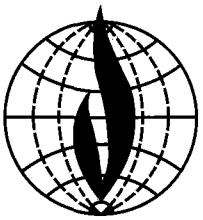
CIJL Yearbook



Vol. II

Legal Protection of Lawyers

Centre for the Independence of Judges and Lawyers

April 1993
Editor: Mona A. Rishmawi

Established in 1978 by the International Commission of Jurists in Geneva, the Centre for the Independence of Judges and Lawyers:

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

In pursuing these goals, the CIJL:

- works with the United Nations in setting standards for the independence of judges and lawyers. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers endorsed by the UN General Assembly;
- organizes conferences and seminars on the independence of the judiciary and the legal profession. Regional seminars have been held in Central America, South America, South Asia, South-East Asia, East Africa, West Africa and the Caribbean. National workshops have been organized in India, Nicaragua, Pakistan, Paraguay and Peru;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- provides technical assistance to strengthen the judiciary and the legal profession;
- publishes a Yearbook in English, French and Spanish. It contains articles and documents relevant to the independence of the judiciary and the legal profession. Over 5,000 individuals and organizations in 127 countries receive the CIJL Yearbook;
- publishes a yearly report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers" world-wide.

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Subscriptions to the Yearbook and the annual report on "Attacks on Justice: The Harassment and Persecution of Judges and Lawyers" are Swiss francs 25, each, or for combined subscription Swiss francs 43, including postage.

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Editorial

> Law and lawyers are instruments of social order. Without law, the evolution of ...[humankind] to its present stage of development would not have been possible. Through the law, society is preserved and ... [the person] is enabled to live and love and labour in peace from generation to generation.[1]

Law regulates society. Every citizen is expected to adhere to its provisions. This power, which is embodied in the very concept of law itself, may be subject to abuse. When this happens, law becomes an instrument of oppression.

It is the judges and lawyers of every society who should uphold the ideals of just law. It is they who should explain to the governed and to the governor the concept of the Rule of Law. It is they who should point out that the Rule of Law embraces a broader concept of justice that is far from the mere application of legal rules. It is they who should emphasis that if law is to be just, its ultimate goal should be the protection of human rights. Through exercising the right of defence, lawyers everyday put to test their country's respect of human rights.

For lawyers to be able to perform these crucial functions, they should be protected from improper interference. They should be able to organize themselves in free and independent bar associations. Law should embody adequate safeguards to allow them to function.

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1 ICJ Conference of Bangkok, 1965, Committee III, *in* The Rule of Law and Human Rights: Principles and Definitions, at 36 (International Commission of Jurists 1966).

This second volume of the *CIJL Yearbook* concentrates on the role of lawyers in protecting human rights. It uses the 1990 UN Basic Principles on the Role of Lawyers as a standard. These twenty-nine Basic Principles focus on the following issues: provisions for effective access to legal assistance for all groups within society; the right of the accused to counsel and legal assistance of their own choosing; education of the public on the role of lawyers in protecting fundamental rights and liberties; training and qualifications of lawyers; the role of governments, bar associations, and other professional associations; the right of lawyers to undertake representation of clients or causes without fear of repression or persecution; and lawyers' obligation to keep communications with clients confidential, including the right to refuse to give testimony on such matters.

The Basic Principles constitute the minimum. As F. S. Nariman correctly points out in his contribution to this volume, the attempt to achieve universal rules has meant the adoption of some principles which reflect the lowest acceptable denominator.

Mr. Nariman reminds us that in most societies, ordinary persons think that lawyers are more protected than themselves. Hence, the respect of lawyers' rights as defence counsels is a yard-stick to measure a country's adherence to international human rights instruments. The Rule of Law and human rights are particularly endangered in countries where even lawyers are harassed and persecuted for their professional functions.

Mr. Nariman also reminds lawyers of their social obligations, and urges them not to be confined to rendering their services only to commercial clients. During his examination of India's legal guarantees for the role of lawyers, he criticizes

lawyers' strikes. I share his basic sentiment that conscientious lawyers cannot stop rendering their services to the community.

Nabil al-Hilali identifies three levels of protecting the legal profession: to what extent law recognizes the right of defence; to what degree it guarantees it; and, what immunity it grants during the exercise of this right. After exploring these concepts under Egyptian law, he tells us to what degree these guarantees are respected in practice.

Pierre Lambert then embarks on a similar analysis of the independence of lawyers in Belgium. He warns us not to see lawyers as merely "auxiliaries" of justice, but as full partners in the administration of justice.

There are currently no practising lawyers in Cambodia. During the tragic years of massacres, lawyers either were killed, or fled the country fearing prosecution. Moreover, there is no functioning judicial system. Basil Fernando, who deals with this problem on daily basis in his capacity as a senior United Nations human rights official in Cambodia, explores the problems of the existing system and strives to envisige a better future .

Professional associations of lawyers have a vital role to play in upholding professional standards and ethics at the national and international level. The Centre for the Independence of Judges and Lawyers (CIJL) advocates that national and regional bar associations create special committees to focus on the protection of lawyers and judges in other countries. The Bar Council of England and Wales established such a committee. We are very encouraged by its first report which we publish here with the hope that it will inspire other bar associations to take similar action.

Before I end, I would like to acknowledge the special effort of my colleague, Peter Wilborn, legal assistant with the CIJL. He and I have shared long hours of work. I would like to thank him not only for his professional skills, devotion, and enthusiasm, but above all for his ability to stay cheerful and pleasant, even while we are trying to meet tight deadlines.

Many lawyers throughout the world will identify with many of the issues and concerns raised in this volume. Through providing this forum, the CIJL hopes that it is advancing the understanding and, therefore, the protection of the independence of lawyers throughout the world. As the International Commission of Jurists said in 1965, however,

> The lawyer must look beyond the narrower confines of the law, and gain understanding of the society in which he lives, so that he may play his part in its advancement. The inspiration of the lawyers of the world could play a large part in moulding free societies of the future, able to promote the full dignity of man, and to withstand the perils and dangers of the changing times.[2]

Mona A. Rishmawi
CIJL Director

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2 Id.

Foreword

The legal profession is rooted in long standing tradition – tradition of honesty, integrity and service. Lawyers have, throughout the ages, maintained the honour and dignity of their noble profession and assisted in the quest for justice with unfluctuating devotion and unwavering faith. They have served the cause of justice, truly and well, and it can no longer be disputed that they are an indispensable part of civil society.

In every kind of civilization and in every form of political ordering, the pursuit of justice occupies a prime place. It is a basic and primordial instinct in every human being, and every society strives to attain it through its legal system. The degree of success attained by the legal system may be measured by the extent to which it succeeds in giving the instinct for justice. However well-devised a legal system may be, it cannot succeed in reaching this goal and fulfilling the instinct for justice, unless there is a strong and independent legal profession, ready to espouse the cause of justice and when we talk of justice, we mean not commutative justice but social justice – justice which seeks to bring about equitable distribution of the social, material and political resources of the community. Lawyers have to transcend their immediate preoccupation with the cases of their clients, with facts, statutes, briefs, oral arguments, et cetera, and realize their broad and lofty mission of serving the ends of social justice. The role of lawyers, today, more than ever before, is not only to uphold their professional concerns and to support their clients' causes. They are, on account of their talent, knowledge and skill coupled

with high prestige and dedication, in a unique position to blaze a trail to social justice, the common future goal of humankind.

Obviously, in order to be able to attain this goal, lawyers must be allowed to function with true independence. They must be fearless and independent with total commitment to justice. This volume of the *Yearbook* of the Centre for the Independence of Judges and Lawyers (CIJL) is dedicated to the consideration and analysis of the independence of lawyers in various countries and to defining the role of lawyers in using this independence for the protection of human rights.

Justice P.N. Bhagwati
Former Chief Justice of India
Chairman, CIJL Advisory Board

I - ARTICLES

Legal Guarantees on the Role of Lawyers in Protecting Human Rights:

The Indian Experience

*F.S. Nariman**

Introduction

The Universal Declaration of Human Rights, adopted in 1948, states: "It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law." What really gives meaning to human rights is the capacity and competence of an independent legal profession to uphold them, and the willingness of an independent judiciary to protect them. If an independent judiciary is the backbone of the Rule of Law, as it has been often described, an independent legal profession is the catalyst that helps achieve it.

In any country, therefore, what matters is not the mere existence of judges and lawyers. Every society has had, in one form or another, judges, courts and lawyers. This proves nothing. It is their quality, their approach and, above all, their independence that really matter.

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* Senior Advocate, Supreme Court of India; President, Bar Association of India; Member, Executive Committee, International Commission of Jurists.

International Standard-Setting: Advantages and Disadvantages

It was on the assumption of a common set of standards, by which such independence could be judged, that the 1985 UN Basic Principles on the Independence of the Judiciary[1] and the 1990 UN Basic Principles on the Role of Lawyers[2] were drafted. The landmark UN Study on the Independence of Judges and Lawyers in 1985 furnishes the *raison d'être* for the Basic Principles on the Role of Lawyers. It records that:

> Sometimes when the independence of the legal profession is besieged within the country and internal protest proves to be of little avail, the solidarity of the international community in general, and of the legal profession in other countries of the world, can prove to be an important factor.[3]

Much effort was directed to formulate a set of principles on the role of lawyers applicable in all regions and under different legal systems. International standard-setting on the role of lawyers has involved much hard work amongst experts and statesmen over the years, and the road to "Basic Principles" is strewn with many

1 G.A. Res. 146, U.N. GAOR, 40th Sess. (1985), *reprinted in* 25-26 CIJL BULLETIN 14 (1990).

2 G.A. Res. 166, U.N. GAOR, 45th Sess. (1990), *reprinted in* 25-26 CIJL BULLETIN 27 (1990).

3 E/CN.4/Sub.2/1985/18/Add. 2 at para. 364.

"drafts."[4] As with all such attempts at universalization, however, what has been ultimately achieved is minimalization, the prescription of minimum, not optimum, norms of independence. To accommodate the largest number of countries and a variety of legal systems, compromises were inevitable. The result has been that regional differences, though noticed, had to be ignored or were slurred over.

The 1983 World Conference on the Independence of Justice held at Montreal framed the Draft Declaration on the Independence of Justice, known as the "Montreal Principles." The principles contained a separate section on the role of lawyers. The conference was well represented as it was attended by delegates from thirty regional jurists' associations around the world, and by members of four international courts, including the International Court of Justice. The Montreal Principles declared : "No Court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client."[5]

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4 *See, e.g.,* the "Noto Principles" of May 1982, *reprinted in* 25-26 CIJL BULLETIN 72 (1990); the Montreal Declaration of June 1983, relevant excerpts *reprinted in* The Independence of Judges and Lawyers in South Asia, Report of a CIJL Seminar held in Kathmandu (1987); Draft Universal Declaration on the Independence of Justice (hereinafter Singhvi Declaration), *reprinted in* 25-26 CIJL BULLETIN 51 (1990); draft principles prepared at an international experts meeting in Baden, Austria in November, 1987, later modified at the Eighth UN Crime congress (Vienna June, 1988), then discussed and vetted at five regional preparatory meetings held in 1989, from which there emerged a new draft set of principles, which were ultimately adopted by consensus, at the Eighth UN Congress on the Prevention of Crime at its meeting in Havana, Cuba in 1990, and welcomed by the General Assembly, *supra* note 2.

5 Montreal Declaration, *supra* note 4, at para. 3.14.

This simple and straightforward affirmation was diluted, by much circumlocution, by the 1988 UN Rapporteur's Draft Universal Declaration on the Independence of Justice (the "Singhvi Declaration"). In its revised version, the "guarantee" read:

> Save and except when the right of representation by a lawyer before an administrative department of a domestic forum may have been excluded by law, or when a lawyer is suspended, disqualified or disbarred by an appropriate authority, no court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client, provided, however, that such exclusion suspension disqualification or disbarment shall be subject to independent judicial review.[6]

This is a confusing amalgam of concepts all in one clause and an omission of the essence of the Principle agreed upon in Montreal, *i.e.*, the universal guarantee of representation by a lawyer before any court or administrative authority. Principle 19 of the UN Basic Principles on the Role of Lawyers adopted an even narrower version than provided in the Singhvi Declaration. It reads:

> No Court or administrative authority *before whom the right to counsel is recognized* shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.[7]

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6 Singhvi Declaration, *supra* note 4, at para. 86.

7 UN Basic Principles on the Role of Lawyers, *supra* note 2 (emphasis added).

For the constitutions that recognize preventive detention,[8] Principle 19 offers no guarantee at all: "No court or administrative authority before whom the right to counsel *is recognized....*" Recognized by whom? Obviously, either recognized by the national law, or by the national court or administrative authority. The "guarantee" is worthless if the national law does not recognize the right of representation before the administrative authority[9] or if the authority chooses not to recognize the right of a detainee to be represented by a lawyer. Obviously, the relevant above-quoted principle adopted at Montreal provided better safeguards to lawyers, not for their own benefit, but for the protection of the human rights of their clients.

At a CIJL seminar held in Kathmandu on the independence of judges and lawyers in South Asia, the need of dealing specifically with cases of preventive detention in the Asian region found expression in the following recommendations:

> - There should be no preventive detention except in times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. [10]
>
> - In the case of preventive detention (other than detention by court order) no person should be held for a

8 As do many Constitutions in South Asia - including India.

9 Like an authority reviewing a detention order or the Advisory Board, in India, for instance.

10 The Independence of Judges and Lawyers in South Asia, *supra* note 4, at recom. 27.

period exceeding 3 months unless such person is produced before a Board of Review and such Board authorizes a further period of detention up to 3 months. No such detention should extend beyond 12 months. The Board should have access to all information and documents should be disclosed to the detainee and/or detainee's counsel unless the Board decides that such disclosures will affect public security. The Board should consist of two judges of superior courts. *The detainee should be entitled to legal representation.*[11]

This provision is even more specific than the relevant Montreal principle because the effort at Kathmandu was region-oriented. Universalization has its advantages, but also its drawbacks, and the lack of regional input into the UN Basic Principles is one of the disadvantages of a global approach.

Public Perceptions of the Legal Profession in India

What are the *legal* safeguards or guarantees for lawyers in India in their role of protecting human rights? Very few in fact. Only Article 22 (1) of the Constitution addresses this matter. The real constitutional guarantor in India is the Supreme Court in its role of final interpreter of fundamental rights, and the ultimate guarantor of the human rights role of lawyers is public opinion. A few words first about the "ultimate guarantor":

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11 *Id.* at recom. 28 (In the 1985 study on states of emergency, the ICJ adopted more elaborate guarantees in cases of administrative or preventive detention, *cf.* States of Emergency: Their Impact on Human Rights 460 (I.C.J. 1985) - ed.).

a. "Seeing Ourselves as Others See Us"

To see ourselves as others see us is vital. This is because the legal profession is accountable to the people it professes to serve. Many people, many reasonable people in India, Pakistan, and Bangladesh that share the same Anglo-Saxon heritage, go to lawyers with about the same degree of hesitation they go to public hospitals: they go only because they have to! The reason for this is that they believe that the legal profession is no longer proficient, that it lacks integrity, and that it does little to serve the people. This is because lawyers in general do not perform according to the expectations of the people they are meant to serve.

The experience is not confined to the Indian subcontinent. In a speech to the American Bar Association a few years ago, former Chief Justice Warren Burger of the United States reminded his audience of what society expects of lawyers. He said:

> The entire legal profession, lawyers, judges and law teachers, has become so mesmerized with the stimulation of the courtroom contest that we tend to forget that we ought to be healers of conflicts. Doctors, in spite of astronomical costs, still retain a high degree of public confidence because they are perceived as healers. Should lawyers not be healers?

To be effective in a developing society, to cater to the need of the underprivileged (as well as to corporations), I believe that lawyers need to cultivate this healing touch. For those of us who already have it, we need to convince the public by our actions, not words, that we are not at our best only in litigation. I recall what a wise English judge said long ago, that litigation is an activity that has not markedly contributed to the happiness of

mankind. The image of the legal profession in the developing world would greatly improve if lawyers helped to contribute more to "the happiness of mankind." An ounce of sound advice at the right time is worth more than a ton of argument in court.

b. The Perennial "Strike-Syndrome"

An independent legal profession? Yes, but the independence of the profession must be perceived to be real and apparent, not for protecting the interests of lawyers, but for the public they are meant to serve. When, for instance, lawyers go on strike, and for long periods, as they frequently do in India today, the public response to an independent legal profession is that it may be a good idea, *if* and *when* lawyers decide to work.

When lawyers look to their own rights and privileges, important as they are, to the exclusion of serving the litigating public, people, reasonable people, question lawyers' usefulness to society. When judges, who are traditionally accustomed to the assistance of the legal profession in dispensing justice, get used to the compulsions of a prolonged strike syndrome, and begin to think that they can dispense better justice without lawyers, the entire profession of practising lawyers is in peril.

The professional importance of the lawyer to the community seeking justice is comparable to the professional importance of a surgeon ministering to those needing immediate surgical attention. There is a close similarity in their respective functions.[12] The client whose case is being argued is not

12 Illustrated by the facetious saying: "Have I left anything out?" says the lawyer to his junior before concluding his address. "Have I left anything in?" asks the surgeon of his assistant before completing the operation!

functionally different from the patient lying on the operating table. Both are at the mercy of professional expertise.

The duty of lawyers to ensure legal representation for their clients is not amongst the "Basic Principles" approved by the UN General Assembly. This is possibly because it could not have occurred to the drafters to provide for this regional aberration. Conscious of this problem, however, regional representatives at the Kathmandu Seminar favoured an *"effective* legal representation" resolving that in order that legal representation be effective, there should be "legal practitioners of competence, *commitment,* and integrity."[13] A striking lawyer is not a lawyer committed to his/her profession.

c. "More Equal Than Others"

Despite all this criticism, ordinary people in developing countries such as India see lawyers as "more equal" than themselves. They regard lawyers as trained to use the freedoms granted by the country's constitution and as persons who know better than ordinary people how to use these freedoms. In times of grave crisis, constitutional or national, people look to lawyers, and their associations, to see how they react. I can recall two telling instances, one in the distant past and another just a few months ago.

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13 The Independence of Judges and Lawyers in South Asia, *supra* note 4, at para. 44 (emphasis added).

First about the distant past: In India, though not a constitutional requirement, but as a matter of constitutional practice, the most senior judge in the Apex Court is appointed Chief Justice of India. This was so ever since independence. It was customary for the incumbent Chief Justice, before his reaching the constitutional age of retirement, to recommend to the Government the next senior judge on the Court as his successor. Accordingly, in January 1973, Chief Justice Sikri, before his impending retirement at the age of 65, recommended the next senior judge, Justice Shelat, as his successor. This was at a time when Chief Justice Sikri was residing over the largest Bench of Justices that has ever sat to determine a case.

In India's great constitutional case, *Kesvananda Bharati,* a Bench of thirteen Justices was specially constituted to hear and decide the fiercely controversial question of whether Parliament, in the exercise of its constituent power, and with the requisite two-thirds majority, was competent to amend any and every provision of the Constitution of India. The Government argued before the Bench for an unbridled power of amendment. The Government lost narrowly, six Justices in favour of its stand, seven against.

Encouraged by the division amongst the Court members, the Government of the day was emboldened to disregard Chief Justice Sikri's recommendation of Justice Shelat as his successor.[14] Bypassing the next three senior most judges (Shelat, Hegde and Grover, JJ.), who had pronounced against the

14 A useful and timely reminder of how quickly governments cash in when judges are split into different camps!

Government in *Kesavananda Bharati,* the successor Chief Justice was hand-picked from amongst the judges who supported Government's stand in that case. In April 1973, Justice A.N. Ray was appointed the Chief Justice of India.

The country was aghast. It looked up to the bar associations to provide leadership in this grave crisis. The bar associations around the country responded, almost with unanimity, by roundly condemning the supersession, as it breached an unbroken record of past constitutional practice. As a result, "supersession" in India's judicial history is now a thing of the past. It has not been attempted by any Government for nearly twenty years.

More recently, when the demolition of the religious structure at Ayodhya[15] shook and shocked the country just a few months ago, the Bar Association of India unanimously condemned the incident, proclaiming that it was "a gross affront to our secular Constitution and the rule of law." The resolution went on to say that it was "the duty of every lawyer in the country regardless of his/her religious beliefs or political persuasion to mobilize public opinion for restoration of the destroyed structure." It also condemned damage to or destruction of religious structures elsewhere in the world. I like to believe that this resolution helped to unite secular forces in the country.

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15 6 December 1992.

India's Guarantees on the Role of Lawyers in Protecting Human Rights

a. The Legal Provisions

There is only one legal provision in India that guarantees the role of lawyers in protecting human rights. It is contained in the Fundamental Rights Chapter of the Constitution of India.[16] Under Article 22 (1) of the Constitution, the right of an arrested person to consult and be defended by a legal practitioner of his choice is guaranteed.[17] This provision was already contained in statutory law in British India.[18] The framers of India's Constitution, however, wanted this right to be protected from laws made by Parliament and by State Legislatures.

There is no other guarantee provided by law. The Advocate's Act of 1961, which secures a unified legal profession throughout the country and provides for autonomous and independent bar councils, both in the States and at the centre,

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16 Ch. III.

17 Article 22 reads as follows:
(1) No person who is arrested shall be detained in custody without being informed as soon as may be, of the ground of such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice.
(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
(3) Nothing in clauses (1), (2) shall apply -
a) to any person who for the time being is an enemy alien; or
b) to any person who is arrested or detained under any law providing for preventive detention.

18 Criminal Procedure Code § 340 (i) (1873).

contains a provision entitling advocates on the roll of any State to practice *as of right* throughout India in all courts and tribunals, and before any authority or person before whom such advocate is by or under any law entitled to practice. But this provision, Section 30, has not been brought into force, and has, therefore, no legal sanction.[19] The Bar Council of India and State bar councils have been clamouring for Section 30 to be brought into force, unsuccessfully thus far. One enterprising advocate even filed a Public-Interest Petition in the Supreme Court of India for a mandamus.[20] The Court saw no reason why the section should not be brought into force. Since an earlier Constitution Bench judgement had ruled, however, that no mandamus would lie against the Government compelling it to bring into force enacted law, the case now stands referred to a five-Judge Bench. Meanwhile, three decades after its enactment, Section 30 remains a dead letter.

b. The Law as it Operates in Practice

Article 22 (1) provides that the right to consult an advocate of choice and be defended by him/her shall not be denied to an arrested person. This does not mean, said the Supreme Court in April 1978, that persons not under arrest or in custody could be denied that right. Justice Krishna Iyer, speaking for the Court, said the spirit and sense of Article 22 (1) is that it is fundamental

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19 Under the scheme of legislative drafting in India, a Bill when passed by both Houses of Parliament (and assented to by the President) becomes an Act, but often such Acts provide that its provisions will come into force on such date as the Government by notification determines; generally, such a provision is inserted merely for administrative convenience.

20 Altemesh Rein v. Union of India, A.I.R. 1988 S.C. 1768.

to the Rule of Law that the services of a lawyer shall be available for consultation for any accused person under circumstances of "near custodial interrogation."[21]

Article 20 (3) of the Constitution guaranteed that no person accused of any offence shall be compelled to be a witness against himself. The observance of the right against self-incrimination was held to be best promoted by conceding to an accused the right to consult a legal practitioner of his choice. During a police interrogation, therefore, the person interrogated is entitled, as of right, to the services of a lawyer.[22]

But when the same right was more recently claimed during an investigation, before customs officers, excise officers and officers of the Foreign Exchange Directorate, the claim was denied by the Supreme Court. The Court grounded its decision on the basis that prior judicial decisions considered the protection against testimonial compulsion as provided for in Article 20 (3) to be restricted only to persons interrogated by police officers, not by other statutory authorities having police powers. It was also argued in that case that, where a person was called away from his house and questioned in the atmosphere of a customs officer's room without the assistance of his lawyer or friend, the action was violative of Article 21 of the Constitution, known as the Life and Liberty Clause.[23] The argument was rejected, with some

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21 Nandini Satpathy v. P.L. Dani, A.I.R. 1978 S.C. 1025.

22 This article also appears in the Fundamental Rights Chapter.

23 Article 21 provides:
"No person shall be deprived of his life or personal liberty except according to procedure established by law."

uncharitable observations on the role of lawyers. "The purpose of inquiry under the Customs Act and other similar statutes," said the Court,

> will be completely frustrated if the whims of the persons in possession of useful information for the departments are allowed to prevail. *For achieving the object of such an inquiry if the appropriate authorities be of the view that such persons should be disassociated from the atmosphere and the company of persons who provide encouragement to them in adopting a non-cooperative attitude to the machineries of law, there cannot be any legitimate objection in depriving them of such company.* [24]

In view of the constitutional embargo in Article 22 (3)(b),[25] which excludes the benefit of the right guaranteed under Article 22 (1) to persons under detention, the Supreme Court has held[26] that a detainee has no right to appear through a legal practitioner in proceedings before an Advisory Board set up under the law, for example, the 1980 National Security Act, to consider whether there are adequate grounds for his detention. The Court, however, held that since the result of the proceedings before the Board had a serious impact on a citizen's liberty, he was entitled to be heard before the Advisory Board "assisted by friend," although the statute permitted the detainee to be heard only

24 Emphasis added.
25 *See supra* note 17 for the text of the article.
26 A.K. Roy v. Union of India, A.I.R. 1982 S.C. 710.

in person. The reason for this judge-made law is basically humanitarian. As explained by the Constitution Bench in *A.K. Roy:*

> A detenu, taken straight from his cell to the Advisory board's room, may lack the ease and composure to present his point of view. He may be tongue-tied, nervous, confused or wanting in intelligence, and if justice is to be done, he must at least have the help of a friend who can assist him to give coherence to his stray and wandering ideas. Incarceration makes a man and his thoughts dishevelled. Just as a person who is dumb is entitled, as he must, to be represented by a person who has speech, even so, a person who finds himself unable to present his own case is entitled to take the aid and advice of a person who is better situated to appreciate the facts of the case and the language of the law. It may be that denial of legal representation is not denial of natural justice *per se*, and therefore, if a statute excludes that facility expressly, it would not be open to the tribunal to allow it. Fairness as said by Lord Denning M.R. in Maynard v. Osmond (1977) 1 QB 240, 253: (1977) 1 All ER 64 can be obtained without legal representation. But, it is unfair - and the statute does not exclude that right - that the detenu should not even be allowed to take the aid of a friend. Whenever demanded, the Advisory Boards must grant that facility.

Whenever an Advisory Board constituted under a law of preventive detention has refused to grant the request of a detainee to be assisted by a friend at the hearing of his representation before the Board, the detainee has been ordered to

be set at liberty by the courts, irrespective of whether any prejudice was shown.[27]

Lawyers are excluded from the Advisory Board room. But is the detainee entitled to avail of the services of a lawyer for making his written representation to the Board? In the 1980 *Francis Coralie* case,[28] this right was upheld by a Division Bench of two Justices of the Supreme Court. In that case the Court held that the detainee had a right to consult a lawyer of his choice for the purpose of preparing his representation, advising him as to how he should defend himself before the Advisory Board, and preparing and filing a *habeas corpus* petition or other proceedings for securing his release. The law declared in *Francis Coralie* holds good today.

Conclusions

a. The Bad News

When flying at rare altitudes, the airline passenger often experiences rough weather for seemingly no apparent reason. The pilot explains this as "high altitude turbulence." The legal profession, in this country as in many parts of the world, is at present passing though a similar phase. High Altitude Turbulence: the unsettling disturbance caused by the extreme pressure of public expectation on the role of the legal profession, and the poor response of its members; their incapacity to perform as expected of them. All of this is bad news.

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27 *E.g.,* Anil Vats v. Union of India, A.I.R. 1991 SC 797.

28 Francis Coralie v. Union Territory of Delhi, A.I.R. 1981 SC 746.

b. The Good News

There is good news, too. The good news is that, without the support of legal guarantees, the lawyer in India has shown that he is at his best when the going is rough. An impartial administration of the law is like oxygen in the air: people know and care little about it till it is withdrawn. When it was withdrawn during the internal emergency, declared in June 1975, the majority of those who stood up and were counted were the country's practising lawyers. They openly fought the establishment, espousing human rights causes. The organizations established during this "phony" emergency for upholding civil liberties are flourishing today: the Citizens for Democracy, People's Union for Civil Liberties, People's Union for Democratic Rights, etc., are staffed and led mainly by lawyers. An increasing number of practising lawyers, as well as of former judges, academic lawyers and law journalists, is now crusading against varying forms of injustice and exploitation, and assisting in promoting change and development in favour of the poor and the deprived, particularly through Public Interest Litigation, an innovative technique developed by India's judges with the active assistance of the legal profession.

Even with all this, an independent legal profession cannot survive for long without public support, either in India or elsewhere. I recall what Justice Dorab Patel said in his keynote address at the Kathmandu Seminar. He said: "In the long run, the manner in which judges and lawyers discharge their duties can build up public opinion for the courts, and public opinion is a better safeguard for the independence (of judges and lawyers) than law and constitutional guarantees." What he said is not restricted to his country, Pakistan. It applies to many countries, including India.

Safeguards for Legal Independence in Egypt:

Between Law and Practice *

Ahmad Nabeel El-Helali **

Introduction

The protection of the human rights and basic freedoms enshrined in various international instruments requires that each person have access to legal services provided by independent jurists. Lawyers, therefore, should be enabled to perform their professional function freely, independently, and efficiently. In other words, the legal profession will not be able to fulfil its noble aims and objectives unless the right of defence is upheld by law, and unless lawyers are guaranteed the freedom of defence and ensured immunities while exercising professional duties.

This article attempts to examine the extent to which Egyptian legislation recognizes the right of defence; the degree to which it guarantees the freedom of defence; the extent to which the law grants immunity during defence; and, finally, the extent to which these legal provisions are respected.

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* Translation from the Arabic original.

** Lawyer and member of the Egyptian Organization of Human Rights.

Constitutional and International Guarantees

The concept of the independence of the legal profession has long been established in Egypt. The 1971 Egyptian Constitution guarantees all citizens the right of defence. Article 67 provides that "a suspect is innocent unless proven otherwise in a court of law that protects defence safeguards." It adds that "a suspect of a felony shall be provided with a lawyer to defend him." Article 69 provides that "the right to defence, whether directly or through an attorney, is guaranteed." In addition, Article 71 guarantees "that all arrested or detained persons shall be immediately informed of the reasons for their arrest or detention; and, they shall be entitled to contact or seek the assistance of any person they wish to inform of what has happened, as regulated by law."

The wisdom behind these protections is that it is not possible to imagine a fair trial without the right to free defence. This is because providing suspects with lawyers to defend them ensures correct judicial procedure and strikes a balance between suspects and the indicting authorities.

Egyptian law considers lawyers as associates in the judicial process.[1] They are partners to judges in carrying out the burdens of the judicial institution, establishing justice, and upholding the Rule of Law.[2] Lawyers, therefore, have been named the standing judiciary to distinguish them from the sitting judiciary, *i.e.*,

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1 Article 1 of the Legal Profession Law No. 17 (1983) states: "The legal profession is a free profession. It participates with the judiciary in establishing justice, upholding the rule of law, and protecting the citizens' rights and liberties."

2 *Id.*

judges. Such terminology requires that lawyers enjoy the same independence and safeguards enjoyed by judges.

Moreover, the international community, not satisfied with the defence safeguards enshrined in different constitutions, established a set of criteria and guarantees on the role of lawyers: the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders[3] adopted by consensus the UN Basic Principles on the Role of Lawyers. The Conference recommended that these Principles be implemented, both nationally and regionally. The United Nations General Assembly specifically welcomed the Basic Principles and invited "[s]tates to take into account and to respect the Basic Principles within the framework of their national legislation and practice."[4]

Upholding the Right of Defence

a. Access to Lawyers during Detention

Human rights protection requires that each person have access to independent legal assistance. Accordingly, the First Principle of the Basic Principles on the Role of Lawyers provides that "All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings." Principle 7

3 Held in Havana, Cuba, 27 Aug.-7 Sept. 1990.

4 G.A. Res. 166, U.N. GAOR, 45th Sess. (1990), *reprinted in* 25-26 CIJL BULLETIN 27 (1990).

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

As stated above, Egyptian law does indeed guarantee the right of defence to all citizens. In addition to the constitutional provisions, Article 139 of the Law of Criminal Procedures states that "any person who is arrested or preventively imprisoned shall be immediately informed of the reasons of his/her arrest or imprisonment. He/she has the right to contact any person they may wish to inform of what has happened and the right to seek a lawyer's assistance."

In practice, however, these provisions are impeded. Often, Security Forces deprive political detainees of their constitutional rights to contact their families or lawyers, and detain them for prolonged periods of time in detention centres without informing their families of their whereabouts. This facilitates torture as well as the initiation of formal interrogation procedures, including extracting confessions, in the absence of a lawyer.

b. Provisions for Legal Aid

The UN Basic Principles on the Role of Lawyers requires that legal services be provided to "all persons ... without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status."[5]

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5 *Id.* at art. 2. *See also id.* at arts. 3, 6.

According to Egyptian law, legal services are to be provided to the disadvantaged. Article 69 of the Constitution provides that "Legal provisions shall guarantee to those who are financially disadvantaged access to the judiciary system in order to defend their rights."

The Legal Profession Act regulates this legal assistance. Amongst the objectives of the Bar Association is to guarantee the right of defence for the citizens and to provide legal assistance for the disadvantaged.[6] Subsidiary councils of the Association are further required to establish offices to provide legal aid to the disadvantaged, each within their geographical competence.[7] This legal assistance shall include: instituting cases and attending the proceedings; being present at investigations; providing legal advice; and drafting contracts.[8] This provision, however, has not been implemented since its issuance in 1983. Nonetheless, the national Bar Association provides legal assistance to citizens, in conformity with Article 94 of the same law.[9]

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6 Legal Profession Act art. 121 (1983).

7 *Id.* at art. 93.

8 *Id.*

9 *Id.* at art. 94. Article 94 states: "Without prejudice to the above provision, the subsidiary council of the Bar shall delegate a lawyer to defend citizens who had been exempt from paying judicial fees, based on insufficient financial abilities. The assigned lawyer shall defend the person before the competent courts without charge."

The Attorney-General shall assign a lawyer for every unrepresented person indicted for a major crime.[10] The assigned lawyer may request fees from the public treasury if the convicted is poor.[11] The fees are assessed by the court in its final judgement.[12] Furthermore, the Committee for the Defence of Liberties in the Bar Association guarantees the right of free defence to every person accused of political crimes, irrespective of his/her political affiliation.[13]

Despite these guarantees, the practice in Egypt is that, at the beginning of recorded interrogations, the interrogator asks the accused persons whether they have a lawyer. If the answer is in the negative, the interrogator does not inform the accused persons of their right to a lawyer. This clearly violates Principle 5 of the Basic Principles on the Role of Lawyers.[14]

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10 *Id.* at art. 214.

11 *Id.* at art. 376.

12 *Id.*

13 This is provided for in Article 116 of the Internal Regulations of the Bar Association, which states that the "Council of the Bar Association and the subsidiary councils shall establish permanent committees to defend the liberties and the sovereignty of law in the Egyptian State."

14 Principle 5 reads: "Governments shall ensure that all persons are immediately informed by the competent authority of their rights to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offense."

Guaranteeing the Freedom of Defence

The right to defence remains an empty slogan unless lawyers are guaranteed freedom and independence in order to perform their professional duties without restrictions that may prevent them from serving justice and defending their clients. Freedom of defence includes the following elements:

a. Free Access to Clients

Lawyers should be allowed to contact their clients in preventive imprisonment as quickly as possible, and at any time. They should also be guaranteed the right to meet their clients without the presence of a third party. The Eighth Principle of the UN Basic Principles on the Role of Lawyers states that "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials."

Egyptian law contains parallel articles. For example, Article 39 of the Law on the Regulation of Prisons provides that prisoners' lawyers shall be authorized to meet clients alone, provided that written permission is obtained.[15] This right is further elaborated in the Bar Association Law which adds that

15 Law on the Regulation of Prisons No. 396 (1956). Permission may be obtained either from the public prosecutor or the investigating judge.

the lawyers have the right to visit clients at any time, and to see them alone and in a suitable place in the prison. [16]

Despite these articles, in reality, lawyers are not allowed to visit detainees except after petitioning to challenge the legality of the detention order. This procedure is only permitted after a thirty-day period following the arrest.[17] Furthermore, State Security officers normally insist on the presence of an officer during the interview between a lawyer and a political detainee. Even when lawyers are permitted to be alone with clients, the meeting is under surveillance.

b. Lawyers' Right to have Access to Files

Principle 21 of the Basic Principles on the UN Role of Lawyers provides that "It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time." Egyptian law also guarantees these protections.

16 Bar Association Law art. 53.

17 Emergency Law No. 162 (1958).

The Bar Association Law grants lawyers the right to have access to cases and judicial papers, and to obtain all relevant information related to the case at hand.[18] This law also requests courts, prosecutions, police departments and other administrative offices to facilitate the work of lawyers by providing them with relevant documents and enabling them to meet their clients. The Law goes on to emphasize that "the requests of lawyers should not be denied without legal justification." Moreover, Article 125 of the Law of Criminal Procedures gives lawyers access to the investigation file the day before questioning the client, unless the judge decides otherwise.

In practice, however, these provisions are not respected. Some departments of prosecution require formal conditions before giving the lawyer access to the proceedings, such as presenting a power of attorney from the accused, a condition that is difficult to fulfil in the appropriate time when the client is imprisoned.

c. Lawyers' Right to Attend Interrogations

In general, Egyptian law guarantees the right of lawyers to attend the interrogations of their clients. Several provisions, however, permit the suspension of this right under certain circumstances. The law also imposes formal restrictions that may

18 Bar Association Law art. 52.

impede lawyers from fulfilling their duties. Article 124 of the Law of Criminal Procedures exemplifies this trend. It states:

> In situations other than crimes "on foot," or those which necessitate rapidity for fear of loss of evidence, interrogators in major crimes may not interrogate the accused, or confront him with other accused persons or witnesses without inviting his attorney to attend, if the person has an attorney.

The accused shall declare in writing the name of the lawyer at the court's registrar, or through the prison director. The lawyer may also take up these procedures.

Lawyers may not speak without the judge's authorization. If the judge does not grant this authorization, the denial shall be recorded in the proceedings.

This provision means that the interrogator is not obliged to invite the lawyer to attend the proceedings, unless a lawyer has already been appointed. This deprives most persons accused of committing major crimes, who fail to appoint a lawyer, of this guarantee. Even if the accused has a lawyer, the law permits the lawyer not to be invited to attend the proceedings in cases of crimes "on foot," or those which necessitate rapid action for fear of loss of evidence. The necessity for rapid action is subjective, however, and it is left to the interrogator to determine this matter.

Additionally, Article 124 requires the accused to fulfil certain formal procedures to declare the name of his lawyer if he wants to enjoy the guarantee of inviting his lawyer to attend the questioning or encounter. Furthermore, the Article allows the investigator to forbid the lawyer from speaking, which renders

the presence of the lawyer a formality and deprives the lawyer of the right to ask questions, to object to certain questions, or to record observations in the interrogation file.

Moreover, the law requires that in all cases, the accused should not be separated from his lawyer during the interrogation.[19] In political cases, however, the investigating authorities do not allow lawyers to attend the interrogation under the pretext of the need for confidentiality. The authorities cite Article 77 of the Law of Criminal Procedures which enables the interrogator to proceed in the investigations without the presence of the accused or the lawyer if the interrogator deems this necessary "to reveal the truth."[20]

According to the Egyptian Court of Cassation, denying a lawyer access to an investigation does not render the proceedings null or void.[21] This judgement has been criticized by Egyptian jurists on the ground that it does not conform to a basic legal guarantee of the right of defence in the preliminary investigation

19 Law of Criminal Procedures art. 125.

20 Article 77 adds that as soon as this necessity is over, the interrogator should allow them to have access to the investigations.

21 According to the Egyptian Court of Cassation, "If the prosecution deprives the lawyer of attending the interrogation, this does not render the interrogation null or void, nor does it default the judgement. This is because the law, on the one side, does not necessitate the presence of the accused's lawyer; and because, on the other side, it allows the prosecution to proceed in the investigations in the absence of the accused if it considered it necessary to reveal the truth." Court of Cassation Judgment, The Criminal Department, 14/11/1929, The Criminal Rules of the Court of Cassation, Part 1, Rule 326, at p. 377.

which is that the separation of the accused and his lawyer is forbidden for whatsoever reason. The requirement of confidentiality should not mean that the accused should face the investigator alone without a lawyer since the accused and the lawyer are considered as one person in the case. If confidentiality is applicable for one, it is immediately applicable for the other.[22]

d. The Freedom of Pleading

To adequately fulfil their duties, lawyers must be granted enough time to prepare their defence and the right to plead freely without interferences and interruptions. Therefore, Principle 21 of the Basic Principles for the Role of Lawyers requires the authorities to ensure that lawyers have early access "to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients."

This right, however, is not respected before the exceptional courts in Egypt. Such courts normally do not provide lawyers with sufficient time to review the necessary documents and to prepare for the case. In two recent cases in which the accused were members of the Islamic Jihad (Holy War) group, the Higher Military Court refused the request made by the lawyers for postponement, despite the gravity of the accusations. The Court speeded up the process of these two cases and eventually

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22 *The Importance of the Presence of the Lawyer for the Accused in a Felony*, The Egyptian Modern Journal 7 (July 1961).

rendered sentences of death penalties against eight of the accused, and life imprisonment with hard labour for many others.

These guarantees are even further restricted. Article 47 of the Bar Association Law enables lawyers to follow any ethically accepted method to defend their clients. Article 70 of the same law, however, denies lawyers the right to make statements or declarations concerning the cases they are handling or to publicize any matter that may, in the course of the case, be beneficial to the interests of clients or harmful to the interests of opponents.

Article 70, therefore, restricts lawyers from correcting any published information in the media that is wrong or dubious and which may harm the interests of their clients, especially in political cases. This restriction violates Principle 23 of the Basic Principles on the Role of Lawyers, which states: "Lawyers like other citizens are entitled to freedom of expression."

e. Independence of Lawyers

If lawyers want to fulfil their duties, the independence of the legal profession is indispensable. It is hard to imagine an unfettered right to defence if lawyers cannot exercise their profession freely. This freedom can only be restricted by the legitimate needs of the client, professional ethics, and the Rule of Law.

Accordingly, Principle 14 of the Basic Principles on the Role of Lawyers provides:

> Lawyers, in protecting the right of their clients and in promoting the cause of justice, shall seek to uphold

human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

Article 1 of the 1983 Egyptian Legal Profession Law confirmed the freedom of legal profession. It emphasized that lawyers participate with the judiciary in order to achieve justice, to uphold the Rule of Law, and to guarantee all citizens the right to defence.

The Bar Association in Egypt includes not only private lawyers, but also those who work in the legal departments of the public sector companies. Because such lawyers are employed by the government, there is a potential threat to their independence. A 1973 law guaranteed, however, the independence of such lawyers.[23] Article 6 of this law confirmed that the legal departments practice their technical jurisdictions independently and without interferences.[24]

This independence is now threatened. A 1991 law[25] cancelled the 1973 law, and the new law fails to include a provision similar to Article 6. Such exclusion threatens the independence of thousands of lawyers who work in the public sector and deprives them of the few immunities that the 1973 law provided.

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23 Law No. 47 (1973).

24 Other than those prescribed by law.

25 Law No. 203 art. 42 (1991) (concerning companies of the public sector).

f. The Independence of the Bar Association

An effective protection of the independence of lawyers requires enabling them to organize into associations and professional groups. Thus, Principle 24 of the UN Basic Principles on the Role of Lawyers provides:

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

Article 120 of the 1983 Legal Profession Law states that the Bar Association is a professional independent institution. Article 121 includes among the objectives of the Bar Association the protection of the interests of its members and the guarantee of their independence in fulfilling their duties. Article 223 excludes the professional meetings of the Bar Associations from the general restriction in Egypt on public meetings.

Despite these provisions, the independence of the Bar Association has been gravely infringed. In 1981, the Egyptian Government dissolved the existing Bar Council.[26] The Minister of Justice appointed a temporary Council.[27] It seems that such measures were taken in response to the major role the Bar Association has played in defending democracy and human

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26 Law No. 125 (1981).

27 *Id.*

rights, and in opposing certain governmental legislation restricting freedoms. This is in addition to the Bar's continuous demand to end the state of emergency.

The dissolved Council challenged the constitutionality of Law 125 (1981) before the Supreme Constitutional Court on the basis that it violates Article 56 of the Egyptian Constitution, which states that the democratic establishment of associations and unions is a right guaranteed by law.

On 11 June 1983, the Supreme Constitutional Court accepted the challenge and announced the unconstitutionality of Law 125 (1981). The Court ruled:

> By enacting Article 56, the Egyptian legislature meant to affirm freedom of association in its democratic sense which includes, *inter alia,* the right of the members to freely choose the leadership of their association that expresses their will and represents them. This means that this right cannot be violated through its prohibition or ban....
>
> Law 125 (1981), Article 1, has enacted specific rules pertaining to the Bar Association, which ended the term of office of the Chairman and the other members of the Bar Council from the day of its coming into force. This law therefore violated Article 56 of the Constitution because it violated freedom of association since the Chairman and the members had been elected.[28]

28 The High Constitutional Court, Judgement of 11/6/1983, The Compilation of the Judgements of the High Constitutional Court, Part 2, at p. 127.

The Government is presently in the process of preparing draft unified legislation for professional associations. This proposed law embodies additional violations of the independence of the professional associations as it disregards the above-mentioned judgement of the highest constitutional court in Egypt. The government is trying to issue this law rapidly, without taking into account the opinion of professional associations. The draft law dissolves the elected councils, and replaces them by appointed ones for a period of six months. At the end of this period, the general assemblies of these councils will be invited to elect new councils. The draft law requires a quorum of at least fifty per cent of the members of the General Assembly. Otherwise, the President of the Republic is entitled to appoint the council.

On the other hand, another danger threatens the independence of the Bar Association. The 1992 elections resulted in the overwhelming election of the candidates of the fundamental brotherhood. The predominance of one political party in the Bar Association threatens its independence as it allows this political party to use the Association to fulfil its political aims.

Immunity during the Exercise of the Right of Defence

To protect the right of defence, lawyers should be protected from intimidation and prosecution while exercising their professional functions. Article 16 of the Basic Principles for the Role of Lawyers states:

> Governments shall ensure that lawyers (a) are able to perform all of their professional functions without

intimidation, hindrance, harassment or improper interferences; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Additionally, Principle 18 provides that "Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions."

The Egyptian law guarantees a number of such safeguards. Article 51 of the Legal Profession Law regulates the manner in which the search of a lawyer's office may take place. The provision takes into account that this procedure infringes upon the independence of lawyers. If a search is to be conducted, it requires the notification and the presence of the public prosecutor. The public prosecution has also to notify, within an appropriate time, the Bar Council or the council of a branch before initiating any procedure against a lawyer. This immunity is also extended to the offices of the Bar Association.[29]

29 Article 224 of the same Law provides that the "Bar Association, its subsidiary Associations and Committees cannot be searched or sealed without the knowledge of a member of the Public Prosecution and the presence of the Chairman of the Association or the subsidiary association, or their representatives."

Lawyers are also safeguarded against claims of defamation and slander regarding language used in oral or written pleadings.[30] Furthermore, lawyers enjoy special immunity against any crimes committed during the sessions.

If lawyers commit offenses during the sessions which touch upon the order of the court, the court decides whether to refer them to the Public Prosecution or not.[31] In interpreting this provision, the Committee for the Law of Criminal Procedures in the Deputy Council declared:

> The lawyer enjoys a status different from the public during court sessions - that is defending one of the opponents. His zeal to fulfil his professional duty may provoke him to say a word that is severe, which the judge may interpret differently from what was intended. Judging him in public puts him in a delicate position, and infringes upon his integrity, even the integrity of the entire legal profession. In contrast, not judging him immediately allows for a compromise between the judge and the lawyer. Often the investigation of such incidents by the public prosecutor concludes the conflict.

30 Penal Law art. 309. *See also* Legal Profession Law art. 47 (which reiterates this principle).

31 Law of Criminal Procedures art. 245.

The Bar Law guarantees further immunity in Article 54, which provides that anyone who attacks or insults lawyers by words, deeds or threats shall be punished with the penalties foreseen for such attacks against members of the court.

Nonetheless, violations of the immunities prescribed by law for lawyers are a frequent occurrence in Egypt. These violations include the beating of lawyers, who are performing professional duties, in front of police stations. Moreover, these violations do not form isolated cases. Therefore, on 23 April 1986, the Chairman of the Bar Association issued an official warning to the Minister of the Interior of the consequence if these violations continue. On 28 May 1986, the Bar Council organized a public strike against these repeated violations.

Moreover, the Security Forces sometimes unjustly accuse those lawyers who defend political detainees of committing crimes themselves. On 24 August 1989, the Security Forces arrested two lawyers active in the human rights field, Advocate Amir Salem, a then board member of the Egyptian Organization for Human Rights, and Advocate Hisham Moubarak. They were both accused of belonging to an illegal secret organization.[32] They were both subjected, with others, to serious torture. The real reason for their arrest and torture, however, is that they were active in defending the workers of the Steel and Metal Company who were imprisoned because they were on strike.

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32 *See* Attacks on Justice 1989-1990 at p. 32.

After the attempted assassination of the ex-Minister of the Interior, Governor Hassan Abu Shafi, in May 1987, six lawyers submitted an appeal to the Public Prosecutor concerning the Security Forces' selective arrest and torture of a large number of citizens. Consequently, the Security Forces arrested the six lawyers, after they had met the Public Prosecutor, and refused to set them free. The Bar Association responded with a public protest in the Association building. Likewise, on 7 June 1991, the Security Forces arrested, detained and tortured Advocate Shazli Abeed because he had defended members of the Islamic Party.

The Independence of Lawyers Under Belgian Law *

Pierre Lambert **

Introduction

"It is now universally recognized that fundamental rights and liberties can best be preserved in a society where the legal profession and the judiciary enjoy freedom from interference and pressure."[1] This independence constitutes a fundamental condition for the fulfilment of the lawyer's mission under the Rule of Law. The contours of independence, however, have not always been sufficiently defined. While some see the independence of lawyers as a privilege, others see it as a duty towards clients and judges. Rare are those who attach the notion of independence of lawyers to the fact that, in fulfilling their professional duties, lawyers participate in the administration of justice. In a political democracy, the independence of lawyers is an indispensable corollary of the independence of the judiciary.

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* Translated from the French original.

** Member, the Bar of Brussels.

1 Louis Joinet, UN Rapporteur on the independence of the judiciary and the protection of practising lawyers, *quoted in* 25-26 CIJL Bulletin 3 (April-Oct. 1990).

Historical Background

Before the joining of the Belgian provinces to France in 1795, lawyers enjoyed a large amount of independence. This fact has attracted little attention from academics, not only because the precepts and rules related to this matter are scarce, but also because their scarcity shows precisely that freedom was not lacking before our old judiciary.[2] The history of the Belgian Bar before 1795 neither mentions conflicts nor attempts to muzzle pleas for the defence.

Indeed, commentators recommended that lawyers exercise prudence in cases where, in their pleas for the defence, they attacked the prince's power or denied the prince's right to modify the Constitution and the laws of the country, or, also, where they contested the usefulness of a law. In these thorny matters, and others such as in the defence of those accused of heresy, the commentators, who favoured freedom of speech, were careful to recommend that lawyers use the utmost discretion and oratory precautions.

The situation changed under the control of France. Napoleon's decree of 14 December 1810, which governed the legal profession for many years, set out the regulations for the practice of the profession and the discipline of the Bar. An illustrative example of Napleon's concept of the independence of

2 *See De la profession d'avocat en Belique avant la domination française,* Belg. jud., col. 1535 et seq. (1884).

lawyers is a letter he wrote to Cambacérès concerning an early, more liberal, draft of the decree. Napoleon wrote:

> I received a draft of the decree on lawyers. There is nothing that gives the judge the means to restrain them. I prefer to do nothing rather than to take away my means of taking measures against these charlatans, contrivers of revolutions, almost all of whom are inspired only by crime and corruption. As long as I have a sword at my side, I will never sign such an absurd decree; I wish that one could cut out the tongue of a lawyer that uses it against the government.

The final decree embodied this spirit of domination that characterized Napoleonic government, and the Bar was subordinated. While Article 37 of the decree stated that "lawyers shall freely exercise their services for the defence of justice and truth," this apparent independence was considerably reduced in its field of application by the provisions of Article 39. Article 39 provided that, if a lawyer, in pleas for defence or in writings, took the liberty of attacking the principles of monarchy, the constitutions of the Empire, the laws or the established authorities, the Tribunal in charge was to pronounce at once, on the decision of the Public Prosecutor, one of the penalties provided for by Article 25.

These penalties included warning, censorship, reprimand, temporary interdiction, and disbarment. Furthermore, under Article 40 of the Napoleonic decree, the Minister of Justice, in his authority and according to each case, had the right to inflict upon any lawyer the disciplinary penalties provided in the decree, including disbarment.

Contemporary Independence of Belgian Lawyers

The Belgian Bar is proud of having achieved real independence, not only in the interest of lawyers, but, as Berryer proclaimed, because "the independence of the Bar is a bulwark for each citizen against the wrath and attacks of power, against violations of law, against unfair persecutions; everything to be feared if it is maimed, nothing to fear if it is respected."

In 1836, a royal decree repealed Articles 19 and 21 of the Napoleonic decree (which gave the Attorney General the right to name the president of the Bar and the Disciplinary Council), Article 33 (relating to the prohibition of lawyers to freely associate or meet), and Article 40 (which gave disciplinary power to the Minister of Justice). The Judicial Code, which entered into force in 1967, confirmed the independence of lawyers: the *statut de l'avocat* and the appointment of the Bar, which regulate the profession, were made free from government authority.[3]

The appurtenance of the Bar to the Judiciary is proclaimed and ratified by the Judicial Code. The Judicial Code, which according to its first article "governs the organization of the courts and tribunals," states that the Bar is covered in the part of the Code dedicated to judicial organization.

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3 Cyr Cambier, *Le Code Van Reepinghen et le barreau,* Journ. trib. 721 (1968).

"The Bar is of public law: its institution is one of the foundations of Justice," writes the Royal Commissioner for Judicial Reform.[4] It is no longer possible to try to assimilate the organs of the Bar into the governmental bodies, as the thesis had been maintained on several occasions before the *Conseil d'Etat.* The decisions of the authorities of the Bar cannot be judged by the *Conseil d'Etat.* The appeals to reverse or to annul, provided for by the Judicial Code, are under the sole jurisdiction of the Judiciary.[5]

This link of the Bar to the Judiciary is not accompanied, however, by any dependency of the former on the latter. This was not always the case. Notwithstanding the abrogation, in 1836, of the control exercised by the government over the Bar with the mediation of the Attorney-General, a certain dependence on the Judiciary remained. The Court of Appeal continued to take cognizance of the right to appeal disciplinary sentences; the tribunal served the functions of the Disciplinary Council in those departments where the Council had not been legally formed or renewed; and, the judge could condemn the lawyer for shortcomings/omissions committed during hearings. Furthermore, a sort of supplementary protection was foreseen in favour of the Attorney-General, who could convoke the Assembly of the Bar and seize the Disciplinary Council with indictments.

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4 *Rapport sur la réforme judiciaire*, Mon. b. 187, (1964).

5 *See* decree No. 21,573, *Maerschalk c. le bâtonnier de l'Ordre des avocats du barreau de Bruxelles,* 20 November 1981, Journ. trib. 27, (1982); *See also* decree 24163, *Allo et Matthys,* 22 March 1984, concerning a decision of the President of the Bar to refuse to produce before the tribunal correspondence between lawyers in view of its confidential nature.

The Judicial Code of 1967, however, discontinued these disguised forms of dependency. The power to rule on an appeal against a disciplinary sentence pronounced by the Council was transferred to a Disciplinary Council of Appeal consisting exclusively of lawyers meeting under the chairmanship of the First President of the Court of Appeal.

A Council of the Bar is constituted in each department regardless of the number of lawyers registered on the Board. In the case where the Council is not legally formed or renewed, its functions are provisionally carried out by the outgoing Council. The presiding judge no longer has the power to repress shortcomings/omissions imputable to the lawyer; the judge will prepare a report which he/she will transmit to the disciplinary authorities in charge of pronouncing judgement.

The power formerly conferred on the Attorney General to summon the Assembly has been removed; this also applies to the power to seize the Council of the Bar, which cannot take cognizance of disciplinary matters unless the President of the Bar intervenes, be it officially, on a complaint, or upon a written declaration by the Attorney General.

Lastly, the legislature remarkably reinforced the Bar's autonomy by confirming the jurisprudence which had granted it such an essential and exceptional prerogative: the absolute control of the Board and the *liste du stage*. Without formally withdrawing this control, a recent law of 19 November 1992 provides that the refusal to register should be well founded, and such refusal may be subject to an appeal before the Disciplinary Council of Appeal.

This brief summary shows that the UN Basic Principles on the Role of Lawyers, which the General Assembly of the United Nations invited its member States to take into consideration in their legislation and national practices,[6] is largely in force under Belgian law.

Other Issues Relating to the Independence of Belgian Lawyers

a. The Role of Lawyers

It is no longer asserted that lawyers should be an "auxiliary of justice." "Auxiliary" is an awkward word which permitted the role of lawyers to be kept both subordinate and superfluous, or, as it has been pretended foolishly, as a luxury. The falsity of this commonly-used expression has been demonstrated:[7] an auxiliary is useful, not indispensable. In fact, there is no real justice without lawyers; the right of defence, understood in the broadest sense, is the primary expression of the right to freedom. The lawyer, in truth, provides indispensable assistance to the impartial solution of conflicts. The qualification "auxiliary of justice" may be applied to public and ministerial officials, but not to lawyers who express the right of the accused persons by requesting that justice be administered to them.[8]

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6 G.A. Res. 166, U.N. GAOR, 45th Sess. (1990), *reprinted in* 25-26 CIJL BULLETIN 27 (1990).

7 Eugène Reumont, Journ. trib. 17 (1957).

8 Syr. Cambier, I Droit judiciaire civil: fonction et organisation 687 (Larcier, ed.) (1974).

The legal profession continues to be fundamentally liberal. Lawyers exercise their calling under a system of free practice, in favour of whoever comes to them for help. The role of lawyers is justified wherever the right of defence must be exercised. Wherever it is necessary to assist, to advise, or to defend, lawyers have their place, as long as their mission is accomplished with due respect for the principles of probity, dignity and independence, the foundations of the profession.

b. Legal Assistance

Access to a lawyer, unfortunately, confronts financial obstacles which cannot be completely avoided by the offices of consultation and of defence established by the Councils of the Bar. This fact is due to the meagre portion of the budget allotted by the State for legal aid.

As was mentioned by a Senator during the work in preparation of the law of 9 April 1980, which, according to its heading, aimed at providing a partial solution to the problem of legal aid and to organise the remuneration of legal trainees entrusted with it, Belgium has, in Western Europe, the curious distinction of organizing a public service at the expense of those who ensure its functioning. This duty falls upon those young lawyers most often lacking professional resources and whose remuneration for legal assistance is very low.

Legal trainees cannot refuse to offer their services without having an excuse approved by the proper authority. Whether in civil or penal law, they have the same obligations as any other lawyer.

c. Immunity

The Judicial Code expressly accords lawyers relative immunity in the exercise of their profession. This is to ensure that "lawyers freely exercise their services to defend justice and truth." They must abstain from any serious act against the honour and the reputation of persons, unless the circumstances of the case so require, and thereby risking disciplinary prosecutions. Furthermore, if a lawyer, in pleas or in writing, should attack the Monarchy, the Constitution, the laws of the Belgian people or the State authorities, the tribunal or the court entrusted with the case could order a report to be prepared by the court clerk and seize the corresponding Council of the Bar.[9]

The speeches given or the writings produced at the tribunals escape from sanctions provided by law for attacks on the honour of persons. But the independence of lawyers and the corresponding immunity should not degenerate into abuses of liberty. If lawyers fail to observe the bounds imposed by the law, disciplinary proceedings could be brought against them.

While the first line of Article 452 of the Penal Code states that speeches pronounced or writings produced before tribunals will not be the object of any repressive prosecution in those cases where these speeches or writings relate to the cause or its parts, the second line adds: "slanderous or defamatory

9 Code judiciaire §§ 444-45.

charges extraneous to the cause or its parts may give grounds to public or civil action of the parties." The Supreme Court of Appeals has determined that the Bench "will decide whether these remarks made during judicial proceedings are related to the cause or to the parties."[10]

Conclusion

The defence of members of the Bar against any unjustified interference menacing their independence may assume diverse forms. Beyond the various possible defences, it must be stressed that the independence of lawyers originates, in the first place, from their need to be in full command of the case entrusted to them. Thus defined, independence is imperative to the lawyer's duties.

Yet, independence is more than this. Indeed, it blends with firmness of character. Above all, it constitutes a fundamental condition for the accomplishment of the lawyer's calling. Thus, it is of a primordial social interest for the proper organization of justice.

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10 Cass., 18 October 1988, I Pas. 181 (1989) (concerning charges contained in the decisions in a divorce case and putting a third person in cause); Cass., 10 July 1944, I Pas. 431, (1944) (the attacked judgement pointed out that if it can be allowed that the accused, in his defence, pleads that testimonies produced against him are debatable, inexact or untrue, the fact of adding that the witnesses have been paid to make false testimony undeniably goes beyond the strict right of defence and gives the remark an insulting and defamatory character).

Cambodia
The Courts and the Constitution:
A Point of View

Basil Fernando *

After the general election in Cambodia which is to be held in late May 1993, the constitutional assembly that is elected will sit to adopt the Constitution for Cambodia. It is hoped that this Constitution will be based on liberal democratic principles.

One of the issues that this Constitution would have to resolve if it is to introduce even a barely elementary form of liberal democracy to Cambodia is the issue of the independence of the judiciary. Under the former Constitution of the State of Cambodia, the judiciary is completely incorporated into the executive.

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An Analysis of the Independence of the Judiciary under the Former Constitution

The former Constitution of the State of Cambodia was passed by the National Assembly of Cambodia on 30 April 1989.[1] This Constitution does not envisage an independent judiciary. Under Article 48 of the Constitution, the National Assembly has the power to establish and dissolve the People's Supreme Court as well as the right to monitor its activities.[2] Under Article 53, the president of the People's Supreme Court is named among the persons that are entitled to submit draft legislation to the National Assembly. Under Article 79, the functions of the courts are defined as:

(a) to defend the state authority of the people and democratic legality;

(b) to preserve security and social order;

(c) to protect public property; and,

(d) to protect the rights, freedoms, life and legitimate interests of citizens.

From the manner in which these functions are stated, it is clear that judicial review of the actions of the executive and of the legislative branches do not fall within the purview of the courts. Though the courts ought to protect the rights, freedoms, life

1 The State of Cambodia is the name given in 1989 to the regime installed by the Vietnamese in 1979.

2 For the full text of relevant articles of the Constitution of the State of Cambodia, see annex.

and legitimate interests of the citizens, there does not seem to be any provision empowering the courts to adjudicate cases in which a conflict arises between an organ of the state and an individual. In such an event, the court must defend the state authority. The role of the judiciary, as envisaged in the Constitution, seems a very limited one.

Besides such limitations on the scope of the functions and powers of the judiciary, the functions of courts may be controlled by the National Assembly and the executive by direct monitoring.[3] The Public Prosecutor has the overriding power over courts' judgements, as the Prosecutor General "must ensure that legal proceedings, judgements and the execution of judgements are conducted correctly and in accordance with the law." People's assessors have the right to participate in court proceedings and during a hearing they have the same rights as judges.[4] The Council of State has the right to establish special courts to try special cases.[5] The determination of what is a special case, who will sit as judges in the "special court," what procedure will be followed by the "special court," and what will be the powers of such courts, seems to be left to the executive.

The implication of all of the provisions of the Constitution taken together is that the concept of independence of the judiciary does not form part of the legal structure envisaged in the Constitution of Cambodia. Any serious approach to introducing the independence of the judiciary must necessarily come to grips with this aspect of the former Constitution of

3 Constitution of the State of Cambodia art. 48.
4 *Id.* at art. 82.
5 *Id.* at art. 82.

Cambodia. A purely piecemeal approach of introducing new aspects, without addressing this central issue, does not seem capable of achieving a significant result.

Advisory Function

The Human Rights Component of the United Nations Transitional Authority in Cambodia (UNTAC), as well as the UN Civil Administration, has engaged in observing the judicial process of Cambodia during the transitional period. There is a unanimous view that the concept of the independence of the judiciary is alien to Cambodia despite many declarations affirming adherence to the principle by the State of Cambodia and other signatories to the Paris Agreements. One of the common ways of interfering with the independence of the judiciary is the so-called "advisory function" of the Supreme Court and the Ministry of Justice. In accordance with the existing laws, judges were required before deciding each case, to request the advice of the Supreme Court and/or Ministry of Justice. Such a procedure is not only in contradiction to the basic principles of review, but is a denial of the fundamentals on which the independence of the judiciary is based.

Instead of appellate review, the practice that exists in Cambodia is a review of decisions of judges by the Ministry of Justice. In the recent cases of Em Chann and Than Theoun, filed by the UNTAC Prosecutor, at the Municipal Court of Phnom Penh, the Minister of Justice Uk Bun Chhoeun called the judge of the court and instructed him not to proceed with the cases. In an interview with two UNTAC officers, the Minister explained that it was his role to punish the judges who violate the law by making

incorrect judgements. The idea of the judgements being reviewed by appeal courts does not exist. The review of cases by the Supreme Court consists of private readings by the Supreme Court judges of the judgements made by the provincial courts. Where the Supreme Court feels that there is some violation of law or misinterpretation of facts, they may instruct the provincial court to correct its decision. As there is no procedure for public hearing of appeals, and as the judges of the Supreme Court are not required to give reasons why they consider a particular judgement given by the provincial court incorrect, this procedure allows the Ministry of Justice, and any other interested person, to influence the Supreme Court to interfere with the judgements of the Municipal Courts.

Human Rights under the New Constitution for Cambodia

"A Comprehensive Political Settlement of the Cambodia Conflict" provides that the new Constitution will contain a declaration of fundamental rights.[6] This provision has been made as a special measure to assure protection of human rights in the context of Cambodia's tragic recent history. Article 2 then enumerates a list of rights which will be consistent with the provisions of the Universal Declaration of Human Rights and other relevant international instruments.

6 Article 2 of Annex 5.

Article 2 goes on to state that "agreed individuals will be entitled to have courts adjudicate and enforce these rights." What is envisaged in this provision is an enforceable bill of rights. The countries of the region in which such provisions exist are Hong Kong, India and Sri Lanka.

The main issue that an enforceable bill of rights raises is which courts would adjudicate and enforce these rights. The courts as they exist in Cambodia today are intrinsically incapable of adjudicating and enforcing such a bill of rights.

In fact, Article 5 of the same Annex envisages discontinuing the system of judiciary and provides that "an independent judiciary will be established, empowered to enforce the rights provided under the Constitution." The establishment of a new system of courts in Cambodia is one of the imperatives mentioned in Article 5, Annex 5, of the "Comprehensive Political Settlement of the Cambodia Conflict."

In the drafting of the new Constitution, one of the primary concerns, therefore, is the establishment of an independent judiciary. For reasons stated above, the establishment of such independence implies the complete displacement of the judicial system that presently exists in Cambodia.

A Constitutional Issue

In most instances, when new constitutions are made, the principle that is followed by the drafters is to retain as much of the former judicial institutions as possible for the sake of continuity. In the instance of Cambodia, however, following that principle would lead to abandoning the principle of the

independence of the judiciary for the reasons stated above. What is required in the sphere of judiciary is a complete rupture with the past. Some academics may not agree with this view on the basis that constitutions should incorporate as much of the local practices and traditions as possible. However, given the specific character of Cambodia, particularly since 1975 when the principle of independence of the judiciary was consciously replaced, the incorporation of local traditions and practices would amount to adoption of the administrative and executive control of the judiciary. Thus, merely borrowing provisions of other constitutions related to the issue of the judiciary will not be an answer to one of the most serious problems facing liberal democracy in Cambodia which the Constitution of the State of Cambodia will follow, according to Article 4 of Annex 5.

The Police and the Judiciary: Existing Practice

In reality, the judicial power in Cambodia on criminal matters is mainly exercised by the police. On some matters, it is exercised by the military. While this power is sometimes shared with other administrative authorities, the actual judges of criminal matters in Cambodia are the police.

The police in Cambodia exercise the following powers:

(a) They have *the option* to initiate an investigation into a crime. Whether the crime is murder, rape or any other matter, the police are not under obligation to investigate all complaints relating to crimes. They do not even have an obligation to record all complaints.

(b) Where police exercise this option, in favour of conducting

an investigation, the methods of investigations are entirely optional.

(c) The police may stop any investigation, whenever they wish.

(d) Even after an investigation, whether the case is to be placed before a court is optional.

(e) Where the case is placed before the court, the police dictate the verdict. The function of the court was to "rubber stamp" police verdicts. Thus, very few cases come to court, and in almost all such cases the accused are pronounced guilty. The police never give evidence in court. But the court gives the verdict according to the police dossier.

The achievement of independence of the judiciary in Cambodia lies mainly in the reform of the police, and not merely in the reform of the judiciary. The reform of the police will not be achieved by police education alone; strict definitions of functions and accountability to the courts are essential to any rational functioning of the police.

Till such a reform is achieved, the single most prominent threat to public security would be the police themselves. The branches of police that exercise more sinister functions, such as secret police, could not be controlled without bringing the entire police under the judicial control of the courts.[7]

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7 From an earlier paper submitted by Basil Fernando to the Human Rights Symposium held in Phnom Penh in November 1992.

Review of Administrative Actions

Cambodian law as it exists now does not provide for any legal procedure to review the decisions made by administrative officers. One could say without exaggeration that administrators enjoy absolute immunity with regard to their official activities. Thus the citizens do not have a right to challenge an administrative decision. Articles 2 and 5 of Annex 5 envisage a situation in which all persons would be subject to judicial actions if they violate human rights provided for under the new Constitution. Thus, completely new legal provisions would have to be designed in order to bring the administrators to justice in Cambodia in terms of Articles 2 and 5 of Annex 5. This also sharply raises the issue of the nature of remedies against administrative actions when human rights are violated by such actions.

It may not be out of place to consider some practical measures that would have to be taken if Articles 2 and 5 of Annex 5 are to be implemented in Cambodia.

(a) It would be imperative to work out in detail the issue of the independence of the judiciary in the new Constitution. To this end, it would be necessary to abolish the judiciary as it exists now, completely. It would be necessary to provide for the appointment and the dismissal of judges in a manner that would not interfere with their independence. The matters related to discipline of judicial officers as well as to the salaries of the judges would have to be dealt with.

(b) As the judges of Cambodia have no experience at all of functioning as an independent body, it would not be possible to achieve a transition without the assistance and active

participation of legal experts familiar with the independence of the judiciary. It may be necessary to provide for a transitional period of two to five years in which Cambodian judges will work in close cooperation with foreign legal experts, judges, lawyers and legal drafters. Such experts acting purely as advisors would not suffice as a tradition of independence of the judiciary has to be worked out in actual practice taking place in courts. Mere formal objections to such a move on the basis that this may mar the prestige of the Cambodian courts is no answer to the need for a radical new situation that is envisaged under Articles 2 and 5 of Annex 5.

(c) Considering the need to implement Articles 2 and 5 of Annex 5 through the new Constitution, it would not be out of place to introduce some reforms for the purpose of preparing the ground for a functioning judiciary adhering to the principle of independence of the judiciary in the "Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period." Drafted by UNTAC and adopted by the Supreme National Council on 10 September 1992, the provisions mention this need for independence of the judiciary. Attempts were made also to train judges to put into effect the said provisions. In the discussions with the judges, however, it became very clear that the whole concept of the independence of the judiciary was alien to them. Some of them even expressed the view that, even if they wanted to be independent, they had no way of making orders against the police or administrative officers as those persons are in fact more powerful than the judiciary. As a result, the "Provisions Relating to the Judiciary and Criminal Law and

Procedure Applicable in Cambodia during the Transitional Period" were virtually ignored by the Cambodian courts. It may be said that at the stage of drafting the said criminal provisions the lack of independence was not fully appreciated. The presumption on which these criminal provisions have been made seems to be that the existing Cambodian courts could be transformed into independent courts by making some alterations in the laws.

(d) During the remaining part of the transitional period, it is advisable to exercise greater supervisory power over the judiciary. Legal experts sitting with judges as advisors, as was done in the Congo in the early 1950s, may be one means of exercising such supervision. Other means, too, would be developed for active supervision of courts for reasons stated above.

Root Causes for the Absence of an Independent Judiciary in Cambodia

Many causes militate against the independence of the judiciary in Cambodia. Among these, the absence of urban society since April 1975, particularly after the evacuation of Phnom Penh and other social centres, the fragile nature of social organization, the nature of wealth and its distribution in recent times, the effect of the civil war, the nature of the social controls by the party, the low pay of civil servants, and the lack of primary prospects for lawyers are some of the factors that would affect a functioning judiciary for some time to come.

a. Effect of the 1975 Evacuations

All urban centres were emptied in April 1975 as part of an attempted radical revolution, which sought a clean break with the past. Whatever this move would have otherwise achieved, it definitely brought the limited urban life of Cambodia to an end. People returned after 1979 to what once were places which had seen a beginning of urban life, but these places never returned to what they were before 1975. Besides, over a million urban people have died and many hundreds of thousands have fled. The social organization that developed after 1979 in no way encouraged the growth of an independent urban life.

Courts in any society are an integral part of the social organization. Further, courts as we know them today are products of urban life. Total collapse of the social organization of towns has deprived the country of a natural habitat in which a court system would have taken root.

It was not only the court system that collapsed during 1975-1979, but also the legal system in general. David Chandler notes that there was no legal system during the PDK [8] rule. Despite some laws and decrees passed by the National Assembly of the State of Cambodia since 1979, there is still no legal system as such in existence in Cambodia.

Hundreds of thousands of Cambodians who lived in the refugee camps did not have any experience of urban life at all. They lived a sort of communal life. As they returned to grass roots in recent years, they had to find their roots in the localities

8 The Khmer Rouge, also called Party of Democratic Kampuchea (PDK).

where they were resettled. Most of them returned to an agricultural society, with a little farm land allocated to them. Though these refugees are accustomed to "codes law," which were used to keep discipline in camps, these laws could hardly be compared to a judicial system.

While the radical displacement of the Cambodian population is well documented, the social implications of that process to present-day and future Cambodia has not been carefully assessed. This, too, is perhaps a result of the displacement process itself. Among Cambodians, those who engage in the interpretation of the "past" experience in relation to present-day problems or the future of Cambodia are few. This is largely a result of the extermination of the intellectuals, "those who wore the glasses." Total absence of urban discussion centres of any sort have retarded the interpretation in process.

b. Fragile Nature of Social Organization after 1979

Outside the territories controlled by the State of Cambodia, social organization remained informal. There are no formal procedures controlling any aspect of social life. Naturally, there does not exist any court at all in these areas.

There are informal methods of dispute settlement, mediated by party leaders and cadres who control the areas. A community leadership in the traditional sense does not exist. The approach of some academics to look for community organizations and leadership would not lead to much due to the very nature of the radical change that was brought about by the displacement and physical exterminations that took place during the PDK regime. In the area controlled by the State of Cambodia, the administrative

machinery is still very fragile. As the country was caught up in the civil war, there was hardly any time for spontaneous social organizations. Due to war, social initiatives remained in the hands of the military and the party.

In recent months, when peace brought foreign companies eager for commerce in Cambodia, many new issues, such as company registration, trademark registration and similar matters, have arisen. There are no formal legal institutions, however, within which a commercial dispute may be settled. Banking remains in a fragile state. The need for dispute settlement in the areas of commerce and trade may provide some impetus for broader judicial institutions as well as other forms of arbitration.

c. Civil War

In any country, one of the main victims of the civil war is the courts. During these wars, the Rule of Law is often suspended by the imposition of emergency regulations and other public security laws. Even after 1979, since the civil war continued, Cambodia was run on the basis of public security laws. One of the direct results of this was the emergence of the military and the police as far more important social institutions than those needed in a civil society. This pre-eminence of the military and the police has denigrated the status of the civilian. A concept of civilian rights against the military or the police does not exist at all. The social position of the military and the police has also provided the persons belonging to these institutions – particularly those holding high positions – with many economic opportunities. Their privileged position would be endangered by any attempt to return to civil society. As leaders of the police and the

military play a very significant role in decision-making in Cambodian politics, the likelihood of a significant judicial reform empowering an independent judiciary to enquire into activities of the military and the police is most unlikely.

d. Nature of Wealth and its Distribution in Recent Times

The "new rich" of the post-PDK era have combined legal and illegal means to create their wealth. Earnings from smuggling, illegal logging, gem mining and other sales combine with whatever salaries are received from doing various jobs. UNTAC presence has provided the opportunity for affluent persons to earn more merely by way of rents and providing some services such as hotels, eating places, and other businesses.[9] Even these legitimate ways of earning have been accompanied by tax fraud, which is quite common in Cambodia.

The system of enrichment that exists here requires secrecy. Intense resistance is likely to rise in opposition to any encroachment of this privacy, judicial or otherwise.

The income distribution is so discriminatory that the rich may want a system of summary executions and imprisonment without trial, as exists now, particularly for offences such as robbery. Ironically, the movements that represent average

9 However, a sizeable part of this income has also gone to non-Cambodians, such as Thai nationals.

citizens do not exist to agitate for legal reform. The non-governmental organization (NGO) movement, while increasing its numbers and producing members of excellent personality, is still in a fragile state.

e. Lack of a Concept of Regulating Society by Way of Law

Post-1975 society is unfamiliar with the concept of laws. Both PDK and the State of Cambodia have this in common. In this present day, Cambodia is different from post-colonial societies, which have inhabited a sense of being ruled by laws made by colonial powers.

The colonial rulers usually leave a volume of laws, relating to almost all aspects of social life. Although some of these laws are abolished or replaced by the new rulers, in interpreting the new rules courts continually refer to the "old" laws. In Cambodia, whatever laws the French left were radically altered in 1975 by the National Army of Democratic Kampuchea (NADK), and the State of Cambodia authorities made no attempt to bring these back after 1979. In fact, the destruction of the old system between 1975-79 was so complete that there was no possibility of reviving it.

Both the NADK and the State of Cambodia ruled by decrees and commands, made orally or in writing. A command-structure exists which intimately connects the party committees and cells with the administrative structure. The standards and norms to which the structure making day-to-day administrative decisions should conform are unwritten at this time.

State of Cambodia authorities have produced some "legislation" since 1979. But this is very limited. With the introduction of a liberal democratic system, most parts of this body of law are also likely to become irrelevant.

Making of a Supreme Court

The "Provisions Relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period" passed by the Supreme National Council on 10 September 1992 was an attempt to introduce the independence of judiciary to the courts of Cambodia, namely Municipal Courts of the territory controlled by the State of Cambodia and any other courts outside that territory. To date, however, there is no functioning court in other territories. Above these courts there is an institution named the Supreme Court. The said special provisions did not touch the issue of the Supreme Court.

In implementing the special provisions passed by the Supreme National Council on 10 September 1992, many difficulties have arisen, some of which may be summarized in the following questions which are often raised by Cambodians, including some of the judges from the Municipal Courts:

(a) If the police and the military do not accept the authority of the courts, what would the courts do to assert this authority?

The answer to this question in the current circumstances is that the courts cannot do anything about it.

(b) What would the courts do to compel a policeman or a

soldier (of any rank) to attend court, as an accused or even as a witness?

The answer in the present circumstances is that the courts cannot do anything to enforce this.

(c) If the police have conducted an investigation, could the court compel such police investigators to attend court and to answer the questions asked in cross-examination by the parties involved in this case?

The answer in the present circumstances is that they cannot enforce this.

(d) If an individual has a grievance against any executive decision taken by any of the departments of authority, would the court have authority to compel such authorities to attend court and to answer the allegations made against them?

The answer in the present circumstances is that the court has no such authority.

This litany could go on in the same way for aeons, and the answer would always be the same, that is, except in disputes of private individuals, courts in Cambodia can hardly do anything, except when parties decide to abide by court decisions voluntarily.

The question that arises is whether such a situation could be changed by bringing about changes in the lower courts. This is not possible simply because the jurisdictions of the lower courts are very limited. The issue that needs to be dealt with in terms of establishing the independence of the judiciary in Cambodia has to begin with the creation of a strong Supreme Court. The word "strong" here is not used solely to indicate the quality of individuals who, of course, have to be strong to resist the

pressure. The strength of the Court must lie in its actual powers and the machinery it has for the enforcement of such powers. Whatever the quality may be of the individuals belonging to an institution, now known as the Supreme Court, this Court does not have the power of a Supreme Court or a machinery for enforcement of its judgements. [10] The function of judicial review and interpretation of the law is performed by the executive, mainly the Ministry of Justice, with or without the mediation of the Supreme Court.

In countries where Supreme Courts have grown out of the internal historical process, they have come up as the ultimate forum of social compromise. However, in many Third World countries, the Constitution and the Supreme Court have been enforced as necessary steps in creating democratic institutions. Due to the lack of an organic link to the society, the Supreme Courts have not always been allowed to perform the function of the ultimate arbitrator in social disputes. If the Supreme Court that is to be set up in Cambodia is to be the ultimate guardian of the Bill of Rights, and is to have the actual powers to act as the final arbitrator in disputes between individuals and the institutions of the State, special steps need to be taken in the very creation of this institution. If the Constitution only formulates the usual provisions, which are associated with the independence of the judiciary, such as the appointment, transfer, dismissal and

10 At present, the Supreme Court has no power to make any judgements. It has only the power to send back a case for a re-hearing in the law courts. Thus, the creation of a Supreme Court in Cambodia would have to be started from scratch.

disciplinary control of the members of the judiciary, the matters related to the salaries and pensions, etc., those would not suffice in the circumstances of Cambodia at present. The purpose of this article is not to go into the details of this matter, but to raise the fundamental issue that the independence of the judiciary in Cambodia will depend on the nature of the Supreme Court that is to be created and not on judicial reforms of procedure and matters.

The Constitution and the Bill of Rights

What is a genuine Cambodian Constitution? It is one that identifies truly Cambodian problems and suggests ways to solve them. Facing oneself, however, is a hard task for individuals as well as for nations.

Some of the genuine Cambodian problems concerning the judiciary include: summary executions and administrative detention; the inability to prosecute offences committed by the police or military, and to summon police and military personnel as witnesses; executive control over the judiciary; and, the lack of a system of fair trial, and of trained lawyers. The is no proper appeal system, and no Supreme Court with the power of judicial review or of examining the validity and legality of administrative actions.

Coming to terms with this formidable list of problems requires an understanding of the lack of legal provisions ensuring independence, the lack of experienced judges to set an example for future generations of judges, and the lack of crucial resources, such as books and other materials. There is also the fear on the

part of Cambodians of acting as independent judges, due to the apprehension that there is no real protection if they assert their independence. The police and the military are at present exercising powers that ought to be exercised only by the judiciary. Furthermore, there is a lack of laws in many spheres of life.

For the new Constitution to tackle these problems, it must include the relevant safeguards and prohibit the exercise of judicial powers by the police and other non-judicial institutions. Also, if Cambodians realize a need for assistance from experienced judges from other countries to assist them in the initial period, provisions could be included in the Constitution to make this possible. There could also be provisions in the Constitution for a legal drafters' office and for a law reform commission.

It may be helpful to think of ways in which the international community could help to establish independent and competent judicial institutions in Cambodia; such assistance may involve funding as well as expert assistance. Attention should be given to international standards to aid in the introduction and implementation of the constitutional provisions relating to the independence of the judiciary.

Special provisions in the Constitution against every form of extra-judicial executions are needed due to the unique experience of mass massacres in Cambodia. A genuine Cambodian Constitution must make a strong expression on this issue.

On procedural matters relating to the Bill of Rights, access to courts in the instances of violations must be easy, inexpensive and simple, so that the vast rural population of Cambodia would have

the benefits of the Bill of Rights. For this purpose, it should become possible to make applications relating to human rights violations in provincial, district and other courts. Procedurally, informal applications should be allowed. In this regard, the experience of social action litigation brought about by the Indian Supreme Court could be usefully adopted.

If the Bill of Rights of the Cambodian Consitution is to resolve some of the problems faced by Cambodians, the drafters must carefully avoid being tricked by allowing public security laws to override the human rights provisions in the Constitution, and by writing elaborate limitations on rights such as freedom of speech, of association, and protection from illegal arrest. The judicial interpretation of the Bill of Rights should not be limited by the inclusion of certain clauses.

Conclusions: Like Ankor Wat

Some people are afraid that a judiciary based on a foreign model would be imposed on Cambodia.

At all costs this should be avoided. At present, the court system in the State of Cambodia is based on the Vietnamese model – a completely foreign model that does not recognize the independence of the judiciary. In other administrative areas there are no courts. There is nothing Cambodian in this situation. In trying to remedy this situation, it would be a tragedy if Continental (French) or Anglo-Saxon models were imposed. When you borrow models from outside, it does not work. V.S. Naipaul said of India's judicial institutions that "Borrowed institutions worked like borrowed institutions." If the French

system were good for Cambodia, then the court system which existed prior to 1975 would have played a significant role to prevent the tragedy that Cambodia experienced. It did not. A court system that cannot help the society to arrive at social compromises is not an authentic court system. So the Cambodians do not have a reason to repeat their past in this respect.

Take Ankor Wat, the magnificent Khmer achievement, as an example. This great world wonder reflects the assimilation of what was best in architecture and art in all neighbouring civilizations of the time. All great mythologies of the region have left eternal footprints there. Yet, it is not a reproduction of a foreign model. In fact, the synthesis it has created is a model itself. So it should be with the laws and the judicial system. Taking what is good and suitable from whichever system or experience, adjusting and adopting it with great care and craftsmanship, with utmost respect for the Khmer mind and the Khmer sense of dignity and justice, a truly genuine Khmer court system, relevant and useful to 20th and 21st century Cambodia, could be created. In this process, Cambodians have much to learn from the experience of other Asian countries which have developed many ideas throughout history and particularly during this century. These regional experiences may be quite relevant.

Ankor Wat was built over a long period of time. Would the court system take as much time?

I would say no because, in my view, the price for the system has already been paid; in fact, an excessive price has been paid by way of lives and the suffering of the Khmer people. Such a unique experience must necessarily produce extraordinary results. In fact, the greatest resource that Cambodia has at the

moment is the trauma the people of this country have gone through and continue to go through. This is the aspect that some people ignore when they say Cambodia will always be in this dismal situation. When the social consciousness is burned to the extent it has been burned in Cambodia, there have to be extraordinary responses from the people when they are given the opportunity to open up. There are too many sceptical and cynical people around. They do not respect the sensitivity of the people of this country who have suffered so much. One cannot stress enough the creative potential of mass trauma of this type.

In terms of time schedule, when should the rebuilding of the court system take place? Well, I say it should have happened yesterday. Let me put it in a different way. When should summary executions stop? When should law be enforced? When should all crimes be prosecuted and the police not have the *option* to prosecute? When should people be punished only if found guilty after trial? When should judges be free from all pressure when making judgements and not be punished for the decisions they make? etc., etc. The answer is very clear. Remedying the abuses is the first priority in getting out of the social mess Cambodia is in.

The international community must give assurance to Cambodia that it will provide all resources to help Cambodia build its legal system. Resources may involve funds as well as experts, such as judges, prosecutors and drafters, to work hand-in-hand with the Cambodians for a period of time till these judicial institutions could rely upon completely on local resources. I am sure on this issue; there are many nations that will help with good will. Cambodian political parties, themselves, should make their ideas known on this issue. Persons with imagination will see a moment of great opportunity.

ANNEX

Specific articles of the former Constitution of the State of Cambodia that conflict with the concept of independence of the judiciary are as follows:

Article 48

The National Assembly shall have the following powers:

7. To establish or dissolve the People's Supreme Court and the Office of the Prosecutor-General attached to the People's Supreme Court, ministries or institutions having the rank of ministries, municipalities, precincts, wards, provinces, provincial capitals, districts and communes....

9. To monitor the activities of the Council of State, the Council of Ministers, the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court....

Article 53

The Council of State, the Council of Ministers, the President of the National Assembly, the President of the United Front for the Construction and Defence of the Kampuchean Motherland, the Chairman of the Federation of Trade Unions, the Chairman of the Cambodian Youth Association, the Chairman of the Women's Association, the Chairman of the Peasants' Association, the President of the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court shall have the right to submit draft legislation to the National Assembly.

Article 57

Members of the National Assembly may question the President and members of the Council of Ministers, the President and members of the Council of State, the President, Vice-President and Secretary-General of the National Assembly, the President of the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court.

The person questioned must answer during the session of the National Assembly. He shall be deprived of his office if more than one half of the members of the National Assembly vote in favour of a censure motion.

Article 60

4. To adopt decrees on the establishment or dissolution of the People's Supreme Court and the Prosecutor-General attached to the People's Supreme Court, ministries and institutions having the rank of ministries, municipalities, precincts, wards, provinces, provincial capitals, districts and communes, following a decision by the National Assembly....

Article 79

The functions of the courts and of the Office of the Prosecutor-General are:

1. To defend the state authority of the people and democratic legality;

2. To preserve public security and social order;

3. To protect public property;

4. To protect the rights, freedoms, life and legitimate interests of citizens.

Article 80

The People's Courts and the military courts are the judicial organs of the State of Cambodia. The office of the Prosecutor-General attached to the courts shall initiate prosecutions and legal proceedings in accordance with the law and shall ensure that legal proceedings, judgements and the execution of judgements are conducted correctly and in accordance with the law.

In case of necessity, the Council of State may establish special courts to try special cases.

Article 82

People's assessors shall participate in court proceedings in accordance with the provisions laid down by law. During the hearing, the people's assessors shall have the same right as judges.

The bench shall decide by a majority of votes.

Article 92

Laws, decree-laws, decrees, sub-decrees, ordinances and decisions passed by the institutions of the People's Republic of

Kampuchea that are in conformity with the Constitution of the State of Cambodia shall remain in force until new texts are issued.

Decree-laws and decisions of the People's Revolutionary Council of Kampuchea which have the force of law and are in conformity with the Constitution of the State of Cambodia shall remain in force until new texts are issued.

II - REPORTS

Editor's note:

In his landmark 1985 UN study on the independence of judges and lawyers, Dr. L. M. Singhvi (India) wrote:

> *An important factor in ensuring the independence of the legal profession is its sense of solidarity. The profession is able to preserve its dignity and ideals. Sometimes when the independence of the legal profession is besieged within a country and internal protests prove to be of little avail, the solidarity of the international community in general and of the legal profession in other countries of the world can prove to be an important factor.*
>
> *How can this solidarity be further developed?*

The CIJL advocates that international, national and regional bar associations create committees specifically tasked with the protection of judges and lawyers - and with the independence of the judiciary and the bar - in other countries. Some of the recommended activities are:

- *The writing of protest letters to the offending governments.*
- *Intervening with their own governments to take appropriate actions vis-a-vis offending governments.*
- *Pressuring their governments to adopt a change of policy towards the offending government.*

We further urge bar associations, as groups of concerned lawyers, to begin playing a more active role in respect of other forms of solidarity. These might include sending trial observers and missions of inquiry, as well as inviting lawyers from other countries to visit and explain the situation, and to share experiences.

The Bar Council of England and Wales has established a Human Rights Committee. In 1992, the Committee submitted its first annual report to the Bar Council. Due to the significance of the activities of this Committee, we are publishing this report with the hope that it will inspire other bar councils to follow the same trend.

The Bar Council of England and Wales Human Rights Committee First Annual Report 1992

The purpose of this report is to summarize the activities of the Committee during its first calendar year of operation and to set out the likely principal activities in the forthcoming year.

Background

In July 1991 the then chairman of the Bar announced the setting up of a Bar Human Rights Task Force. In early 1992 it was decided that this initiative should be taken forward by way of a human rights sub-committee of the International Practice Committee, which met for the first time in March. In September 1992, the Bar Council approved proposals in a paper tabled by the sub-committee, including the provision of an annual budget to a committee separate from the International Practice

Committee with a remit specifically linked to assistance to persecuted judges and lawyers overseas, but also including assistance with Caribbean death row appeals.

Structure and administration

Much of the first year's work has been taken up with devising an effective structure for a committee which is required to carry a very heavy load of often urgent work, and all of whose members are liable to be in court and unobtainable without notice any at time.

The structure devised so far involves:

- having at least one alternate for each office-holder;
- each member of the committee having specific tasks on which they take the lead;
- a separate sub-committee for Caribbean death row work.

Any member of the Bar is welcome to attend as an observer at the monthly meeting of the Committee. Observers who become actively involved in the Committee's work are invited to join the Committee.

The Committee's filed papers and reports received from other human rights organizations are kept, as are copies of journals to which the Committee subscribes - the Bulletin of the International Human Rights Federation, the Central America Human Rights Newsletter, the "Malawi Democrat" and the International Commission of Jurists Bulletin. The Committee has a bank account free of bank charges and a business travel account.

Missions

a) Central America

Two Committee members, including the Chairman, took part in a British lawyers' delegation to El Salvador in May, organized by the Central America Human Rights Committee. In El Salvador the lawyers attended a conference of the lawyers' professional association IEJES about constitutional safeguards for human rights and had meetings with a large number of those concerned directly or indirectly with human rights and human rights abuses. The Chairman continued to Guatemala where he made representations to the Attorney-General on behalf of the Bar of England and Wales about death threats to judges and prosecutors in human rights cases, and Government inaction in relation to a number of murders of judges and lawyers. The report of this mission, entitled "A Law unto Themselves," is available.

b) Malawi

A joint Bar, Law Society and Scottish Faculty of Advocates mission visited Malawi in September at the invitation of the Malawi Law Society to:

- establish links with the Society;
- report on the legal system, which is in a state of transition as the former one-party state begins to loosen its hold;
- attend the trial of opposition leader Chakufwa Chihana, regarded as a test case for the Rule of Law in Malawi;
- make representations on behalf of political prisoners and in particular on behalf of Orton and Vera Chirwa,

members of the English Bar imprisoned for eleven years after being convicted of treason at a trial internationally condemned as unfair.

The mission of four barrister members had a two-hour audience with Life President Hastings Banda and was granted permission to visit the Chirwas in prison, the first visit they had had for eight years. Tragically Orton Chirwa died a few weeks later. The Chihana trial was adjourned at the defence's request, but a member of the Committee attended the trial in November as an observer. The report of the Malawi mission, "Human Rights in Malawi," is available. The Committee understands that the report has been considered twice at meetings of the Malawi Cabinet. The Commitee has just heard that Vera Chirwa has finally been released, and it is likely that the mission and report played an important part in achieving this.

Letter-Writing

Much of the Committee's routine work involves drafting letters for the Chairman of the Bar to send on behalf of persecuted lawyers. Letters have been sent *inter alia* on behalf of lawyers or judges in India, Syria, Colombia, Peru, El Salvador, Sri Lanka, Cameroon, Indonesia, Ukraine, Ghana, Burma, Guatemala, Malawi, Nigeria and Sudan, and on behalf of two death row prisoners in the United States - one of which generated a reply announcing a stay of execution. The Chairman's letter on behalf of Judge Ajit Singh Bains in India was followed, perhaps coincidentally but very shortly afterwards, by the judge's release from custody.

Colombia

A member of the Committee has produced a report on attacks on judges, lawyers and human rights workers in Colombia, which was forwarded to the President of Colombia by the Chairman of the Bar, and has organized a lawyers' meeting which the Chairman of the Committee chaired with Jorge Gomez Lizarazo, a leading Colombia human rights lawyer.

Chile

While on holiday in Chile, the Chairman took the opportunity to call on Gloria Olivarez Godoy, a courageous judge who has played a key role in bringing to justice soldiers suspected of a political murder in the *Chanfreau* case, a test case for the impunity of the military in Chile for crimes committed during the Pinochet regime. Judge Olivarez said that she had felt quite isolated and had no idea that people outside Chile were following the work she was doing on the case.

Impunity in Latin America

Members of the Committee were involved in organizing a conference on "Impunity in Latin America," held in the Law Society Hall on 21 November. The conference was full to capacity (some 150 people), with 30 more turned away for lack of space. Speakers included Aristides Junquira, Attorney General of Brazil (who had just impeached President Mellor for corruption), Rodolfo Matarrollo from Argentina, and Frank Larue from Guatemala.

Speakers

External speakers who have addressed the monthly meetings of the Committee have included Frances D'Souza of Article 19, Michael Ellman of the International Federation for Human Rights, and Richard Carver of the Malawi Desk of Amnesty International. Philip Baker also spoke to the Committee on the extensive lobbying work in relation to human rights in China which he carries out at the United Nations.

Plans for the forthcoming year

A return mission is planned to Guatemala. Its main aim will be to maintain pressure in relation to the cases of murdered judges and lawyers first raised last year, when promises of action were made by the Guatemalan government which have not been fulfilled.

- A further mission to Malawi was being planned, to maintain pressure for the release of Vera Chirwa. This has now happened. It is likely that a mission will still be appropriate given the Committee's continuing involvement in Malawi. However the timing at this stage is unclear.

- In the last few days I have been formally asked by the Secretary-General of AFIRD, a Malawian pro-democracy movement, to arrange for the Bar to provide representation at the forthcoming appeal of Chakufwa Chihana.

- There is also a possibility that members of the Committee may be asked to be observers at the planned referendum on democracy in Malawi on 15 March.

- The member of the Committee responsible for Kenya, which was also identified as a priority country, has met Gito Imanyara, the editor of the Nairobi Law Monthly and a leading pro-democracy campaigner in Kenya. It is likely that this contact will lead to more involvement with Kenya and possibly a mission at some stage.

Other projects in hand are:

- organization of a basic level course on "What are human rights and what is human rights law?" for practising members of the Bar. This will be a weekend course at the Council of Legal Education on 27 and 28 March (at which involvement by the Chairman of the Bar would be very welcome);

- development of links with the Centre for the Independence of Judges and Lawyers in Geneva, and of closer links with the Lawyers Committee for Human Rights in New York;

- possible input into the World Human Rights Conference planned in Vienna in June (this may be on a sufficient scale to merit an attendance by the chairman or vice-chairman of the Bar);

- setting up of an Anglo-Malawi Legal Association to co-ordinate the continuing ties which have been developed over the past year between the professional bodies in the two countries, many of which seem likely to concern professional education, so that such work no longer falls directly on the Bar and Law Society Human Rights Committees;

- presentation of the published reports on Malawi and

Central America to the British Government Foreign Office Ministers responsible for the countries in question;

- the chairman was asked by the Bar Council to consider whether the remit of the Committee should be extended to include the United Kingdom. This is a very difficult question. The initial reaction is that the additional workload could not be taken on without employing full-time staff. However the possibility will be fully discussed and investigated.

It is also possible that the year will see a significant increase in the amount of work on Caribbean capital cases, following new legislation in Jamaica.

Conclusion

A great deal has been achieved in a relatively short time in setting up the committee and furthering human rights objectives. Further success will depend on striking a balance between the desire to respond to the large number of appeals which reach the Bar, and the need to keep activities within the bounds of what a small group of volunteers can reasonably hope to accomplish.

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The Independence of Judges and Lawyers:
A Compilation of International Standards

A Special Issue of the CIJL Bulletin (No. 25-26, April-October 1990).
Published by the ICJ, Geneva. Available in English, French and Spanish. 123 pp.
15 Swiss francs, plus postage.

This compilation brings together for easy reference the most important international norms concerning the independence of the judiciary and the legal profession. Included in the bulletin are both instruments approved by the UN and those promoted by leading organizations of judges and lawyers, including: the UN Basic Principles on the Independence of the Judiciary; the UN Basic Principles on the Role of Lawyers; the UN Draft Declaration on the Independence of Justice (Singhvi Declaration); and, the International Convention for the Preservation of Defense Rights.

Attacks on Justice. The Harassment and Persecution of Judges and Lawyers
June 1991-May 1992

A CIJL study
Published by the ICJ, Geneva (1992). Available in English. 224 pp.
15 Swiss francs, plus postage.

The fourth annual report lists the cases of 447 jurists in 46 countries who have suffered reprisals for carrying out their professional functions between June 1991 and May 1992. Of these, 35 were killed, 2 "disappeared", 17 were attacked, 67 received threats of violence, 103 were detained, and 223 were sanctioned professionally. In an effort to place these violations in a larger context, the report also describes some of the structural shortcomings found in legal systems.

Chile: A Time of Reckoning

A CIJL/ICJ study on human rights and the judiciary
Published by the ICJ, Geneva (1992). Available in English. 259 pp.
25 Swiss francs, plus postage.

This study focuses on Chile as a case study on how countries in transition are dealing with the legacy of oppression. The 1989 transition to democracy in Chile raised hope that past injustice would be rectified. Several measures, however, taken by the former military government, the most significant of which was the passage of the 1978 Amnesty Decree, have made this task difficult. The study interviews lawyers, representatives of Chile's non-governmental human rights organizations, relatives of victims of human rights violations, political prisoners, members of the judiciary, parliamentarians, and government officials, and assesses Chile's efforts to confront its past.