of prospective jurors so as to achieve the best possible use of them with a minimum of inconvenience.
- 4.16: Courts shall provide adequate protection for jurors from threats and intimidation.
- 4.17: Courts shall provide an adequate and suitable environment for jurors, and jury facilities shall be arranged to minimize contact between jurors and parties, counsel and the public.
- 4.18: Persons called for jury service shall receive a reasonable allowance.
- 4.19: Employers shall be prohibited from penalizing employees who are called for jury service.

IV. Jury consideration and deliberations

- 4.20: Procedures shall be provided to prevent a trial from being terminated because of unforeseen circumstances which would reduce the number of jurors.
- 4.21: Courts shall provide some form of orientation or instruction to persons called for jury service to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors.
- 4.22: In simple language, the trial judge shall:
- i) directly following empanelment of the jury, give preliminary explanations of the jury's rôle and of trial procedures;
 - ii) prior to commencement of deliberations, direct the jury on the law.
- 4.23: A jury's deliberations shall be held in secrecy. Jurors shall not make public reasons for their decisions.
- 4.24: a) A jury shall be sequestered only for the purpose of insulating its members from improper information or influence.
b) Standard procedures shall be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors is minimized.

- V -

Assessors

I. Status

- 5.01: In defining assessor the following shall be considered: In general, on certain judicial, quasi-judicial bodies or administrative tribunals the assessor sits with a judge, magistrate or other jurist, to assist him in his duties. In most cases he is a person who does not necessarily have legal training, but who has some specific professional qualification or socio-economic expertise that pertains to the subject-matter under consideration.

- 5.02: In some cases, the assessor shares with his legally-trained colleague responsibility for the decision to be rendered: this then becomes a multi-disciplinary judicial or quasi-judicial body.

II. Appointment

- 5.03: Unless he is selected by the parties unanimously, the assessor shall be appointed by a neutral authority not involved in the dispute.
- 5.04: Unless agreed upon by the parties or provided by law, the assessor shall be paid according to the decision of a neutral authority not involved in the dispute.
- 5.05: The assessor shall be selected for reasons of integrity and competence especially relevant to the matter to be considered by him.
- 5.06: The assessor shall enjoy a tenure which guarantees his independence; if he serves on a permanent basis he shall be guaranteed security, adequate remuneration and conditions of service.
- 5.07: Before commencing his duties, the assessor shall take an oath or affirmation of office.

III. Exercise of mandate

- 5.08: In the decision-making process, the assessor shall be free from any orders or instructions by the authority which has appointed him, by the parties or by the professional associations to which he belongs.
- 5.09: The assessor shall have the right to participate in the decision with complete freedom and independence in the area of his jurisdiction.
- 5.10: The assessor shall behave in such a manner as will maintain the dignity of his position and the impartiality and independence of justice.
- 5.11: The assessor shall not sit in a case where a reasonable apprehension of bias on his part may arise.

5.12: The assessor shall be free to withdraw for generally-accepted reasons.

IV. Powers and immunity

5.13: The assessor shall be vested with the authority, immunity and powers necessary to carry out his duties.

5.14: The assessor shall not be sued or harassed for acts and omissions in his official capacity.

V. Dismissal

5.15: The assessor shall not be dismissed in the course of his mandate except for incapacity or misbehaviour.

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