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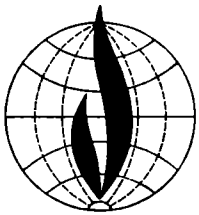

Nº 18

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CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS
October 1986
Editor: Ustinia Dolgopol

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

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to promote the independence of the judiciary and the legal profession. It is supported by contributions from lawyers organisations and private foundations. The work of the Centre has been supported by generous grants from the Rockefeller Brothers Fund and the J. Roderick MacArthur Foundation, but its future will be dependent upon increased funding from the legal profession. A grant from the Ford Foundation has helped to meet the cost of publishing the Bulletin in English, French and Spanish.

There remains a substantial deficit to be met. We hope that bar associations and other lawyers' organisations concerned with the fate of their colleagues around the world will decide to provide the financial support essential to the survival of the Centre.

Affiliation

Inquiries have been received from associations wishing to affiliate with the Centre. The affiliation of judges', lawyers' and jurists' organisations will be welcomed. Interested organisations are invited to write to the Director, CIJL, at the address indicated below.

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C A S E R E P O R T S

A U S T R A L I A

Parliament and the Independence of the Judiciary

Respect for the independence of the judiciary is as important for members of Parliament as it is for members of the Executive. This is particularly true in those countries where the removal of judges from office is entrusted to Parliament.

Section 72 of the Australian Constitution provides that

"The Justices of the High Court and of the other courts created by the Parliament -

(iii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

This section was a basis for the establishment of a Parliamentary Commission of Enquiry during 1986 into the conduct of a High Court Judge, Mr. Justice Lionel K. Murphy. Justice Murphy's untimely death on 21 October 1986 led the government to move for the termination of the proceedings. The motion was approved by Parliament.

Although the proceedings have ended, the questions raised by them linger, and there is concern among members of the legal profession as to the future application of section 72, in particular, the use of Commissions of Enquiry.

Their use must be looked at in light of the recently adopted United Nations Basic Principles on the Independence of the Judiciary. With respect to removal procedures, the principles state:

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

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

The wide publicity given to the establishment of the Commission of Enquiry goes against principle 17, which calls for confidentiality of the proceedings during the initial stages. Although the materials being considered by the Commission were kept confidential, there were numerous press articles speculating about the Commission's work. This is exactly the type of adverse publicity that principle 17 seeks to prevent. It allows public suspicions to develop when it is not yet known whether or not there is a basis for discipline or for removal. This problem was exacerbated in this particular case as Justice Murphy had previously had criminal proceedings brought against him and had been acquitted on retrial.

There has been some questioning of the use of this type of procedure within Australia, in particular, the breadth of the terms of reference of the Commission which seemingly had the power to look generally into the judge's conduct to determine if grounds existed for his removal, and the lack of any statement of charges or a list of specific allegations given to the judge before the Commission began its work. In addition, criticisms have been made of the failure to guarantee the judge's rights to remain silent and not to incriminate himself, rights which are otherwise protected in Australia.

The breadth of the Commission's mandate would also conflict with principle 19, which calls for all determinations to be made in accordance with established standards of judicial conduct.

Although the Basic Principles do not recommend any particular procedure for removal, in deference to the many legal systems and approaches throughout the world, they do place emphasis on the need for a fair procedure and outline some of the fundamental guarantees that should be made available to judges. As noted by one distinguished Australian jurist, Justice Michael Kirby, "procedures are central to the protection of freedom. Once adopted, they affect the relationship of those subject to them."

It would seem that insufficient attention was given to this aspect of the problem by the Parliament. We would urge that these issues be given due consideration before there is further need to give practical effect to section 72, and that Parliament be vigilant in carrying out its obligation to respect the independence of the judiciary and to treat it as a separate branch of government.

C H I L E

Judicial Discipline and Judicial Independence

On 6 October 1986, the Supreme Court of Chile ordered the suspension from duties of a trial court judge, Carlos Cerda Fernandez, for a period of two months with half pay. The manner in which this decision was reached is of concern to the CIJL.

The United Nations Basic Principles on the Independence of the Judiciary set out the following guidelines for the discipline and removal of judges:

> "(17) A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.
>
> (18) Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
>
> (19) All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct."

Unfortunately, these guidelines were not followed by the Chilean Supreme Court, which suspended Judge Cerda without giving him an opportunity to be heard and without specifying any standards of judicial conduct that he had breached.

Background

Judge Cerda had been appointed as the investigating magistrate in the case of ten persons who had disappeared during the years 1973 to 1976. The case, originally opened in 1977, was ordered closed by the special judge appointed to it after a brief investigation, on the basis that the persons in question had left the country for Argentina. This decision was eventually overturned by the appellate courts and the investigation recommenced in 1982. Judge Cerda was assigned to the case in 1983.

From 1983 to 1986 Judge Cerda continued his investigation and during this period issued several orders of arrest and orders for the posting of security (which signal that the person is under suspicion). Some of these orders were reversed on appeal, others were upheld. In one of these appeals, the Court of Appeal of Santiago upheld his ruling that a certain Miquel Estay Reyno be included in the investigation as an accomplice in the case with respect to two of the disappeared. Mr. Estay appealed this order on the basis of an amnesty law which had been passed for political crimes occurring prior to 1978.* The appellate court heard argument twice and both times rejected the appeal, first in September 1985 and then in January 1986.

On 14 August 1986, Judge Cerda issued orders for the arrest of 40 people on the grounds that there was sufficient evidence of their involvement either as perpetrators, accomplices or aiders and abettors in the crime of having illicitly and illegally deprived two of the 10 disappeared of their liberty to warrant prosecution. Thirty-eight of them were either active or retired members of the various branches of the military or the secret police.

Some of the persons named in Judge Cerda's order took an appeal alleging that the amnesty law prevented any further investigations in the case. The appeal was heard on 10 September by the Santiago Court of Appeal, which on this occasion accepted the argument that the amnesty law prohibited the continuation of the investigation, and ordered that the case be closed. This decision was upheld by the Supreme Court on 6 October.

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*The United Nations Special Rapporteur on Chile observed in his report that the law benefited principally those responsible for assassination, torture and other offences committed during the administration of the Junta, rather than granting a genuine amnesty to political opponents." UN doc. A/33/331, page 68, para. 273 and Annex XXVIII. The Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities,on Amnesty Laws and Their Role in the Safeguarding and Protection of Human Rights, draws a distinction between Amnesty Laws designed to erase a conviction and to assist in national reconciliation and those which allow the perpetrators of human rights violations to act with impunity,and suggests that Chile's law falls into the latter category. See E/CN.4/Sub.2/1985/16.

Judge Cerda believed that this ruling was not well-founded and, relying on Article 226 of the penal code which makes it a crime to execute an order believed to be incorrect unless representations are made to superior officials setting out the reasons for the order's illegality, sent a memorandum to a panel of the Court of Appeals explaining why he believed the order to be wrong. This memorandum was sent by the appellate court to the Supreme Court.

In his memorandum Judge Cerda stated that the amnesty law had not been meant to apply to the investigatory stage of the proceedings, as to apply it in this way would mean that the facts surrounding the crime would never come to light and the perpetrators would not be identified. He argued that the law became applicable once the identity of the perpetrators was clearly established, and pointed to previous opinions of the Supreme Court to support his assertion.* He also argued that the crime of depriving someone of their liberty was a continuing crime and no date of commission could be assigned until the time of the person's release. As eight of the ten "disappeared" had not been located, the crime could not be considered to have ended. Therefore, the amnesty law which only covered events prior to 1978 was not applicable.

On the 8th of October the Supreme Court issued an order in which it reprimanded Judge Cerda for having taken issue with its decision and stated that it was the opinion of the court that his conduct represented "an absolute disobedience to his duties and obligations and a grave lack of judicial discipline, because no law authorised him to raise, discuss and object to judicial orders, ripe for execution, and even less so, resolutions of the Supreme Court." The Court also asserted that his behaviour undermined the proper functioning of the judiciary and concluded that it had a duty to sanction him. The Court suspended Judge Cerda from office for two months with half pay to be effective immediately.

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*In its published comments in this case, the Vicaria referred to the statement of the Minister of Justice responsible for drafting the law, made at the time of its enactment and in response to criticisms made of the law that it would be used to shield violations of human rights abuses, in which he observed that an "amnesty law in its proper sense represents a conscious forgiveness that society gives to particular people because of established facts in the proceedings, so it is not useful to anticipate its application."

Noncompliance with the United Nations Basic Principles

The disciplinary action taken against Judge Cerda was taken without offering him an opportunity to be heard, without any prior warning that judicial sanctions were possible and without any reference to objective criteria. In taking such abrupt action, the Supreme Court violated the provisions of the United Nations Basic Principles concerning the obligation to conduct a fair hearing and to have a judge's actions reviewed in light of established standards of judicial conduct. In addition, the severe penalties of suspension or removal are to be imposed only for "reasons of incapacity or behaviour that renders them unfit to discharge their duties."

Whatever the merits of the case and the correct interpretation of article 226, it would appear that Judge Cerda was acting in good faith and was trying to ensure that justice would be done. His questioning of the Supreme Court order was based on prior decisions of that court and of the appellate courts and the progress of other similar investigations where an amnesty had not been granted during the investigation phase of the proceedings.

It is particularly troubling that it was the highest court of the land that undermined the protections called for in the Basic Principles which were designed to protect and to promote judicial independence and which also violated basic norms of due process of law. Although Judge Cerda has now returned to work, we would urge the Court to review its decision in this case.

Harassment of Lawyers Continues

Bulletin 17 reported on the arrest of lawyer Gustavo Villalobos, who was taken into custody on 6 May 1986 along with several medical colleagues as a result of a case they handled in the exercise of their professional responsibilities at the Vicaria de la Solidaridad. He was held incommunicado until 10 May when he was charged with offences under the arms control laws. On 7 August, Mr. Villalobos was released on bail.

However, in December a new arrest warrant was issued for at least one of the doctors and for attorney Villalobos on the basis that the charges against them were to be changed to offences under the anti-terrorism legislation. Both have appealed and the appeals court has ordered that

execution of the warrants be suspended until the appeal is completed.

During September 1986, the CIJL received information about the harassment of lawyers Luis Toro and Hector Salazar, also working for the Vicaria. Attorney Toro was the subject of death threats, and on one occasion, 13 September 1986, a group of armed men scaled the wall surrounding his house and tried to gain entry to the house. The threats continued for a period of time and it was feared that Mr. Toro was the target of a death squad calling itself the "September 11 Command", a group which had vowed to avenge the 7 September attempted assassination of General Pinochet. The group had claimed responsibility for five murders in the period immediately following 7 September and had stated it would kill an additional five, including someone from the Vicaria.

Mr. Salazar was held for 2 hours and made to respond to allegations of having "insulted the armed forces". He was released without charge.

The allegations against Mr. Salazar were based on statements he had made during the investigation of the attack against two youths, Rodrigo Rojas de Negri, a Chilean born resident of the United States, and Carmen Gloria Quintana, who were both set aflame by an army patrol on 2 July 1986. Rodrigo Rojas died four days later. It is believed that the harassment directed at both Mr. Salazar and Mr. Toro was related to their involvement in the Rojas and Quintana case. Mr. Toro was forced to leave the country for a brief period during October as a result of the threats against his life.

The CIJL wrote to the government of Chile expressing its concern about the harassment of Messieurs Toro and Salazar and also issued a circular letter on their behalf.

Y U G O S L A V I A

Continued Harassment of Yugoslav Lawyer Vladimir Seks

The CIJL has previously reported on the case of the Yugoslav lawyer Vladimir Seks (in Bulletins 13 and 15), and has issued several circular letters on his behalf. The CIJL has continued to follow Mr. Seks' case since his release from imprisonment in August 1985 and is concerned about his continuing inability to find employment.

It has been suggested to Mr. Seks that members of the police and other government officials have exerted pressure on prospective employers not to hire him. In addition, his passport, withdrawn when he entered prison, has not been returned, and despite repeated protests, he has not been given any statement of reasons for this. As Mr. Seks has received offers of assistance from abroad, the refusal to return his passport has denied him the opportunity of obtaining employment outside the country.

One of the remaining possibilities for Mr. Seks is to be admitted to the Belgrade Bar Association. Several of its members have expressed support for his application. However, these people have indicated that they are coming under pressure not to accept him into the Bar. As the Belgrade Bar was to make its decision during January or February 1987, the CIJL issued a circular letter on 20 January requesting bar associations to write to the Belgrade Bar in support of Mr. Seks' application for admission. The CIJL also requested that lawyers write to the government requesting that it either return Mr. Seks' passport or provide him with a statement of reasons for its refusal to do so.

The CIJL has also written to the government of Yugoslavia urging it to take appropriate action to ensure that Mr. Seks does not suffer from harassment in his attempts to find employment,and to the Belgrade Bar Association requesting it to give sympathetic consideration to Mr. Seks' application for admission.

Numerous interventions have been made on Mr. Seks' behalf by the Norwegian Bar Association. These efforts by the Association and by individual members of the Association are to be commended.

THE INDEPENDENCE OF THE LEGAL PROFESSION
HOW TO CREATE AND SUSTAIN IT*

Param Cumaraswamy**

1. Introduction

The Montreal Universal Declaration on the Independence of Justice*** spells out three general principles for the recognition of the independence of the legal profession:

"3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights;

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

3.04 All persons shall have effective access to legal services provided by an independent lawyer to protect and establish their economic, social and cultural as well as civil and political rights."

Further in the same Declaration it is provided that "it shall be the responsibility of the lawyers to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies".

These are lofty platitudes and have been repeated over the centuries as the prerequisites for the protection of fundamental freedoms in any democratic state. But the very fact that they needed re-affirmation in a universal declaration as recent as 1983 is clear acknowledgment of

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*This is a slightly shortened version of a paper presented to the International Bar Association Seminar on the Independence of the Legal Profession, September 1986.

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***Editor's Note: see CIJL Bulletin 12, October 1983.

universal violation of the same principles. To the masses in the third world countries striken by poverty and illiteracy, these ideals mean nothing. To many the term independence of the Bar is an ornamental slogan used by the profession for its own enrichment. Government politicians loath it. It is a threat to their positions as political masters thriving generally on the ignorance of the masses. Lawyers who stand firm and challenge every action of governmental lawlessness are often characterized as subversives or anti-nationals. In some countries they are subjected to severe harassment, detentions without trials under security legislation on flimsy grounds, unjust prosecutions and even assassinations.

While independence of the legal profession is recognised as an essential guarantee for the promotion and protection of human rights, the architects of constitutions of nations do not seem to have found it necessary to entrench this concept as fundamental in the same constitutions. However, in some countries it is provided for in local legislation. The Malaysian Legal Profession Act of 1976 provides that the first purpose of the Malaysian Bar is "to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour". It will be seen that this objective is more onerous than that spelt out in the Universal Declaration of Justice, which merely enjoins the profession to promote and uphold the cause of justice, without fear or favour.

2. Role of the Legal Profession

Before embarking on any discussion on the organisation of the profession for the preservation of its independence, it is first necessary to identify and circumscribe what should be the extent of the role of the legal profession in society and,in particular, third world societies. In 1981, the Malaysian Parliament was about to debate some far-reaching amendments to the Societies Act. The amendments violated fundamental rights on freedom of association. The Bar Council and several public interest groups protested publicly. Some 100 members of the Bar stood outside Parliament building under heavy drizzle to distribute the Council's memorandum to members of Parliament who were leaving that House. This action received considerable publicity in the media and embarrassed the Government. The then Minister for Home Affairs was reported to have said that the legal profession should decide whether it should remain as

law interpreters or law makers. The same question was raised in Pakistan a few years ago.

Very recently, in June 1986, the Law Society of Singapore was very severely reprimanded by Government Ministers over a well reasoned and constructive memorandum the Society submitted to the Government on a proposed amendment legislation to the Newspaper and Printing Presses Act. This was the first time, after many years, that the Society took the Government to task publicly. The purpose of the amendment was, inter alia, to make it an offence for foreign publications to be critical of domestic politics of Singapore. The Memorandum was submitted in March and made public in May. Government Ministers took strong objection to the conduct of the Law Society. A senior Minister was reported to have said that the Society "had gone political". 1/ Another Minister was reported to have said: "Public policy is the domain of the Government. It is not the playground of those who have no responsibility to the people and who are not answerable for the livelihood or the survival of Singaporeans". 2/ The same Minister went on to ask: "Does the Law Society seriously think it is better qualified than the Government to decide on matters of public interest?". The Republic's government has further retaliated by moving amendments to the Legal Profession Act to further restrict the already muzzled Bar. 3/*

Incidentally, of the one hundred lawyers outside the Parliament building in Kuala Lumpur, 40 were charged in court for unlawful assembly and found guilty. Prior to 1983, one of the purposes of the Malaysian Bar provided for in the Legal Profession Act 1976 was

> "to advise the Government and the Courts where necessary in matters affecting legislation and the administration and practice of the law in Malaysia."

As a sequence to the protest outside Parliament building, this Section was repealed in 1983 and replaced by the following provision:

> "Where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia." (writer's emphasis)

1/ The Straits Times, June 14, 1986.
2/ The Straits Times, June 1, 1986.
3/ The Straits Times, August 28 and 30, 1986.
* Editor's Note: These amendments were subsequently passed.

Earlier, in 1977, the same legislation had been amended, inter alia, to exclude lawyers under seven years standing from getting elected into the Bar Council, which is the governing body of the Malaysian Bar. The exclusion came in the aftermath of a resolution adopted by the general meeting of the Bar advising all members that they could refuse briefs to defend internal security cases if they so wished. The Bar was most unhappy with the Essential Security Cases Regulations 1975, which had resulted in, inter alia, the mandatory death sentence being imposed on a 14 year old schoolboy for possession of a firearm. The Government was under the impression that the resolution was masterminded by the younger lawyers, thus their exclusion. That amendment has been challenged by the Bar Council as being in violation of the equality principle under the constitution. The Supreme Court is expected to deliver its judgment soon.

These are some incidents which reflect the thoughts of our political masters on the role of the legal profession. Politics and law-making are their domain,to the exclusion of all others. They justify this on the ground that they are the elected representatives and therefore they know what is best for the electorate.

The role of the legal profession, particularly in third world countries, must necessarily be wider than the traditional role of advising clients on legal matters and advocating their causes in court. It will not only be a betrayal of society, but a betrayal of the profession itself if the legal profession adopts a passive traditional role in society. No other profession or section in society has the skill and understanding of the intricacies and niceties of the law and the constitution. In presenting legislation before Parliament, politicians, being what they are, very often fail to realize and appreciate the implications and far-reaching effects of their proposals. Even if they realize, they are more concerned with the political exigencies of the situation. In the course of events they are prepared to sacrifice well settled principles for short term political gains. Would not the profession fail in its duty to society if it fails to alert the people of the obnoxious features of such legislation? Lawyers are duty bound to promote and protect human rights as spelt out in the first principle in the Montreal Declaration. Human rights often have political undertones. Hence, where lawyers are involved in the promotion and protection of human rights, they will often be branded as being political. Despite

such characterisation and accusation, it is imperative for lawyers to continue to advance the cause of their profession without fear or favour. There should be no compromise on this role. The stark realities must be accepted by the governments. Governments should not fear the profession. Instead, they should appreciate and be respectful of the role of the profession. On the other hand, the profession must be constructive and not destructive.

3. Organisation of the Legal Profession

In practically all third world countries the profession is governed by statute. It is also assumed that in such countries the profession is fused rather than distinct, as in England and Wales and some other industrialized countries. With respect to controls over qualifications, practice and discipline, statutory provisions over such matters are quite common. The disadvantage of such statutory control is that it negates the concept of absolute independence. Parliamentary control may lead to control by the government. The ruling party forming the executive arm of the government will necessarily control Parliament. In those circumstances, the profession cannot be said to be absolutely independent. Executive interference through Parliament was seen in recent years in the number of amendments to legislation concerning the legal profession in Malaysia and Singapore. One advantage of statutory control is the legal recognition it entails for the profession. What is of uttermost importance is that the legislation recognises, declares and expresses in clear terms the independence of the profession. Once that is secured, the commitment of the members of the legal profession to uphold the cause of justice without fear or favour will be the motivating force to nurture and preserve that independence. Without commitment from the rank and file within the profession, it will be an exercise in futility. Independence will remain a dead letter.

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

...

(c) Self-discipline

Stemming from self-regulation is self-discipline. This has been a sore issue in practically all jurisdictions. The Law Society in England and Wales commissioned a firm of accountants to advise on their structure, including the disciplinary procedure. The English Bar too has recently received a report by the Rawlison Committee with recommendations for change. The public cannot possibly understand the rationale of a lawyer being tried for professional misconduct by his own peers. There is a constant suspicion in their minds that the profession cannot possibly be independent in such adjudications, as it will at all times protect its members. This does not conform with their notion of justice. To them, the very structure of the profession is to protect itself and the interests of its members. The system cannot possibly be expected to protect the public against delinquent lawyers. Hence, the public outcry continues supported by the media which always finds the legal profession a target for sensationalism. Governments, particularly in third world countries where the profession is active, exploit the situation and further add to the injury by interfering under the pretext of putting some order into the profession, as the profession itself is unable to handle the situation. Governments achieve their purpose. The profession becomes discredited and the public begins to lose faith in its lawyers. The profession's influence in society is lessened. It is often suspected that in third world countries where the media is often controlled by the governments, issues are sensationalised by the media and blown out of proportion, to the detriment of those groups who are critical of the government and its policies.

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

The Malaysian Bar has in recent years been subjected to criticism by the public over its disciplinary procedures. For a period,such complaints became a feature in the letters to the editors column in the English dailies. The Bar Council took cognisance and began a soul searching exercise, and, in November 1985, set up a high-powered committee to look into the disciplinary procedure provided in the Legal Profession Act and to consider its adequacy, and,if inadequate, recommend changes. The committee is headed by a former Prime Minister, Tun Hussein Onn, who was a practising lawyer himself. Other members are the former Lord President of the Federal Court, Tun Mohamed Suffian, representatives of the Chief Justice, public interest groups and members of the Bar. The formation of the committee was generally welcomed by the public. Media editorials hailed it as a step in the right direction. The committee's report is expected by the end of this year [1986]. Radical changes are expected amongst its recommendations, including the presence of lay persons in disciplinary tribunals. Such representation will serve to allay public suspicion of protectiveness within the Bar. The presence of lay persons in such tribunals is now accepted in many countries. Their presence will not in any way erode the independence of the Bar but could very well enhance the public image of the profession. What is important here is that the public is now aware that self-regulation and self-discipline also involve self-examination and self-correction. For the preservation of independence, it is imperative that the profession handle these problems and not give the government an excuse to encroach.

4. Sustaining the Independence of the Profession

Under third world governments controlled by power-thirsty and politically immature politicians, an activist profession will always be threatened. Such threats can take a variety of forms. The profession must always be on the alert and protest loudly and clearly at the slightest threat. Against such threats the profession's support must necessarily come from the people. The survival of politicians depends ultimately on the people. It is therefore of utmost importance for the profession to gain the good will of the general public. In addition to providing legal services of quality and displaying honesty and integrity in the discharge of professional duties, the profession collectively

must be involved in public interest issues. In developing countries the majority of the population is often illiterate and survives below the poverty level. Their good will is important for the profession. It is this group which is often exploited and sometimes neglected. The profession's involvement in legal aid for the poor and human rights issues and public interest litigation will result in considerable respect for the Bar, and will immensely enhance the image of the Bar. Public respect for the profession cannot possibly be ignored by governments.

In this respect, the Malaysian Bar is active. It is currently involved in legal aid work. The programme is entirely funded by the profession; each lawyer contributes $100 per year to the fund. It is managed and run by the Bar Council and assisted by voluntary lawyers who do not get paid for their services. The first centre was opened in the capital city of Kuala Lumpur in 1983. It has expanded and centres have been opened in four other state capitals with clinics in smaller districts. It is the intention of the Bar Council to intensify this programme by not only providing legal advice and assistance for the poor and the needy, but also by providing legal literacy programmes in rural areas to educate the people of their rights and obligations. All police stations where legal aid centres are operating carry posters explaining the services of the centres. Negotiations are now in progress with the police to place in all police stations posters informing suspects and accused persons of their rights and of the limits of police powers. This is being done in conjunction with the Bar Council's Human Rights Sub-committee.

This sub-committee is also active in public issues. Any violation of human rights brought to the attention of the Council is attended to and action taken either by making public protests through the media or by writing to the authorities concerned, and, as a last resort, challenging the conduct before the courts. The Malaysian public are gradually beginning to appreciate the public spiritedness of the profession. This is evident from the many letters the Council receives from the public for assistance with regard to their problems with the bureaucracy. The sub-committee also organises seminars on human rights issues. These seminars are valuable in that they generate public awareness of important issues affecting fundamental rights. The Council organises biennial national law conferences over a period of three days. The subjects for discussion are often of national importance and receive wide media coverage. Again, it

generates considerable public awareness of issues of the day. There are other committees of the Council involved in law reform and matters affecting the administration of justice which monitor both substantial and procedural laws and call for reforms whenever necessary. Often the Council is invited to submit its views on any changes proposed by the government.

5. Public Relations

The legal profession is by far the most misunderstood of all professions. To the average layman the profession is clouded by a mystery of legal jargon and antiquated laws and procedures which it believes are perpetuated for the exclusive enrichment of the profession. Almost no attempt is made by the profession to explain and unveil the mystery. One consumer association in Malaysia has called for simplification of legal language for the benefit of the people. There is a great deal of sympathy for this. Such simplification is particularly needed in third world countries so that the general population can gain an understanding of the law and its ramifications.

But what is needed immediately is for the profession to explain itself to the people to allay their suspicions.

...

In Malaysia, the Bar Council encourages its members to accept all invitations to speak at seminars, conferences and other group discussions organised by public interest groups to explain the functions and role of the profession and to answer questions. The legal profession is a component part of the machinery for the administration of justice. It is therefore important that there be a cordial relationship with the judiciary and the attorney general. Such a relationship must be one of mutuality in an equal partnership. It should not be at the expense of the profession playing a subservient role. Not one component party should consider itself as superior to the other. The paramount interest should be the dispensation of justice, and this can only be done if there is harmony among the three. Suspicions of one another's role can mar the quality of justice and undermine public confidence in the system of justice.

6. Conclusion - International Support

Lastly, and in conclusion, it may be thought by some that what has been said in this paper for the creation and sustenance of the profession's independence is easier said than done. The practical problems may be there. But the struggle must go on. At times the price may be very high. Considerable personal sacrifice may have to be made. But the burden and stress of those who struggle for these ideals would be lessened if it were known that their cause is shared and actively supported by others, and in particular by international and other national associations of lawyers. This was demonstrated late last year when the writer stood trial before the Kuala Lumpur High Court on a charge of sedition. It was over a public appeal made to the Pardons Board to review its advice to the King to compute the death sentence imposed on a young labourer for possession of a firearm. The concern and support expressed and shown by so many national and international bar associations was most heartening. The presence at the trial of eminent counsel either holding watching brief or as observers for the International Bar Association, the International Commission of Jurists,* LAWASIA and the Bar Council of England and Wales clearly demonstrated to the Malaysian public the solidarity of lawyers all over the world to uphold the cause of justice and for the effective promotion and protection of the rule of law and human rights. The local Bar stood united in support of the Defence. Five eminent Malaysian lawyers conducted the Defence in the highest traditions of the Bar over a period of nine days. They did not seek any remuneration. That was their commitment to the cause of the legal profession. The writer was acquitted; justice triumphed; the independence of the Malaysian judiciary was reaffirmed; and the independence of the Bar was vindicated. Unfortunately, the young labourer was eventually executed after further unsuccessful legal battles to save him. The writer extends his grateful thanks to all and everyone for their concern and support.

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*Editor's note: see CIJL Bulletins 16 and 17.

REPORTS

The Administration of the Courts

Justice, the British Section of the International Commission of Jurists, established a committee to conduct an enquiry into the administration of the courts in England and Wales from the point of view of the litigant. The committee's report has been published by Justice. The terms of reference of the committee were:

> "To investigate the range and nature of complaints about the administration of civil and criminal courts in England and Wales; to assess the adequacy of existing channels for complaints and remedies, and to make recommendations thereon."

The committee did not look into administrative tribunals nor did it concern itself with the way in which decisions on the merits of cases are reached, the organisation of the legal profession, misconduct by barristers and solicitors, the need for reforms of civil and criminal procedures or the way in which legal services are provided.

Included among the committee's recommendations are the following:

1. the responsibility of the administration of all courts in England and Wales should lie with one department of State and that should be the Lord Chancellor's department;

2. in every court building a notice should be displayed telling people where they can get help or information or make a complaint concerning the administration of the courts;

3. if a complaint is rejected an explanation should be provided, and, if the reason is that the matter is judicial and an avenue of appeal lies open, the complainant should be so advised and be told how to obtain help to appeal;

4. if a complaint is accepted, the complainant should be informed thereof and of the action to be taken to ensure, so far as possible, that there is not a recurrence of the substance of the complaint;

5. all courts, except the House of Lords, should normally be expected to deliver judgment within 6 working weeks of the end of a trial; and

6. whoever is to be responsible for considering complaints against the judiciary should, in the last resort, be answerable to Parliament; and, for that reason, the setting-up of an independent judicial commission was not favoured.

The committee, in its consideration of the handling of complaints against the judiciary and the role of the Lord Chancellor in this process, recognised that the position of the Lord Chancellor is anomalous in that he is both a Cabinet Minister and head of the judiciary. The committee was divided as to whether that position should remain, some being of the view that, however anomalous in principle, the position was satisfactory because it worked well, while others took the view that the time had come for some changes to be made,as the need for judges to be seen to be independent of the executive is greater today than ever before.

Copies of the report can be obtained from Justice, 95a Chancery Lane, London WC2A 1DT.

Criminal Justice: Education, Reform and Human Rights Protection in the Arab World

The International Institute of Higher Studies in Criminal Sciences held an international conference on: Criminal Justice: Education, Reform and Human Rights Protection in the Arab World, from 1 to 7 December 1985 in Siracusa, Italy. The participants included 76 distinguished jurists from 10 Arab States, Gaza and the West Bank, as well as representatives from the United Nations, the Council of Europe and scholars from various countries.

A report on the conference resolutions was published in April 1986. Below are excerpts from the recommendations which pertain to the independence of judges and lawyers. Additional recommendations were made as to legal education and research in law faculties and specialised institutions, such as judicial training institutes and police academies. Copies of the report may be obtained from the Institute, Siracusa, Italy.

"CONCERNING LEGISLATIVE REFORM

...

(7) Limiting the delegation of authority [to] the police to conduct judicial inquiries [to] extreme emergency cases and forbidding it in political cases.

(8) Ensuring the right of the accused to present a defence, and the necessity to inform him of his rights to legal counsel from the time of his arrest by the police.

...

(12) Ensuring that criminal laws do not conflict with Constitutional guarantees protecting human rights and enabling courts to judicially supervise the constitutionality (of the criminal laws).

(13) Elimination of all exceptional (special) tribunals guaranteeing the citizen's right to access to the ordinary courts (the'natural judge').

(14) Limiting the jurisdiction of military tribunals to military offences and guaranteeing the right of appeal from its judgements.

(15) Guaranteeing the independence of the judiciary and protecting the immunity and dignity of judges.

(16) Ensuring judicial supervision of all procedures which may affect civil liberties in all cases, irrespective of the authority conducting the procedure.

(17) Ensuring the (proper) execution of penal (criminal) sentences through the adoption of the system of supervising judges to oversee the execution of sentences and their individualization in order to ensure respect of human rights (during this phase of execution of sentences).

...

"CONCERNING COMMUNICATION, FORMATION AND EDUCATION ABOUT HUMAN RIGHTS IN CRIMINAL JUSTICE

...

(7) Guaranteeing that professional organizations, particularly bar associations, perform their duties in dissemination of information, education, communication and defence of human rights..."

B O O K R E V I E W

WHERE'S THE JUSTICE?
A Manifesto for Law Reform
by
Tony Gifford*

Reviewed by Peter Allan,
Judge, Industrial Court,
South Australia,
Chairman, IBA Administration
of Justice Division**

"Few myths have been so powerfully developed by the British Establishment than that 'we have the finest legal system in the world'. According to the myth, whenever a citizen's rights are infringed there exists an array of benevolent institutions, known as courts and tribunals, which will provide a remedy. They are said to be presided over by men (nearly always men) of unquestioned impartiality and independence. To help the citizen to have access to these arbiters of truth and right, there is a hierarchy of solicitors, barristers and Queen's Counsel, whose skill, learning and devotion to their clients is incomparable."

So go the opening lines of this highly readable book; and, for the next 100 pages or so, the author goes about exploding the myth and exposing the reality, as he sees it. In doing so he covers a whole range of institutions which substantially go to make up the British legal system: the Lord Chancellor, the judges, the magistrates, juries, courts, barristers, solicitors, law centres and the police. The criticisms are trenchant, but at the same time those aspects of the system which the author sees as being positive and good are given their due.

Essentially, the book is about reform; about what is wrong with the system and what can be done to improve it, perhaps to make it "the finest legal system in the world". This is not a book which is concerned solely with identifying those aspects of the system which are bad; where criticisms are made, concrete proposals for reform are offered. The book aims at being constructive, not destructive.

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*Penguin Books, 1986, 126 pp; £ 2.95 paperback.

**The views expressed are in the author's personal capacity.

Among the proposals for change is that the role of the Lord Chancellor in the system should be replaced by a Minister of Justice accountable to the House of Commons and scrutinized by a Select-Committee, and that all responsibilities affecting the provision of justice should be brought within the Ministry of Justice. He emphasises that a duty should be imposed upon the Ministry of Justice to ensure that comprehensive legal services are available to all.

Also examined is the method of appointment of judges and other judicial officers, including those sections of British society from which they are recruited. The author provides figures for the main categories of judges: Lords of Appeal and Heads of Division, Lord Justices, High Court Judges, Circuit Judges, Recorders, Assistant Recorders, Stipendary Magistrates and full-time chairmen of tribunals, such as the industrial tribunals, social security tribunals and mental health review tribunals. The figures for age, sex and professional background were supplied to the author by the Lord Chancellor's Department and the information about school and university was taken from "Who's Who 1985". The figures are startling. The judges are predominantly older men who have been educated at public schools and at Oxford or Cambridge university and have had a career at the Bar. There are only 71 women among the 1,629 holders of judicial office and only four black people. The recounting of these figures alone might be seen to be sufficient to warrant an investigation into and change of the method of appointment and eligibility for appointment.

The author also draws on his experience as a barrister to offer a personal assessment of the quality of the judging: a few are described as being "frankly unpleasant" with the appearance of despising "the majority of those whose lives they dispose of"; a further few are seen as "incompetent with little understanding of the laws which they have to administer"; a number are seen as taking obvious trouble to be fair and objective and, "(in) the middle are a majority of judges who, while not being openly offensive, are affected by a deep and ingrained bias against the unprivileged individual and towards the more powerful party, such as the prosecution, government department or big corporation." Several proposals for change are made, including the establishment of a judicial training college, the appointment of judges from a wide range of people, including younger people, solicitors and academic lawyers, a retirement age

of 65 and approval by the Select-Committee of the House of Commons of the appointment of the most senior judges.

Other proposals for reform are: the composition of the advisory committee, which makes recommendations to the Lord Chancellor for the appointment of magistrates, should be changed to ensure that they are truly representative of the community in which they are situated; there should be no further limits on the right to trial by jury; the right to trial by jury should be extended to people charged with assaulting a police officer; the vetting of juries should cease; the jury should be allowed to decide the case without the influence of judicial comments; the procedures of the courts should be reshaped so as to meet the needs of the public; procedures at coroner's inquests must be changed so as to allow all interested parties a full opportunity to investigate the causes of an unnatural death; a system of family courts should be introduced for all cases concerning the family and the care of children; facilities should be upgraded to meet the needs of the public; court officials and not the police should be responsible for arranging business in the magistrates court; competent magistrates should be provided by the courts; lay representatives should have the right to speak in the county courts and magistrates courts; all qualified lawyers should be given rights of audience before all courts; the Ministry of Justice should require the Bar to elaborate a fair system of recruitment; the status of Queen's Counsel should be abolished; wigs and gowns should no longer be worn by barristers and judges; the legal aid scheme should be overhauled and gaps in its coverage should be closed; the Minister of Justice should fund a network of community law centres throughout the country and regional legal services committees to research local needs and stimulate local initiatives; everyone detained in a police station should have the right to the assistance of a lawyer; all interviews with suspects should be tape-recorded; the Prevention of Terrorism Act should be repealed; police authorities, to be elected by the community, should be given power to determine police policies and should have the ultimate responsibility for police actions; the European Convention on Human Rights should be incorporated into British law.

It would be unreasonable to expect that the proposals will meet with universal acceptance, but, at the least, they are provocative and may stimulate thought and discussion. The substance of the book is, in

essence, political, and the author makes no excuse for this; and, really,it can not be otherwise, as proposals for reform require political action.

The subject of the book is the British legal system, but much of it is apposite to other legal systems. It is interesting to note that the book has been published in Australia, Canada, New Zealand and the United States. It is written for the community as a whole, not just for lawyers and politicians, although, for the latter it should be prescribed reading: one might even recognise oneself.

COSTA RICA SEMINAR ON THE INDEPENDENCE OF JUDGES AND LAWYERS

During 1986 it was decided that the Centre for the Independence of Judges and Lawyers (CIJL) of the International Commission of Jurists should expand its programme of activities and undertake the organisation of regional and sub-regional seminars on the independence of judges and lawyers. The purpose was to bring together judges, lawyers, academics, human rights activists and government officials to discuss the problems they faced in their countries and regions and to make recommendations about steps that could be taken to further the independence of judges and lawyers and to improve the functioning of the system of administration of justice. Another aim was to make the participants aware of work progressing at the international level and of the existence of international texts such as the United Nations Basic Principles on the Independence of the Judiciary.

The first of these seminars was held by the CIJL and ICJ in conjunction with the Inter-American Institute of Human Rights, the Latin American Institute for the Prevention of Crime and the Treatment of Offenders in San José, Costa Rica from 20 to 25 April 1986, and covered the Central American region as well as the Dominican Republic. Participants came from Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, Panama and the Dominican Republic. They were divided into five working groups which considered the following themes: (1) functional independence of the judiciary; (2) economic and social conditions necessary to guarantee the independence of the judiciary; (3) the independence of lawyers; (4) the independence of the judge; and (5) the independence of the public prosecutor (Ministerio Público).

The recommendations of the working groups as amended in a plenary session were adopted by it, as was a final resolution calling on the participants, bar associations and governments, among others, to work for the implementation of the recommendations at the national level. A committee was named to review the progress made in this respect and it is to report back to the sponsors within the next few months.

The CIJL is publishing the conclusions and recommendations in order to give them wide publicity and in the belief that some at least have relevance to the situation in other regions of the world. It is hoped that they will act as a catalyst for continued debate in Central America, a region particularly affected by economic, political and social turmoil and where attacks against the independence of judges and lawyers have been more frequent than actions to further it, and that they will encourage readers to take a more critical look at the functioning of the judiciary and the legal profession in their own countries.

CONCLUSIONS AND RECOMMENDATIONS

INTRODUCTION

The need to ensure that the Judiciary is truly independent, both economically and functionally, is a fundamental prerequisite for improving the Administration of Justice and of enhancing respect for Human Rights in a region like Central America,which is in the midst of an economic, social and political crisis.

It is also essential to establish the roles, obligations and duties that those exercising the legal profession must discharge and, included in these, should be the efforts that individual members as well as the profession itself must take to further the independence of the judiciary.

Likewise, the relationship between the independence of justice and human rights should be included in the curricula of law faculties and other academic institutions responsible for providing legal training.

Although these ideas are gaining acceptance, continued efforts need to be made to bring them to fruition and the solutions will depend on increased awareness on the part of the relevant government officials, as well as a more comprehensive understanding of the problems being faced in the individual countries.

For this reason it was considered vital to bring together members of the legal profession from the region and to have them undertake a study of the problems and approve a set of recommendations that, if implemented, would help to ensure the independence of justice in all of the countries.

TOPIC I

FUNCTIONAL INDEPENDENCE OF THE JUDICIARY

A. Formal Guarantees for the Independence of the Judiciary

1. Formal guarantees for the independence of the judiciary are contained in the various constitutions and include provisions that create a division of powers, that recognise the exclusive competence of the courts to sit in judgement and to ensure the execution of their judgements, and that make Magistrates and Judges, with respect to the exercise of the judicial functions, independent and subject solely to the Constitution and the laws.

2. It is recommended that the independence of the judiciary should be maintained as a constitutional principle and that it be strengthened by the creation of a career judiciary.

3. It is recommended as a matter of urgency that an investigatory body should be established within the judicial branch of government, so that the initiation or conduct of legal proceedings will be impartial; that judicial functions should not be given to other organs; that the parties to legal proceedings should not make use of the media to air matters submitted for the information and decision of the courts while such matters are still sub judice, because in doing so they interfere in the administration of justice.

B. Objectives and Functions of the Judiciary

We recommend, as functions of the Judiciary, the following:

4. To be exclusively concerned with the exercise of jurisdiction over matters of a judicial nature.

5. To ensure the correct and just application of the law.

6. To ensure equality before the law of parties to legal proceedings and to be vigilant with regard to the protection of their human rights.

7. To review the constitutionality of legislation and to ensure the observance of the principle of legality.

8. To have the sole prerogative to propose law reforms that concern the judiciary.

9. To fulfill these functions, we believe that it is necessary for Judges to devote themselves exclusively to their judicial responsibilities, and that administrative functions should be performed by departments to be created for this purpose within the judicial branch of government.

10. It is also indispensable to establish a mechanism for the continuous exchange of judicial publications among the judges of the various countries; to provide basic libraries to the lower courts; and to bring to the attention of Judges and Magistrates international conventions and other relevant instruments.

C. Appointment and Control of Magistrates of the Supreme Court

On this subject, we believe it desirable to make the following observations and recommendations:

11. That the appointment, election or designation of the Magistrates of the Supreme Court should be the exclusive prerogative of the Congress or of the Legislative Assembly, and that their term of office should not coincide with that of the President of the Republic or of the Deputies.

12. That the system or procedure for selecting Magistrates must guarantee the independence, integrity and training of the members of the Court.

13. That all criteria of a partisan political nature in the selection and removal of Magistrates should be regarded as an attack on the independence of the judiciary.

14. The law should guarantee professional immunity for members of the Supreme Court.

15. The members of the Supreme Court and the Court as an institution shall not be subjected to any form of interference, pressure or coercion, and shall be subject only to controls established by the Constitution and the law.

CH. Relations Between the Judiciary and Other Organs of Government

We recommend the following:

16. Maintaining the division between the three organs of government and precluding any one of them from gaining supremacy over the others; in addition, there must be an inter-relationship among the organs of government.

17. Maintaining the constitutional protections of writs of amparo and habeas corpus, and the right to have legislation declared unconstitutional as a method of judicial control to safeguard the rights of the people.

18. Maintaining the practice of using impeachment proceedings against high state officials for the commission of penal offences.

19. Having respect for the traditional forms of administration of justice of indigenous communities that have preserved their ethnic characteristics and live in accordance with them, in so far as these do not contravene general principles of justice.

D. Special Courts

It is recommended:

20. That all types of special courts be abolished.

21. It is also recommended that the jurisdiction of military courts be limited to military offences committed by military personnel.

22. We note that popular justice in the sense of justice directly applied by the people contradicts principles of natural justice and of due process and is a form or modality of a special court.

TOPIC II

ECONOMIC AND SOCIAL CONDITIONS NECESSARY TO GUARANTEE THE INDEPENDENCE OF THE JUDICIARY

A. Economic Aspects of the Independence of the Judiciary

23. In some countries of the region the other branches of government have direct control over the budget of the judiciary. The controls vary from the ability of the Ministry of Finance and the Legislative Assembly to reduce the budget of the judiciary without prior consultation with the judiciary, to the ability of the executive to approve and to administer the budget of the judiciary. This economic dependence obviously creates the possibility of undue pressure and direct intervention by the other Powers in matters properly belonging to the judiciary.

24. In other countries of the region a constitutional norm recognises the right of the judiciary to be accorded a fixed percentage of the national budget, varying from two to six per cent. However, experience has shown that no country fully and continuously respects this norm.

25. In all countries of the region there is obviously a lack of sufficient resources for the development of a system of justice that is truly capable of satisfying effectively and promptly the needs of the people. Among the principal consequences of this lack of resources are:

(a) difficulties in recruiting highly qualified Judges and Magistrates owing to low salaries;

(b) the impossibility of creating a true career judiciary;

(c) the difficulties of recruiting well-trained auxiliary personnel;

(ch) the shortage of physical resources such as the vehicles and office equipment necessary for the exercise of judicial functions, which contributes to the dilatoriness of justice; and

(d) corruption within the ranks of the judiciary.

26. Although insufficient funding of the judiciary is partly due to poor management of resources at the national level and the failure of the other organs of government to appreciate the importance of a sound administration of justice to the promotion of the social order and a balanced and integrated national development, it is also due to the poverty of the countries of our region, caused by the unjust international

economic order that prevails at present.

27. In many countries the Supreme Court is obliged to devote a large proportion of its human resources to administrative work, for which the members of the legal profession are not adequately prepared.

28. The judiciary should not have to depend on obtaining resources from the sale of stamps or the imposition of fines since such dependence could lead to an increase in the cost of gaining access to justice or to the judiciary making undue use of fines as a penalty. When, however, the judiciary does have resources allocated to it, they should be for its exclusive benefit.

29. In view of the foregoing, it is recommended that:

(a) a constitutional norm be established in all countries of the region which would guarantee a minimum amount of money to the judicial system, expressed as a specific percentage of the national budget;

(b) such a constitutional guarantee, where it exists, should be fully respected, and in all cases the judiciary should receive a sufficient percentage of the national budget to enable it to fulfil its functions adequately and with due dignity;

(c) technical offices, entrusted not only with daily administrative duties but also with the preparation of budgets and long range planning should be established within the various levels of the judiciary;

(ch) in all systems, the judiciary should be responsible for the management of its budget, for the appointment and promotion of auxiliary personnel and for other related matters in accordance with the law; and

(d) in situations where the judiciary has its own revenue, this should be for its exclusive use.

B. Public Opinion and the Independence of Justice

30. Public opinion, in principle and in general, contributes to the protection of judicial independence with respect to both the individual judge and of the judiciary as a whole. A judge cannot and should not fulfil his functions in complete isolation from society. The free expression of opinion on the part of different groups in society helps the individual judge to understand the problems and concerns of his or her community. Also, in a democratic society there is a need for each person to have the right to express his or her opinion about each

component and aspect of the national life.

In practice there have been situations in which different sectors of the public have united to demand a system of justice with greater independence and integrity, and these demands have helped to transform the judiciary in these respects.

31. The contribution which public opinion can make to the independence of the judiciary will largely depend on the confidence and understanding of the general public in the administration of justice. Consequently, judges and lawyers and their professional associations should draw up programmes to help the different sectors of society to understand the nature and proper functions of the judiciary and to ensure that all members of the community have access to the courts and tribunals for the effective protection of their rights.

32. Confidence in the Judicial Power may also be strengthened by the participation of non-lawyers in the administration of justice and by the creation of semi-judicial arbitration mechanisms capable of handling certain types of disputes more rapidly and efficiently. As regards the participation of non-lawyers in the work of the courts, it is thought that this type of mixed system offers various advantages over the jury system.

33. There have also been situations in the region in which public opinion has had a negative influence on the independence of justice, both in individual cases and in general. It has been found that public opinion can have a healthy influence, but only when every sector of the public is in a position to express its views freely.

In other words, monopoly of expression or the manipulation and orchestration of public opinion, be it by the State or by private interests, are factors that transform public opinion into a threat to the independence of the individual judge and possibly to the judiciary as an institution. Moreover, it must be realised that the media does not always serve to transmit public opinion, but may sometimes be the means of publicizing and promoting the positions of private interests.

34. The following recommendations may be made on the basis of the foregoing:

(a) in accordance with his moral obligations, no professional person involved in a case sub judice may publicly express an opinion on the subject, except to correct misinformation;

(b) similarly, the authorities must refrain from expressing any opinion whatsoever on matters sub judice;

(c) the media must inform the public objectively about the course of trials and lawsuits, but in cases that are sub judice they must refrain from adopting positions on the substance or on the question of liability;

(ch) every person, group, or body, as well as the media, is entitled to criticize the administration of justice in general, as well as verdicts and rulings of decided cases;

(d) lawyers, judges and magistrates must avoid any action or behaviour, professional or otherwise, that would discredit the administration of justice; and the respective disciplinary courts must ensure strict observance of the laws, while also maintaining respect for the guarantees of due process;

(e) bar associations and other professional bodies must defend the independence of the judiciary at all costs, for example, through legal conferences and programmes of information dissemination and education;

(f) in general, bar associations should play an active part in the defence of human rights and public freedoms and contribute to the solution of national problems, while always refraining from taking up political positions of a partisan nature. When appropriate, these activities should be coordinated with those of other professional associations as well as social organisations;

(g) membership in bar associations should be made compulsory in all countries of the region, as this strengthens the associations' ability to defend the independence of justice, human rights and the Rule of Law; and

(h) judges and magistrates must defend the independence of the judiciary, not only through their rulings and judgements, but also by such activities as the dissemination of information and the creation of programmes of education to heighten public awareness of the importance of an independent judiciary. In this regard, means for collaboration between the judiciary, law faculties and professional legal associations should be established for the purpose of coordinating activities of an educational and formative nature which would serve to strengthen the independence of justice.

C. The Judiciary and Human Rights

35. The judiciary plays a predominant role in the defence of human rights, both political and civil rights, as well as economic, social and cultural rights. Only a judiciary that is truly independent and is committed to the honest and independent exercise of its functions is capable of fully defending those rights. Every effort must therefore be made to strengthen the independence of the judiciary.

36. In the last few years various countries of Central America and the Caribbean have lived through tragic periods characterized by the systematic violation of rights such as the rights to life and to respect for the physical integrity of the person, and the perpetrators of these violations have been able to act with impunity.

37. Ignorance of their economic, social and cultural rights is a problem common to all the peoples of the region, and the various systems of administration of justice have failed to take effective measures to watch over and protect these rights. A problem of special importance in this respect is the ability of persons who commit economic offences to act with impunity and thereby to prolong the poverty from which the countries of the region suffer.

38. The factors that have impeded the courts of different countries in the region from fully and effectively protecting human rights in specific historical circumstances have included the following:

(a) lack of commitment to justice by the members of the judiciary;

(b) systems of appointment dominated by criteria of a political nature or, more generally, by considerations unrelated to professional aptitude or individual morality;

(c) the inadequate training of judges, both in matters of professional ethics and with respect to the content and significance of rights and fundamental freedoms;

(ch) the threat of reprisals, in certain countries, against judges who confront the State or powerful private interests;

(d) corruption; and

(e) the enactment of emergency legislation or the creation of special courts that depend on the Executive, or the introduction of states of emergency for the purpose of altering, restricting or infringing upon the procedures and competence of the ordinary courts.

39. The effective protection of human rights by the judiciary has also been, or is in the process of being, obstructed in certain countries of the region by factors unrelated to the functioning of the judiciary. These include the reluctance of victims to bring legal charges for fear of reprisals, the refusal of the other organs of government to abide by and implement rulings of the judicial authorities, or recourse to repressive tactics which deny the possibility of judicial intervention, for example, the notorious phenomenon of making persons "disappear". This clearly indicates that the independence of the administration of justice is not determined by any one branch, but by the underlying structures of government.

40. In view of the foregoing, it is recommended that:

(a) the appointment of judges and magistrates should be based on objective criteria, in particular training, impartiality and the commitment of the candidate to human rights and the independence of justice;

(b) the judiciary of the different countries of the region should periodically evaluate whether the remedies for the protection of human rights, such as habeas corpus, amparo and of personal appearance, are functioning adequately, with a view to detecting and rectifying shortcomings;

(c) the judiciary should collaborate with research institutions and undertake studies of an inter-disciplinary nature in order to identify methods of improving the protection of human rights;

(ch) the judiciary should do its utmost to support and protect those of its members who are threatened or are under attack because they have carried out their professional obligations; and

(d) international human rights institutions should offer training to judges on matters relating to human rights.

TOPIC III

THE INDEPENDENCE OF LAWYERS

A. Training of Lawyers

It is recommended that:

41. The training of lawyers should promote technical competence, ethical standards and an understanding of the importance of defending those human rights and fundamental freedoms recognized in international law. To accomplish this, the existing programmes of study must be revised.

42. Schools and faculties responsible for providing legal training should put into effect a satisfactory policy for the selection and admission of would-be lawyers.

43. The legal training offered should be compatible with the social, economic and cultural conditions in each country.

44. Schools and faculties responsible for providing legal training should maintain strict controls over the quality of their programmes and over the academic standards of their students and teaching staff.

45. Schools and faculties, as well as bar associations should expand their post-graduate programmes of study and provide refresher courses in order to give lawyers the opportunity of continuing their legal training.

46. There should be greater coordination between schools and law faculties and bar associations, both at the national and at the regional level.

47. Professional associations in the region should be urged to play a more effective and active role in legal training in their respective countries.

B. Exercise of the Profession

It is recommended that:

48. The State should guarantee the independence of lawyers in the performance of their professional duties, which means there should be no restriction, pressure, threat or interference of any kind.

49. The above obligation refers especially to lawyers in the service of the State.

50. Social security schemes should be encouraged and established in order to guarantee lawyers a decent livelihood as a means of ensuring their independence.

51. Neither the authorities nor the general public should identify lawyers with their client's cause.

52. Recognition should be given to the duty of the State to allow lawyers access to the files and documentation necessary for the proper exercise of their profession.

53. Policies and measures must be implemented to encourage the rational geographic distribution of lawyers in each country.

54. The exercise of the profession of notary must be carried out so as to ensure to the parties the impartiality of the notary.

55. Public officials, such as the Executive, Ministers of State, heads of state-run corporate bodies and judges should not exercise the profession of notary.

C. Control Over the Exercise of the Legal Profession

It is recommended that:

56. Control over the exercise of the legal profession be entrusted to professional associations that are legally recognised and independent of the government.

57. Disciplinary mechanisms of professional associations should be strengthened.

58. The bar association should ensure that all disciplinary proceedings conducted by it accord with guarantees for due process of law.

CH. Rights and Duties of Lawyers in the Civic, Political and Social Fields

59. It is the duty and right of lawyers to promote, in so far as they can, respect for the legal system, the enforcement of human rights and the Rule of Law.

60. Every person is entitled to be assisted by a lawyer.

61. A lawyer providing legal assistance without charge should provide it with a reasonable degree of competence and diligence.

62. Professional assistance to the economically disadvantaged should not be confined to labour or penal proceedings.

63. Lawyers have the obligation and the right to criticize judicial decisions, provided that:

(a) They refer to matters on which final judgement has been passed;

(b) They do so in language that is essentially respectful.

Lawyers and the competent authorities should take all necessary measures to promote the practice of having amicus curiae so as to avoid the indiscriminate use of the media as a forum for debating issues under consideration in a given case.

64. Lawyers have the obligation and the right to criticize existing legislation as well as the administration of justice,and they should provide the executive and the legislature with the benefit of their special knowledge and should propose law reforms.

D. Professional and Bar Associations

It is recommended that:

65. Professional associations should encourage the establishment of organisations with the aim of making it easier for the poor and disadvantaged to obtain more effective legal aid.

66. Compulsory membership in the bar association should be regarded as beneficial to the association and to its ability to supervise the members of the profession, and must be considered as a means of strengthening the independence of the profession and the Rule of Law.

67. It is desirable that public officials or government employees who hold positions of authority or who sit on administrative tribunals should abstain from sitting as members of a Board of Directors of a bar association in order to preserve their mutual independence.

TOPIC IV

THE INDEPENDENCE OF THE JUDGE

A. Professional Training of Judges

It is recommended that:

68. A Judicial Training Institute should be established under the control of the judiciary to provide proper training for judges and their subordinate personnel. This could be done either through the Supreme Court in collaboration with University faculties of law, or by establishing seminars or post-graduate courses in the latter. It is also advisable to establish a system of grants for judges from the interior of the country.

69. The Judicial Training Institute (la Escuela de la Judicatura o Escuela Judicial) should use the media in order to reach the community and provide it with training in civics, to ensure that citizens know the steps they must take to assert their rights, as well as to seek redress of grievances for violations of their rights, and also to reinforce the public's belief in the judiciary as a means of guaranteeing the protection of their rights.

70. Judges should have a specialised professional training.

B. Career Judiciary

It is recommended that:

71. A genuine career judiciary should be established or strengthened because this provides the foundation for the whole structure of a sound administration of justice.

72. In this respect a law should be enacted that would set out the requirements for the selection or entry, promotion, training and dismissal of judges, and would, above all, guarantee permanence of tenure so that judges do not have to depend on political alliances or any other type of alliance.

73. The selection or appointment of judges should be based on ability, morality, suitability, professional training, experience and length of service, and should be decided upon impartially by an advisory or collegiate body. This body should have the power to make appointments or to make proposals to the Supreme Court or other body of

electors.

74. Judges need optimal conditions of tenure. For this purpose, a law guaranteeing judges permanence of tenure should be passed to ensure that they are not exposed to undue interference or pressure. The grounds for removal and dismissal must be set out in the law and should be based on serious or repeated breaches of disciplinary rules.

75. Judges should be allotted an adequate and reasonable remuneration in accordance with the standard of living in each country, which would assure them of a dignified style of life and which should be protected from outside encroachments and from economic privation.

76. There should be a graded salary system in accordance with a policy of incentives. The system should be based on specialisation, location, length of service and specialised studies.

77. It is indispensable to have the benefits of social security or other similar State benefits extended to judges without prejudice to other benefits applicable to them by virtue of their professional status.

C. The Function of the Judge

In relation to the activities of the Judge, it is recommended that:

78. The image of the judge should be strengthened in view of his high office and the role he plays vis-à-vis society as the custodian of human rights.

79. Adequate machinery should be established to ensure the independence and the impartiality of the judge, and emphasis should be placed on the incompatibility of his functions with political and election activities or active proselytizing.

80. A judge should exercise no other functions, except, being a judge should not be considered imcompatible with being a teacher, but only if the time required does not interfere with his or her work as a judge.

81. As far as possible, the judge should be relieved of all unnecessary administrative duties so that he may comply with the principle of prompt and expeditious justice.

82. It is likewise necessary that the judge should have sufficient material resources and trained subordinate personnel to perform his functions satisfactorily.

CH. Protection Against Interference and Pressure

83. We recognise that the judge in our society is exposed to a number of pressures of different kinds, both internal and external, and that the best way to counterbalance them is to establish a true career judiciary that will guarantee the judge independence in arriving at his decisions and ensure that his only constraint will be the strict observance of the law.

84. We consider it to be undesirable for a judge to be associated in a binding manner with the jurisprudence of the higher courts, because this would militate against the judge's functional autonomy.

D. The Responsibility of the Judge for His Work

It is recommended that:

85. A specialized monitoring body be created and that it have a sufficient degree of seniority and autonomy to monitor the administrative work and the expeditious handling of cases, and that it be able to sanction a careless or irresponsible judge and his subordinate personnel. The judge should be guaranteed the right to defend himself in a private hearing, unless he requests otherwise.

86. The necessary mechanisms be established for the State to assume joint or subsidiary responsibility for judicial errors that cause injury to citizens, as well as adequate methods of redress and compensation in relation to such errors.

87. Professional associations of lawyers should not intervene in the discipline of judges as this is not within their competence.

E. Associations of Judges

88. Judges are urged to form themselves into study groups to unify their criteria for decision-making and to protect themselves against external intervention with the aim of improving the administration of justice.

TOPIC V

THE INDEPENDENCE OF THE PUBLIC PROSECUTOR
(Ministerio Público)

A. Functions and Nature

89. The Office of the Public Prosecutor must act objectively and impartially in prosecuting penal acts. The Office must promote justice, and ensure that cases are conducted in accordance with guarantees of due process of law and respect for human rights of both the individual and of society.

90. The Office cannot function properly without having a subordinate body of police investigators at its disposal. The assistance of the judicial police would guarantee the effective fulfilment of the duties of the public prosecutor.

91. The independence of the Office of the Public Prosecutor in criminal matters enables it to assume a similar function to that of the Councel for the Defence of the People (Defensor del Pueblo).

92. The views of the public prosecutor should not be binding on judges or on the courts, as this would infringe on the independence of the judiciary.

93. Regarding the bringing of criminal proceedings, judges should not have the competence to order their instigation. Prosecutorial independence in this regard does not preclude the possibility of judicial review for determining whether all procedural guarantees have been observed by the prosecutor.

94. The monopoly over penal proceedings given to the Office of the Public Prosecutor rationalises and humanises the proceedings. The bringing of charges by private persons is not an objective process, and such proceedings would either be characterized by pure vindictiveness or the motivation behind them would bear little relation to the objectives which are supposed to characterise the judicial process.

In countries where the public prosecutor is given a monopoly over penal proceedings, a complainant should be given the possibility of appealing to a higher authority or to the courts in cases where the

prosecutor's office determines that the accusation is unfounded. Moreover, the complainant's representative in any civil suit should be given the right to participate in the corresponding penal proceeding.

B. Impartiality in the Exercise of the Functions of the Public Prosecutor

95. As a general rule, the principle of legality must prevail in the institution of penal proceedings. Although it may be desirable to allow certain exceptions to this principle, the law must clearly establish the cases in which the body responsible for instituting criminal proceedings is not required to do so.

96. The public prosecutor should not be subjected to partisan political influences in the exercise of its powers.

97. A lack of prosecutorial independence impedes the effective prosecution of non-conventional criminal acts, especially in cases involving abuses of power; lack of resources as well as mechanisms resulting in immunity from prosecution prevent effective action against non-conventional offences.

C. External Independence

98. The public prosecutor's office should have formal guarantees for its independence. This can be achieved by giving it recognition in the Constitution, and giving to Parliament the task of electing the Prosecutor-General. The independence of the public prosecutor can also be guaranteed by making it a part of the judiciary, as the public prosecutor, being an impartial body, has the same underlying purposes as the judiciary. Given the socio-political conditions prevailing in Central America and the Caribbean, placing the prosecutor's office under the auspices of the judiciary is the solution that will best guarantee its independence, as long as the judiciary is autonomous.

99. The Office of Public Prosecutor should not be under the control of the Executive, as this would make it difficult to guarantee its independence.

100. Prosecutors-General should have guaranteed tenure until they reach the age of retirement, unless there are well-founded grounds for their dismissal.

CH. Internal Independence

101. The principles of unity and hierarchy must prevail in the functioning of the prosecutor's office. However, these principles do not justify the arbitrary or abusive exercise of the powers of the Prosecutor-General. Instructions from a higher official must always be substantiated; a subordinate official may reject the recommendation of his superior provided he can justify his decision.

102. Members of the public prosecutor's office should be subject to legal liability when they perform an action that is contrary to the duties of their posts.

103. The Prosecutor-General is responsible for his actions within the hierarchy established by the institution to which his office belongs; the procedures for his removal must contain guarantees against decisions being made on the basis of considerations or factors unrelated to the prosecutor's performance of his functions.

104. Accusations made against a member of the public prosecutor's office concerning the exercise of his or her functions are to be dealt with swiftly and impartially, in accordance with the relevant procedure. The Prosecutor-General has the right to be heard. The initial stage of the disciplinary process should be private unless the official makes a request to the contrary.

105. Prosecutors-General may be suspended or removed from their posts only on grounds of incapacity or behaviour that disqualifies them from continuing to perform their functions.

106. Disciplinary measures, suspension or removal from office should be decided by means of a procedure that complies with the guarantees of due process and respects the fundamental principles of the Rule of Law.

107. Decisions taken in disciplinary procedures which result in suspension or removal from office should be subject to an independent review.

FINAL RESOLUTION

The participants in the Meeting on the Independence of Judges and Lawyers in Central America and the Dominican Republic, judges, magistrates, lawyers, Prosecutors-General and professors of law in El Salvador, Guatemala, Honduras, Nicaragua, Panama, the Dominican Republic and Costa Rica, held at San José, Costa Rica, from 21 to 25 April 1986, under the auspices of the Inter-American Institute of Human Rights (IIDH), the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders (ILANUD), the Centre for the Independence of Judges and Lawyers and the International Commission of Jurists,

Taking into account:

1. The Basic Principles on the Independence of the Judiciary approved by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Milan in 1985, and approved by the United Nations General Assembly,

2. The work undertaken by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities,

3. The conclusions and recommendations of the "First Seminar for Legislators on the Improvement of the Administration of Justice", held under the auspices of ILANUD at Antigua, Guatemala, in March 1986,

RESOLVE:

1. To approve the general conclusions and recommendations discussed in the working groups and plenary sessions of the seminar, as set out above.

2. To communicate these conclusions and recommendations to the Governments of the region, bar associations and other lawyers' organisations, the United Nations and the Organisation of American States, and to urge them to take measures which would give effect to the recommendations.

3. To support the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in this field, particularly the Draft Declaration on the Independence of Justice, at present under consideration.

4. To establish "the Central American and Carribean Committee for the Independence of Justice" as a permanent organisation to be composed of representatives from all the countries present at this meeting (Guatemala, Honduras, El Salvador, Nicaragua, Costa Rica, Panama and the Dominican Republic), and to have the following objectives:

a) defend and strengthen the independence of the judiciary in the region;

b) become a force for furthering the independence of the judiciary as well as the independence of the individual judge and of lawyers in each of our communities;

c) to exchange information about the experiences in each of our countries with respect to judicial autonomy;

ch) denounce before the international community the norms and practices which frustrate the independence of the judiciary and the legal profession;

d) undertake academic activities, such as the holding of conferences and seminars, as well as the promotion of research on the independence of judges and lawyers with a view to suggesting the changes needed at the national level to guarantee properly their independence;

e) give wide circulation to the recommendations approved by the seminar and to provide the necessary background information;

f) establish links with the Inter-American Institute of Human Rights, the United Nations Latin American Institute for the Prevention of Crime and Treatment of Offenders, the International Commission of Jurists, the Centre for the Independence of Judges and Lawyers, bar associations and all other organisations interested in the independence of judges and lawyers.

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CIJL BULLETIN

The Return to Democracy in Sudan

Report of an ICJ mission to Sudan in October 1985 by A. Halasa, J. D. Cooke and U. Dolgopol. Published by the ICJ, Geneva, 1986. Available in English. ISBN 92 9037 031 9. Swiss Francs 10, plus postage.

The report is based on meetings with a wide range of members of Sudanese society, from members of the Transitional Military Council to trade unionists and prison officials. It gives an historical overview of the situation in the country followed by chapters on the problems facing the new government, the Southern conflict, legislation affecting human rights, and other constitutional and human rights issues. The report ends with a set of 28 recommendations.

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Human Rights and Mental Patients in Japan

Report of an ICJ mission to Japan in May 1985 by Dr. T.W. Harding, Judge J. Schneider, Dr. H. M. Visotsky and Dr. C. L. Graves. Published by the ICJ, Geneva, 1986. Available in English. ISBN 92 9037 032 7. Swiss Francs 10, plus postage.

This mission to Japan reviewed and made recommendations on the legislation and practices for the treatment of mental patients. Many grave abuses in Japanese mental hospitals have been reported. The mission did not investgate these but commented that "the present structure and function of the Japanese mental health services create conditions which are conducive to inappropriate forms of care and serious human rights violations on a significant scale." The members of the mission, distinguished experts in the field, had discussions with government bodies and officials as well as many professional and concerned individuals. They visited several mental hospitals. Their report ends with 18 conclusions and recommendations pin-pointing the main areas of concern as a lack of legal protection for patients during admission and hospitalisation and a preponderance of long-term institutional treatment allied to a relative lack of community treatment and rehabilitation.

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Human and Peoples' Rights in Africa and The African Charter

Report of a Conference held in Nairobi in December 1985, convened by the ICJ. Published by the ICJ, Geneva, 1986. Available in English and French. ISBN 92 9037 028 9. Swiss Francs 10, plus postage.

In continuation of its prominent role in the promotion of the African Charter, the ICJ brought together its own members and leading African jurists, mostly from countries that had not yet ratified the Charter, to discuss implementation of human rights in Africa with particular reference to bringing the Charter into force. It is perhaps significant that only a few months after this Conference, a sufficient number of ratifications were posed to enable the Charter to come into force. The report contains the opening speeches, the introductory report, the working papers and a summary of the discussions on legal services in rural areas and the Charter.

Publications available from: *ICJ, P.O. Box 120, CH-1224 Geneva*
or from: *AAICJ, 777 UN Plaza, New York, N.Y. 10017*

ISSN 0252-0354