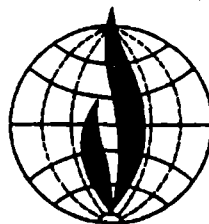


***CIJL BULLETIN***



**N° 25-26**

**SPECIAL ISSUE**

**THE INDEPENDENCE OF  
JUDGES AND LAWYERS:**

**A Compilation of  
International Standards**

**CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS**

**April-October 1990**

*Editor: Reed Brody*

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

The Centre for the Independence of Judges and Lawyers was created by the International Commission of Jurists in 1978 to promote world-wide the basic need for an independent judiciary and legal profession and organise support for judges and lawyers who are being harassed or persecuted.

In pursuing these goals, the CIJL:

- intervenes with governments in particular cases of harassment or persecution and, in some instances, solicits the aid of a network of jurists' and lawyers' organisations throughout the world to do likewise;
- works with the United Nations in setting standards for the independence of judges and lawyers and the impartial administration of justice. The CIJL was instrumental in the formulation of the UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers adopted at the Seventh and Eighth Congresses on the Prevention of Crime and Treatment of Offenders in 1985 and 1990, respectively, and endorsed by the UN General Assembly;
- organises conferences and seminars on the independence of the judiciary and the legal profession. Regional seminars have been held in Central America, South America, South Asia, South-East Asia, East Africa, West Africa and the Caribbean. Several national seminars have also been organised. These seminars bring together judges, lawyers, government officials, activists and academics to discuss obstacles to the implementation of the U.N. standards and how to overcome them;
- sends missions to investigate situations of concern, or the status of the bar and judiciary, in specific countries;
- publishes a yearly report on "Attacks on Justice: the Harassment and Persecution of Judges and Lawyers" world-wide.

## Affiliation – Contributions

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

Individual contributors support the work of the Centre by contributing not less than SFr. 100.– per year. They receive all publications of the Centre and the ICJ.

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# INTRODUCTION

*by Reed Brody,  
CIJL Director*

According to the UN Rapporteur on the independence of the judiciary and the protection of practising lawyers, Mr. Louis Joinet, "It is now universally recognized that fundamental rights and liberties can best be preserved in a society where the legal profession and the judiciary enjoy freedom from interference and pressure. Justice requires that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal, in accordance with the principles proclaimed in the Universal Declaration of Human Rights (article 10), the International Covenant on Civil and Political Rights (article 14), and other United Nations instruments." (UN document E/CN.4/Sub.2/1990/15, para. 1.)

In September 1990, the Eighth United Nations Congress on Prevention of Crime and the Treatment of Offenders adopted the "Basic Principles on the Role of Lawyers." The principles were subsequently welcomed by the UN General Assembly in December 1990. With these events, the CIJL saw the final steps in the accomplishment of a goal it had set for itself in 1978: to promote the elaboration and adoption of universal principles to define and protect the independence of the judiciary and the legal profession. These efforts were, in a sense, the continuation of earlier ICJ endeavours to define the role of judges and lawyers under the Rule of Law. We believe, therefore, that the time has come to publish a special issue containing the most important international norms which have been elaborated on the subject - both those approved by the United Nations and those agreed upon by leading organisations of judges and lawyers.

This introduction will attempt to trace the development of these norms.

\* \* \* \* \*

## **I. Early efforts to define the role of judges and lawyers under the Rule of Law: The Declaration of Delhi, the Law of Lagos, the Resolution of Rio and the Declaration of Bangkok**

The Universal Declaration of Human Rights, adopted in 1948, stated that

"It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."

In the years immediately following adoption of the Universal Declaration, the International Commission of Jurists undertook the tasks of defining and describing, "within the context of modern constitutional and legal practice, the Rule of Law, a notion familiar to lawyers of many different legal systems but too often viewed as a term of uncertain meaning." It did so by means of studies and of discussions at congresses and conferences, seminars and colloquia in different regions of the world.

From the first international congress sponsored by the International Commission of Jurists, which was held in Athens in 1955, there emerged the new dynamic concept of the Rule of Law. The "Act of Athens", which crystallised the deliberations of that congress, described the Rule of Law as springing "from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all."

The first important step in the development of the dynamic concept of the Rule of Law was taken at the International Congress of Jurists held in Delhi in January 1959, in which 185 jurists from 53 countries participated. The Congress was the culmination of two years of preparation by the ICJ Secretariat, ICJ National Sections and Working Groups in many countries. This Congress, having re-affirmed the principles expressed in Athens, proceeded by the "Declaration of Delhi" to:

"recognize that the Rule of Law is a dynamic concept for the expansion and fulfillment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized."

The four committees of the Delhi congress drafted important conclusions on the Legislative and the Rule of Law; the Executive and the Rule of Law; the Judiciary and the Legal Profession under the Rule of Law; and the Criminal Process and the Rule of Law.

The African Conference on the Rule of Law then brought together 194 jurists from 23 African and 9 non-African nations in Lagos in 1961. The participants were drawn equally from English-speaking and French-speaking countries. It reaffirmed the basic principles underlying the Rule of Law as enunciated in New Delhi. One important aspect of the Lagos Conference was the recognition that these principles were universal in their application. The "Law of Lagos" laid down that the Rule of Law can be fully realised only under a system of government established by the will of the people. The conclusions prepared by the congress, as well as its final proclamation, are of enduring validity. Indeed, according to Isaac Nguema, the first Chairman of the African Commission on Human and Peoples' Rights, the Law of Lagos' call for an African Convention on Human Rights was "the starting point for the historical evolution" of the African Charter on Human and Peoples' Rights.

The next important step in the process of definition and application of the Rule of Law was taken at the International Congress of Jurists, held in Rio de Janeiro (Petropolis) in December 1962. This congress considered such problems as how to balance the freedom of the executive to act effectively with the protection of the rights of the individual, and what safeguards should be introduced against the abuse of power by the executive. The "Resolution of Rio", which summarised the conclusions of the congress, emphasised that the protection of the individual from unlawful or excessive interference by government is one of the foundations of the Rule of Law.

While the earlier congresses and conferences of the International Commission of Jurists focussed attention on the political, administrative and legal aspects of the Rule of Law, the conference of Bangkok, held in February 1965, emphasised its social, economic, educational and cultural aspects. The "Declaration of Bangkok" recognised that the Rule of Law and representative government were often endangered by hunger, poverty and unemployment and that therefore lawyers should commit their skills and techniques to the elimination of these evils. The conference also concerned itself with the basic requirements of representative government under the Rule of Law and the role which the lawyer was expected to play in a developing society.

In 1966, the ICJ published and classified the conclusions of the Athens, Delhi, Lagos, Rio and Bangkok congresses in the book "The Rule of Law and Human Rights: Principles and Definitions." In this Bulletin, we are reprinting the conclusions gathered together under the headings "The Judiciary and the Rule of Law" and "The Legal Profession and the Rule of Law."

## **II. The CIJL and United Nations standard-setting**

The CIJL was created by the International Commission of Jurists (ICJ) in 1978 to promote the basic need for an independent judiciary and legal profession throughout the world, and to organise support for judges and lawyers who are harassed or persecuted. At its inception in 1978, the CIJL sought to protect the independence of judges and lawyers by referring to international norms regarding the right to counsel and fair trials before independent courts. Nevertheless, these general norms were often of little help in specific cases as they did not spell out the content of terms such as "independent" and represented only a limited check on governmental action against the judiciary or the legal profession.

As a result, the CIJL began the task of formulating international norms which, when approved at the intergovernmental level, could be relied upon in particular cases. These norms could also serve both as tools in the



ICJ's work on strengthening the judiciaries and legal systems of developing countries and as benchmarks for measuring their independence.

## **A. Background - Two Streams**

As Justice Jules Deschênes of Canada, a leading proponent of judicial independence and a member of the CIJL Advisory Board, has remarked, UN standard-setting "followed two separate, yet converging streams." One stream started with the UN human rights organs - the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities in Geneva. The second stream, which commenced more slowly but soon overtook the first, began at the UN Crime Branch in Vienna and its Committee on Crime Prevention and Control, and developed through UN Congresses in Milan and Havana.

In 1980, the UN Sub-Commission, upon the petition of the CIJL and other NGOs, appointed a Special Rapporteur, Dr. L.M. Singhvi, President of the Bar of the Supreme Court of India, to undertake a study on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, and to formulate recommendations (Stream I). In the same year, the Sixth United Nations Congress on Prevention of Crime and the Treatment of Offenders, in its resolution 16, called on the Committee on Crime Prevention and Control to give priority to "the elaboration of guidelines relating to the independence, selection, professional training and status of judges and prosecutors" (Stream II). By the time Dr. Singhvi had presented his draft declaration on the Independence of Justice to the Sub-Commission in 1985, the Seventh United Nations Congress was approving the Basic Principles on the Independence of the Judiciary, which had been prepared by the Committee on Crime Prevention and Control, and was calling for the elaboration of similar principles on the role of lawyers.

The Commission on Human Rights, at its 1989 session, eventually resolved this duplication by deciding that standard-setting would henceforth be concentrated in the U.N. Crime Branch. It called on states to "take into

account" Dr. Singhvi's detailed principles on the judiciary in implementing the more general Basic Principles on the Independence of the Judiciary and asked the Committee and the Eighth Congress to take that part of Dr. Singhvi's principles relating to lawyers into account in completing its elaboration of the Basic Principles on the Role of Lawyers.

## **B. Stream I - The Singhvi Declaration and the Noto, Siracusa and Montreal Principles**

The CIJL, the ICJ and the International Association of Penal Law, organised two seminars in 1981 and 1982, hosted by the International Institute of Higher Studies in Criminal Sciences in Siracusa and Noto, Sicily, for the purpose of bringing together leading experts from around the world to discuss and formulate principles on the independence of the judiciary and the legal profession, with a view to assisting Dr. Singhvi in his task. The principles adopted at these seminars were appended to the Special Rapporteur's progress reports. Between 1981 and 1983, other such meetings took place in Oslo, Malta, Geneva, Lisbon, Jerusalem and Tokyo. Among the most important of these meetings was the one in New Delhi, which resulted in the adoption of Minimum Standards of Judicial Independence by the International Bar Association in October 1982. Later meetings produced the International Charter of Legal Defense Rights (Quebec, 1987), promoted by the Union Internationale des Avocats, and the International Convention for the Preservation of Defense Rights, signed by 50 bar associations representing 35 countries (Paris, 1987).

The principles set forth at Noto and Siracusa were extensively relied upon at the World Conference on the Independence of Justice held in Montreal, Canada, from 5 to 10 June 1983, under the auspices of Judge Deschênes. The aim of this conference was to gather together the work done in the different meetings referred to above and prepare a universal declaration concerning the independence of judges, lawyers, jurors and assessors for the Special Rapporteur. At this conference, a comprehensive set of principles concerning judges, lawyers, jurors and assessors was prepared by delegates from 30 regional jurists' associations and representatives of four international courts. The declaration adopted by the conference partici-

pants (see CIJL Bulletin No. 12) was also appended to the Special Rapporteur's final report and became, with minor changes, the Draft Declaration on the Independence of Justice, formally proposed by the Special Rapporteur.

The 106-point draft (E/CN.4/Sub.2/1988/20/Add.1) proposed by Dr. Singhvi sets out detailed guarantees for the independence and impartiality of judges, jurors and assessors, and the independence of lawyers. They provide for both the individual and collective independence of judges, and set forth minimum standards to be followed in the selection, training, promotion, transfer, discipline and removal of judges. With regard to lawyers, the draft sets forth standards for open legal education and access to the legal profession, the rights and duties of lawyers, legal services for the poor, the rights of bar associations, and the discipline of lawyers.

After three years of debate, resulting in minor modifications, first in response to the comments of several members of the Sub-Commission and then to take governments' remarks into account, the Sub-Commission transmitted the document to the Commission on Human Rights. There, it became clear that the document would have to be substantially modified before it could be sent to the General Assembly. More importantly, some also questioned the duplication between the Sub-Commission's work and that of the Crime Branch.

Rather than devote itself to perfecting the Singhvi Declaration, the UN Commission on Human Rights, in resolution 1989/32, invited governments to take it into account in implementing the Basic Principles on the Independence of the Judiciary. It also requested the Crime Committee and the Eighth Congress to take the Singhvi principles into account in completing work on the draft basic principles on lawyers. The Commission also called on the Sub-Commission to "consider effective means of monitoring the implementation of the Basic Principles on the Independence of the Judiciary and the protection of practising lawyers." It was this request that, in 1990, led the Sub-Commission to appoint Mr. Louis Joinet to prepare a report on the actual implementation of international standards.

## **C. Stream II - The UN Basic Principles on the Independence of the Judiciary and the UN Basic Principles on the Role of Lawyers**

### **i. UN Basic Principles on the Independence of the Judiciary -**

As already noted, the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders in Caracas called on the Committee on Crime Prevention and Control in Vienna to elaborate guidelines relating to the independence of judges. With the assistance of Judge Deschênes, the Committee prepared a draft which was discussed in Vienna in March 1984, and in Varenna, Italy in September of that year, and which finally appeared on the agenda of the Seventh Congress in Milan. In Milan, however, the ambitious document prepared by Judge Deschênes ran into difficulty from some Eastern European countries, which threatened to kill it. In the end, the "guidelines" produced in Varenna were scrapped, and only through the work of former CIJL Director Ustinia Dolgopol was a more general set of "basic principles" able to be adopted by consensus. As Dr. Singhvi commented to the Sub-Commission: "The Varenna guidelines are far more comprehensive whereas the principles adopted at the Milan Congress are considerably abridged."

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

The twenty Basic Principles set forth standards for the independence of the judiciary and the freedom of expression and association of judges, as well as rules regarding the qualification, selection, training, conditions of service, tenure, immunity, discipline, suspension and removal of judges. They also emphasise that the independence of the judiciary should be guaranteed by the state and enshrined in the Constitution or law of the country.

According to Special Rapporteur Joinet, the Basic Principles, "general though they are, represent the first intergovernmental standards spelling out the minimum standards of judicial independence and are the acknowledged yardstick by which the international community measures that independence." (E/CN.4/Sub.2/1990/35, para. 15.)

**ii. Procedures for the Effective Implementation of the UN Basic Principles on the Independence of the Judiciary** - An international expert meeting on the United Nations and Law Enforcement, held under the auspices of the United Nations in Baden, Austria, in November 1987, and attended by the Secretary-General of the ICJ and the Director of the CIJL, formulated draft "Procedures for the Effective Implementation of the Basic Principles" on the basis of previous work accomplished by the United Nations Social Defence Research Institute, in co-operation with the United Nations Crime Branch Secretariat. These procedures were adopted, with amendments, by the Committee on Crime Prevention and Control at its Tenth Session in Vienna from 22 - 31 August 1988, then by the Economic and Social Council (ECOSOC), in its resolution 1989/60 of 24 May 1989. Finally the ECOSOC resolution was endorsed by the General Assembly in its resolution 44/162 of 15 December 1989.

The Procedures call upon states to "adopt and implement ... the Basic Principles ... in accordance with their constitutional process and domestic practice." They also call on them to publicise the Basic Principles widely, in at least the main or official language or languages of the country and to make the text available to all members of the judiciary. The procedures recommend national and regional seminars and courses on the judiciary and its independence. UN reporting procedures for monitoring implementation of the Basic Principles are established and the United Nations is called on to provide technical co-operation to governments requesting assistance in improving their judicial systems.

**iii. UN Basic Principles on the Role of Lawyers** - The 1985 Crime Congress also adopted a resolution on the role of lawyers, which

highlighted the importance of an independent legal profession to the protection of rights and freedoms and recommended to states that they "provide for protection of practising lawyers against undue restrictions and pressures in the exercise of their functions." The resolution also requested that work begin on a document concerning the role of lawyers (see CIJL Bulletin No. 16).

Accordingly, the Baden expert meeting (see above) prepared draft "Basic Principles on the Role of Lawyers," with substantial input from the CIJL. A modified form of this draft was submitted by the UN Secretariat to an Interregional Preparatory Meeting for the Eighth UN Crime Congress (Vienna, Austria, June 1988) at which the CIJL also made an important contribution. The Tenth Session of the UN Committee on Crime Prevention and Control (Vienna, August 1988) gave preliminary endorsement to the draft. Once this had been discussed at five regional preparatory meetings in 1989, the CIJL was requested by the UN Secretariat to propose a new text, taking into account both the suggestions made at the regional meetings and, as requested by the Commission on Human Rights (see above), points covered in the Singhvi Declaration but not previously found in the draft. The CIJL's proposed amendments were largely incorporated into the new draft, which was given final approval by the Committee on Crime Prevention and Control in February 1990. Then, at its meeting in Havana, Cuba, from 27 August to 7 September 1990, the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders adopted the Principles by consensus.

In its resolution 45/121 of December 1990, the General Assembly "welcomed" the instruments adopted by the Congress and invited governments "to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein ... in accordance with the economic, social, legal, cultural and political circumstances of each country." In resolution 45/166 of December 1990, the General Assembly welcomed the Basic Principles, inviting governments "to respect them and to take them into account within the framework of their national legislation and practice."

The twenty-nine Basic Principles pay special attention to the following issues: provision for effective access to legal assistance for all groups within society; the right of the accused to counsel and legal assistance of their own choosing; education of the public on the role of lawyers in protecting fundamental rights and liberties; training and qualifications of lawyers, and the prevention of discrimination with respect to entry into the legal profession; the role of governments, bar associations and other professional associations; the right of lawyers to undertake representation of clients or causes without fear of repression or persecution; and lawyers' obligation to keep communications with their clients confidential, including the right to refuse to give testimony on such matters.

\* \* \* \* \*

While those documents which have the stamp of approval of the UN General Assembly are, obviously, the most authoritative, we reproduce the others because of the valuable role they play in filling the gaps in the UN documents and in illustrating what judges and lawyers themselves perceive to be the minimum standards for their independence. We hope that this compilation will be of use to all those striving to establish or maintain independent judiciaries or legal professions.

# UNITED NATIONS BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

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

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

## The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

Recalling the Caracas Declaration, unanimously adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly in its resolution 35/171 of 15 December 1980,

Recalling also resolution 16 adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in which the Congress called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges,

Recalling further Economic and Social Council decision 1984/153 of 25 May 1984, in which the Council invited the inter-regional preparatory meeting on the formulation and application of United Nations standards and norms in criminal justice to finalize the draft guidelines on the independence of the judiciary, formulated by the Committee on Crime



Prevention and Control at its eighth session and invited the Secretary-General to submit the final text to the Seventh Congress for adoption,

Taking note with appreciation of the work accomplished in pursuance of the mandate cited above the Committee on Crime Prevention and Control and by the Interregional Preparatory Meeting for the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Varenna, Italy, from 24 to 28 September 1984,

Further taking note with appreciation of the extensive discussions during the Seventh Nations Congress on the Prevention of Crime and the Treatment of Offenders with respect to the draft guidelines on the independence of the judiciary, which led to the formulation of the Basic Principles on the Independence of the Judiciary,

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

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

1. Adopts the Basic Principles on the Independence of the Judiciary contained in the annex to the present resolution;
2. Recommends the Basic principles for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;
3. Invites Governments to take into account within the framework of their national legislation and practice and to respect the Basic Principles;

4. Also invites Member States to bring the Basic Principles to the attention of judges, lawyers, members of the executive and the legislature and the public in general;
5. Urges the regional commissions, the regional and interregional institutes in the field of the prevention of crime and the treatment of offenders, the specialized agencies and other entities within the United Nations system, other intergovernmental organizations concerned and non-governmental organizations having consultative status with the Economic and Social Council to become actively involved in the implementation of the Basic Principles;
6. Calls upon the Commission on Crime Prevention and Control to consider, as a matter of priority, the effective implementation of the present resolution;
7. Requests the Secretary-General to take steps, as appropriate, to ensure the widest possible dissemination of the Basic Principles;
8. Also requests the Secretary-General to prepare a report on the implementation of the Basic principles;
9. Further requests the Secretary-General to assist Member States, at their request, in the implementation of the Basic Principles and to report thereon regularly to the Committee on Crime Prevention and Control;
10. Requests that the present resolution be brought to the attention of all United Nations bodies concerned.

## Annex

### **BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY**

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

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

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

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

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

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

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

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

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

### Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the laws of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before it impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

#### Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organisations to represent their interests, to promote their professional training and to protect their judicial independence.

#### Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a

candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

11. The terms of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

#### Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

#### Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly un-

der an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

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

*(adopted by the Economic and Social Council  
in Resolution 1989/60 and endorsed by the General Assembly  
in Resolution 44/162 of 15 December 1989)*

## **Procedure 1**

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

## **Procedure 2**

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

## **Procedure 3**

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

## **Procedure 4**

States shall ensure that the Basic Principles are widely publicized in at least the main or official language or languages of the respective country. Judges, lawyers, members of the executive, the legislature, and the public in general, shall be informed in the most appropriate manner of the content and the importance of the Basic Principles so that they may promote their application within the framework of the justice system. In



particular, States shall make the text of the Basic Principles available to all members of the judiciary.

### **Procedure 5**

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

### **Procedure 6**

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

### **Procedure 7**

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

### **Procedure 8**

The Secretary-General shall prepare independent quinquennial reports to the Committee on Crime Prevention and Control on progress made with respect to the implementation of the Basic Principles, on the basis of the information received from Governments under Procedure 7, as well as other information available within the United Nations system, including information on the technical co-operation and training provided by institutes, experts and regional and interregional advisers. In the preparation

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

## **Procedure 9**

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

## **Procedure 10**

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

## **Procedure 11**

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

- (a) Assist Governments, at their request, in setting up and strengthening independent and effective judicial systems;
- (b) Make available to Governments requesting them, the services of experts and regional and interregional advisers on judicial matters to assist in implementing the Basic Principles;

- (c) Enhance research concerning effective measures for implementing the Basic Principles, with emphasis on new developments in that area;
- (d) Promote national and regional seminars, as well as other meetings at the professional and non-professional level, on the role of the judiciary in society, the necessity for its independence, and the importance of implementing the Basic Principles to further those goals;
- (e) Strengthen substantive support to the United Nations regional and interregional research and training institutes for crime prevention and criminal justice, as well as other entities within the United Nations system concerned with implementing the Basic Principles.

### **Procedure 12**

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

### **Procedure 13**

The regional commissions, the specialized agencies and other entities within the United Nations system as well as other concerned intergovernmental organizations shall become actively involved in the implementation process. They shall inform the Secretary-General of the efforts made to disseminate the Basic Principles, the measures taken to give effect to them and any obstacles and shortcomings encountered. The Secretary-General shall also take steps to ensure that non-governmental organizations in consultative status with the Economic and Social Council become actively in-

volved in the implementation process and the related reporting procedures.

#### **Procedure 14**

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

#### **Procedure 15**

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

# UNITED NATIONS BASIC PRINCIPLES ON THE ROLE OF LAWYERS

*The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, at its meeting in Havana, Cuba, from 27 August to 7 September 1990 adopted by consensus Basic Principles on the Role of Lawyers.*

*In its resolution 45/121 of 14 December 1990, the General Assembly "welcomed" the instruments adopted by the Congress and invited "Governments to be guided by them in the formulation of appropriate legislation and policy directives and to make efforts to implement the principles contained therein ... in accordance with the economic, social, legal, cultural and political circumstances of each country." In resolution 45/166 of 18 December 1990, the General Assembly welcomed the Basic Principles in particular, inviting Governments "to respect them and to take them into account within the framework of their national legislation and practice."*

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Recalling the Milan Plan of Action<sup>1</sup>, adopted by consensus by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders and endorsed by the General Assembly in its resolution 40/32 of 29 November 1985,

Recalling also resolution 18 of the Seventh Congress<sup>2</sup>, in which the Congress recommended that Member States provide for the protection of

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<sup>1</sup> Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985: Report prepared by the Secretariat (United Nations publication, Sales No. E.86.IV.1), chap. I, sect. A.

<sup>2</sup> Ibid., sect. E.

practising lawyers against undue restrictions and pressures in the exercise of their functions,

Taking note with appreciation of the work accomplished, in pursuance of Seventh Congress resolution 18, by the Committee on Crime Prevention and Control, by the interregional preparatory meeting for the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders on United Nations norms and guidelines in crime prevention and criminal justice and implementation and priorities for further standard setting<sup>3</sup>, and by the regional preparatory meetings for the Eighth Congress,

1. Adopts the Basic Principles on the Role of Lawyers set forth in the annex to the present resolution;
2. Recommends the Basic Principles for national, regional and interregional action and implementation, taking into account the political, economic, social and cultural circumstances and traditions of each country;
3. Invites Member States to take into account and to respect the Basic Principles within the framework of their national legislation and practice;
4. Also invites Member States to bring the Basic Principles to the attention of lawyers, judges, members of the executive branch of government and the legislature, and the public in general;
5. Further invites Member States to inform the Secretary-General every five years, beginning in 1992, of the progress achieved in the implementation of the Basic Principles, including their dissemination, their incorporation into domestic legislation, practice, procedures and policies, the problems faced in their implementation at the national level and assistance that might be needed from the international community, and requests the Secretary-General to report thereon to the Ninth

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<sup>3</sup> A/CONF.144/IPM.5.

United Nations Congress on the Prevention of Crime and the Treatment of Offenders;

6. Appeals to all Governments to promote seminars and training courses at the national and regional levels on the role of lawyers and on respect for equality of conditions of access to the legal profession;
7. Urges the regional commissions, the regional and interregional institutes on crime prevention and criminal justice, the specialized agencies and other entities within the United Nations system, other intergovernmental organizations concerned and non-governmental organizations in consultative status with the Economic and Social Council to become actively involved in the implementation of the Basic Principles and to inform the Secretary-General of the efforts made to disseminate and implement the Basic Principles and the extent of their implementation, and requests the Secretary-General to include this information in his report to the Ninth Congress;
8. Calls upon the Committee on Crime Prevention and Control to consider, as a matter of priority, ways and means of ensuring the effective implementation of this resolution;
9. Requests the Secretary-General:
  - (a) To take steps, as appropriate, to bring this resolution to the attention of Governments and all the United Nations bodies concerned, and to provide for the widest possible dissemination of the Basic Principles;
  - (b) To include the Basic Principles in the next edition of the United Nations publication entitled Human Rights: A Compilation of International Instruments<sup>4</sup>
  - (c) To provide Governments, at their request, with the services of experts and regional and interregional advisers to assist in implementing the Basic Principles and to report to the Ninth Congress on the technical assistance and training actually provided;

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<sup>4</sup> United Nations publication, Sales No. E.88.XIV.1.

- (d) To report to the Committee on Crime Prevention and Control, at its twelfth session, on the steps taken to implement the Basic Principles.

## Annex

### **BASIC PRINCIPLES ON THE ROLE OF LAWYERS**

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language, or religion,

Whereas the Universal Declaration of Human Rights<sup>5</sup> enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights<sup>6</sup> proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights<sup>6</sup> recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

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<sup>5</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>6</sup> General Assembly resolution 2200 A (XXI), annex, of 16 December 1966.



Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>7</sup> provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners<sup>8</sup> recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards guaranteeing protection of those facing the death penalty<sup>9</sup> reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>10</sup> recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and co-operating with governmental and other institutions in furthering the ends of justice and public interest,

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<sup>7</sup> General Assembly resolution 43/173, annex, of 9 December 1988.

<sup>8</sup> Human Rights: A Compilation of International Instruments (United Nations publication, Sales No. E.88.XIV.1), sect. G.

<sup>9</sup> Ibid., sect. G.

<sup>10</sup> General Assembly resolution 40/34, annex, of 29 November 1985.

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

### Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall co-operate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable

them to assert their rights and where necessary call upon the assistance of lawyers.

### Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

### Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the

lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

### Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
  - (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
  - (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
  - (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
15. Lawyers shall always loyally respect the interests of their clients.

### Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.
17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

### Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

### Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
25. Professional associations of lawyers shall co-operate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interfer-

ence, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

### Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.
27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.
29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

# DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE

## ("SINGHVI DECLARATION")

*By its decision 1980/124, the UN Economic and Social Council authorised the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities to entrust Mr. L.M. Singhvi (India) with the preparation of a report on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers.*

*The Special Rapporteur accordingly submitted preliminary and progress reports on the subject in 1980, 1981 and 1982 (E/CN.4/Sub.2/L.731, E/CN.4/Sub.2/481 and Add.1, and E/CN.4/Sub.2/1982/23). At the thirty-eighth session of the Sub-Commission, he introduced his final report on the subject (E/CN.4/Sub.2/1985/18 and Add.1-6) and drew attention, in particular, to his draft declaration on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers (E/CN.4/Sub.2/18/Add.5/Rev.1).*

*Pursuant to Sub-Commission decision 1985/107, the study was circulated to the members of the Sub-Commission for comments. These comments are contained in document E/CN.4/Sub.2/1987/17, which was submitted to the Sub-Commission at its thirty-ninth session.*

*At the fortieth session of the Sub-Commission, the Special Rapporteur submitted a report containing comments and suggestions on the draft declaration (E/CN.4/Sub.2/1988/20) and a revised version of the draft declaration (E/CN.4/Sub.2/1988/20/Add.1 and Add.1/Corr.1)*

*At its fortieth session, the Sub-Commission, in Resolution 1988/25 expressed "its appreciation and thanks to the Special Rapporteur, for the enduring and valuable contribution he made to the legal doctrine relating to the independence of justice, which is one of the primary prerequisites for*



*the promotion and protection of human rights" and referred the draft declaration to the Commission on Human Rights for further consideration.*

*The Commission, at its forty-fifth session, by resolution 1989/32, invited governments to take into account the principles set forth in Dr. Singhvi's draft declaration in implementing the United Nations' Basic Principles on the Independence of the Judiciary, which had been approved in 1985.*

## **DRAFT UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE**

### **JUDGES**

#### **Objectives and Functions**

1. The objectives and functions of the judiciary shall include:
  - (a) Administering the law impartially irrespective of parties;
  - (b) Promoting, within the proper limits of the judicial function, the observance and the attainment of human rights;
  - (c) Ensuring that all peoples are able to live securely under the rule of law.

#### **Independence**

2. Judges individually shall be free, and it shall be their duty, to decide matters before them impartially in accordance with their assessment of the facts and their understanding of law without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of the judge to pronounce his judgement freely.

Judges, on their part, individually and collectively, shall exercise their functions with full responsibility of the discipline of law in their legal system.

4. The Judiciary shall be independent of the Executive and Legislature.

5. (a) The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature, including issues of its own jurisdiction and competence.
- (b) No ad hoc tribunals shall be established to displace jurisdiction properly vested in the courts.
- (c) Everyone shall have the right to be tried with all due expedition and without undue delay by the ordinary courts or judicial tribunals under law subject to review by the courts.
- (d) Some derogations may be permitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts.
- (e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts, and, detention of persons administratively without charge shall be subject to review by courts or other independent authority by way of habeas corpus or similar procedures so as to ensure that the detention is lawful and to inquire into any allegations of ill-treatment.
- (f) The jurisdiction of military tribunals shall be confined to military offences. There shall always be a right of appeal from such tribunals to a legally qualified appellate court or tribunal or a remedy by way of an application for annulment.
- (g) No power shall be so exercised as to interfere with the judicial process.
- (h) The Executive shall not have control over the judicial functions of the courts in the administration of justice.

- (i) The Executive shall not have the power to close down or suspend the operation of the courts.
- (j) The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court decision.

6. No legislation or executive decree shall attempt retroactively to reverse specific court decisions or to change the composition of the court to affect its decision-making.

7. Judges shall be entitled to take collective action to protect their judicial independence.

8. Judges shall always conduct themselves in such a manner as to preserve the dignity and responsibilities of their office and the impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of thought, belief, speech, expression, professional association, assembly and movement.

### Qualifications, Selection and Training

9. Candidates chosen for judicial office shall be individuals of integrity and ability. They shall have equality of access to judicial office; except in case of lay judges, they should be well-trained in the law.

10. In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status, but it may however be subject to citizenship requirements and consideration of suitability for judicial office.

- 11. a) The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.
- (b) Any methods of judicial selection shall scrupulously safeguard against judicial appointments for improper motives.

- (c) Participation in judicial appointments by the Executive or the Legislature or the general electorate is consistent with judicial independence so far as such participation is not vitiated by and is scrupulously safeguarded against improper motives and methods. To secure the most suitable appointments from the point of view of professional ability and integrity and to safeguard individual independence, integrity and endeavour shall be made, in so far as possible, to provide for consultation with members of the judiciary and the legal profession in making judicial appointments or to provide appointments or recommendations for appointments to be made by a body in which members of the judiciary and the legal profession participate effectively.

12. Continuing education shall be available to judges.

#### Posting, Promotion and Transfer

13. Where the law provides for the discretionary assignment of a judge to a post on his appointment or election to judicial office such assignment shall be carried out by the judiciary or by a superior council of the judiciary where such bodies exist.

14. Promotion of a judge shall be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. No promotions shall be made from an improper motive.

15. Except pursuant to a system of regular rotation or promotion, judges shall not be transferred from one jurisdiction or function to another without their consent, but when such transfer is in pursuance of a uniform policy formulated after due consideration by the judiciary, such consent shall not be unreasonably withheld by any individual judge.

## Tenure

16. (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their disadvantage.
  - (b) Subject to the provisions relating to discipline and removal set forth herein, judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their legal term of office.
17. There may be probationary periods for judges following their initial appointment but in such cases the probationary tenure and the conferment of permanent tenure shall be substantially under the control of the judiciary or a superior council of the judiciary.
18. (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.
  - (b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and shall be periodically reviewed to overcome or minimize the effect of inflation.
  - (c) Retirement age shall not be altered for judges in office without their consent.
19. The executive authorities shall at all times ensure the security and physical protection of judges and their families.

## Immunities and Privileges

20. Judges shall be protected from the harassment of personal litigation against them in respect of their judicial functions and shall not be sued or prosecuted except under an authorization of an appropriate judicial authority.

21. Judges shall be bound by professional secrecy in relation to their deliberations and to confidential information acquired in the course of

their duties other than in public proceedings. Judges shall not be required to testify on such matters.

### Disqualifications

22. Judges may not serve in a non-judicial capacity which compromises their judicial independence.

23. Judges and courts shall not render advisory opinions except under an express constitutional or statutory provision.

24. Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property. Judges shall not engage in law practice.

25. A judge shall not sit in a case where a reasonable apprehension of bias on his part or conflict of interest or incompatibility of functions may arise.

### Discipline and Removal

26. (a) A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

(b) The proceedings for judicial removal or discipline when such are initiated shall be held before a Court or a Board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of such a Court or Board.

27. All disciplinary action shall be based upon established standards of judicial conduct.

28. The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

29. Judgements in disciplinary proceedings instituted against judges, whether held in camera or in public, shall be published.

30. A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office.

31. In the event a court is abolished, judges serving on that court, except those who are elected for a specified term, shall not be affected, but they may be transferred to another court of the same status.

### Court Administration

32. The main responsibility for court administration including supervision and disciplinary control of administration personnel and support staff shall vest in the judiciary, or in a body in which the judiciary is represented and has an effective role.

33. It shall be a priority of the highest order for the State to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency; judicial and administrative personnel; and operating budgets.

34. The budget of the courts shall be prepared by the competent authority in collaboration with the judiciary having regard to the needs and requirements of judicial administration.

35. The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

36. The head of the court may exercise supervisory powers over judges only in administrative matters.

### Miscellaneous

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

38. Judges shall accord respect to the members of the Bar, as well as to assessors, procurators, public prosecutors and jurors as the case may be.

39. The State shall ensure the due and proper execution of orders and judgements of the Courts; but supervision over the execution of orders and over the service or process shall be vested in the judiciary.

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

41. These principles and standards shall apply to all persons exercising judicial functions, including international judges, assessors, arbitrators, public prosecutors and procurators who perform judicial functions, unless a reference to the context necessarily makes them inapplicable or inappropriate.

### Assessors

42. An assessor may either perform the functions of a judge or an associate or auxiliary judge or a consultant or a legal or technical expert. In performing any of these functions the assessors shall discharge their duties and perform their functions impartially and independently. Principles and standards which apply to judges are applicable to assessors unless a reference to the context necessarily make them inapplicable or inappropriate.

43. Assessors or Peoples' Assessors, or Nyaya Panchas, may be elected for specified terms on the basis of such franchise and by such electorates as may be provided by law to participate in the collegiate pro-



cess of adjudication along with elected or appointed judges. There shall be no discrimination by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status among citizens in the matter of their eligibility for election as assessors. On their election, such assessors may be empanelled for short and limited periods to discharge their functions as assessors. Assessors may also be appointed or empanelled for technical advice or assistance on the basis of their specialized knowledge appointed to discharge certain simple adjudicating functions.

44. Assessors shall be duly and adequately compensated with a reasonable allowance for the duration of their service as assessors by the State except when they receive such allowance paid to them in their place of employment.

45. Assessors who are elected to participate in the process of adjudication or are appointed to render technical and other assistance shall be free from any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, except that elected assessors may give periodic explanations to their electorate as a part of the system of citizen participation in the justice system.

46. Assessors shall be independent of the judges and of the Executive and Legislature and shall be entitled to participate in the process of adjudication to the extent and in the manner provided for in the law and practice of the legal system. Peoples' assessors who are elected to participate in the process of adjudication shall also be entitled to record their minutes of dissent which shall form a part of the record.

47. Any method of empanelment of assessors shall scrupulously safeguard against any improper motive in the matter of empanelment.

48. A provision may be made for the orientation and instruction for Peoples' Assessors or Nyaya Panchas elected to participate in the process of adjudication.

49. An assessor may be recalled by the electorate or may be disqualified or removed or his appointment may be terminated, but always strictly in accordance with the procedure established by law.

### Selection of Prospective Jurors

50. The opportunity for jury service shall be extended without distinction of any kind by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status, but it may, however, be subject to citizenship requirements.

51. The names of prospective jurors shall be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction.

52. The jury source list shall be representative and shall be as inclusive of the adult population in the jurisdiction as is feasible.

53. The Court shall periodically review the jury source list for its representativeness and inclusiveness. Should the Court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken.

54. Random selection procedures shall be used at all stages throughout the jury selection process except as provided herein.

55. The frequency and the length of time that persons are called upon to perform jury service and to be available therefor, shall be the minimum consistent with the needs of justice.

56. Except as may be expressly provided for by law, all automatic excuses or exemptions from jury service shall be avoided.

57. Eligible persons who are summoned may be excused from jury service only for valid reason by the court, or with its authorization.

### Selection of a Particular Jury

58. Examination of prospective jurors shall be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges.

59. If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case before the court fairly and impartially, that individual shall be removed from the panel. Such a determination may be made on motion of a party or on the judge's own initiative.

60. In jurisdictions where peremptory challenges are permitted, their number and the procedure for exercising them shall be uniform for the same type of case.

61. Peremptory challenges shall be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury.

### Administration of the Jury System

62. The responsibility for the administration of the jury system shall be under the control of the judiciary.

63. The notice summoning a person to jury service shall be in writing, easily understandable, and delivered sufficiently in advance.

64. Courts shall employ the services of prospective jurors so as to achieve the best possible use of them with a minimum of inconvenience.

65. Courts shall provide adequate protection for jurors from threat and intimidation.

66. Courts shall provide an adequate and suitable environment for jurors, and jury facilities shall be arranged to minimize contact between jurors and parties, counsel and the public.

67. Persons called for jury service shall receive a reasonable allowance from the State except when they receive such allowance in their place of employment.

68. Employers shall be prohibited from penalizing employees who are called for jury service.

#### Jury Consideration and Deliberation

69. Procedures shall be provided to prevent a trial from being terminated because of unforeseen circumstances which would reduce the number of jurors.

70. Courts shall provide some form of orientation or instruction to persons called for jury service to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors.

71. In simple language the trial judges shall:

- (a) Directly following empanelment of the jury, give preliminary explanations of the jury's role and of trial procedures;
- (b) Direct the jury on the law.

72. (a) A jury's deliberations shall be held in secrecy. Jurors shall not make public reasons for their decisions.
- (b) A jury shall be sequestered only for the purpose of insulating its members from improper information or influence.
- (c) Standard procedures shall be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors is minimized.

## **LAWYERS**

### **Definitions**

73. In this chapter:

- (a) "Lawyer" means a person qualified and authorized to plead and act on behalf of his clients, to engage in the practice of law and appear before the courts and to advise and represent his clients in legal matters, and shall, for the purposes of this chapter, include agents, assistants, procuradores, paraprofessionals and other persons authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable;
- (b) "Bar Association" means a professional association, guild, faculty, college, bureau, council or any other recognized professional body under any nomenclature within a given jurisdiction, and shall, for the purposes of this chapter, include any association under any nomenclature of agents, assistants, procuradores, paraprofessionals and other persons who are authorized and permitted to perform one or more of the functions of lawyers, unless a reference to the context makes such inclusion inappropriate or inapplicable.

### **General Principles**

74. The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights.

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

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

#### Legal Education and Entry into the Legal Profession

77. Legal education and entry into the legal profession shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national, linguistic or social origin, property, income, birth or status.

78. Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

79. Programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

80. Every person having the necessary qualifications, integrity and good character shall be entitled to become a lawyer and to continue to practise as a lawyer without discrimination on the ground of race, colour, sex, religion or political or other opinion, national, linguistic, or social origin, property, income, birth or status or for having been convicted of an offence for exercising his internationally recognized civil or political rights. The conditions for the disbarment, disqualification or suspension of a lawyer shall, as far as practicably, be specified in the statutes, rules or precedents applicable to lawyers and others performing the functions of lawyers.

#### Education of the Public Concerning the Law

81. It shall be the responsibility of the lawyers and Bar Associations 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 the important role lawyers, judges, jurors, and assessors play in protecting fundamental rights and liberties and to inform the members of the public about their rights and duties and the relevant and available remedies. In particular, the Bar Associations shall prepare and implement appropriate educational programmes for lawyers as well as for the general public, and shall collaborate with the authorities, non-governmental organizations, bodies of citizens and educational institutions in promoting and co-ordinating such programmes.

### Duties and Rights of Lawyers

82. The duties of a lawyer towards his client include:

- (a) Advising the client as to his legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the client's legal rights and obligations;
- (b) Assisting the client in every appropriate way, and taking legal action to protect him and his interest; and,
- (c) Representing him before courts, tribunals or administrative authorities.

83. The lawyer in discharging his duties shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

84. Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law and it is the duty of the lawyer to do so to the best of his ability and with integrity and independence. Consequently, the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

85. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or assisted any client or for having represented any client's cause.

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

87. It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.

88. If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judges or judges who participated in the proceedings which gave rise to the charge against the lawyer, except that the judge or judges concerned may in such a case suspend the proceedings and decline to continue to hear the lawyer concerned.

89. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his professional appearance before a court, tribunal or other legal or administrative authority.

90. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including:

- (a) Confidentiality of the lawyer-client relationship and the right to refuse to give testimony if it impinges on such confidentiality;
- (b) The right to travel and to consult with their clients freely born within their own country and abroad;
- (c) The right to visit, to communicate with and to take instructions from their clients;



- (d) The right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work;
- (e) The right to accept or refuse a client or a brief on reasonable personal or professional grounds.

92. Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to:

- (a) Take part in public discussion of matters concerning the law and the administration of justice;
- (b) Join or form freely local, national and international organizations;
- (c) Propose and recommend well considered law reforms in the public interest and inform the public about such matters;
- (d) Take full and active part in the political, social and cultural life of their country.

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

#### Legal Service for the Poor

94. It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society and particularly to its weaker sections, so that free legal aid may be given in appropriate cases, no one may be denied justice, and the Bar may promote the cause of justice by protecting economic, social, cultural, civil and political human rights of individuals and groups.

95. Governments shall be responsible for providing sufficient funding for appropriate legal service programmes for those who cannot afford the expenses on their legitimate litigation. Governments shall also be responsible for laying down the criteria and prescribing the procedure for making such legal services available in such cases.

96. Lawyers engaged in legal service programmes and organizations, which are financed wholly or in part from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:

- (a) The direction of such programmes or organizations being entrusted to Bar Associations or independent boards composed mainly or entirely of members of the profession, with effective control over its policies, allocated budget and staff;
- (b) Recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgement.

#### The Bar Association

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

98. In order to foster the solidarity and maintain the independence of the legal profession, it shall be the duty of a lawyer to enrol himself as a member of an appropriate Bar Association.

#### Functions of the Bar Association

99. The functions of a Bar Association in ensuring the independence of the legal professional shall be inter alia:

- (a) To promote and uphold the cause of justice, without fear or favour;
- (b) To maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;

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

100. Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall, as far as practicable, co-operate in assisting the foreign lawyer to obtain the necessary right of audience.

101. To enable the Bar Association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention of any of its members or any lawyer practising within its jurisdiction; and for the same purpose the Association shall have notice of:

- (a) Any search of his person or property;
- (b) Any seizure of documents in his possession;

- (c) Any decision to take proceedings affecting or calling into question the integrity of a lawyer.

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

### Disciplinary Proceedings

102. The Bar Association shall establish and enforce in accordance with the law a code of professional conduct of lawyers. Such a code of conduct may also be established by legislation.

103. The Bar Association or an independent statutory authority consisting mainly of lawyers shall ordinarily have the primary competence to conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant or a public-spirited citizen. A court or a public authority may also report a case to the Bar Association or the statutory authority which may on that basis initiate disciplinary proceedings.

104. Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.

105. An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.

106. Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this Declaration.

# DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

## ("SIRACUSA PRINCIPLES")

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

*The main purpose of the meeting was to seek to exchange information and formulate principles which might be of assistance to Dr. L.M. Singhvi, Special Rapporteur on the Study on the Independence of the Judiciary of the UN Sub-Commission on the Protection of Minorities and the Prevention of Discrimination. Dr. Singhvi was present at the meeting, and submitted the Draft Principles to the Sub-Commission at its August 1981 meeting as an annex to his progress report (UN Doc. E/CN.4/Sub.2/481/Add.1).\**

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\* See CIJL Bulletin No. 6 for Dr. Singhvi's preliminary report to the Sub-Commission

# **DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY**

## **I. Preamble**

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

## **II. Definition**

Art. 2. Independence of the judiciary means

(1) that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for any reason, and

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

## **III. Qualification, Selection and Training of Judges**

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

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

Art. 5. Selection for the appointment of judges should be made without distinction of any kind such as race, colour, sex, language or

religion, political or other opinion, national or social origin, property, birth or status.

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

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

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

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

#### IV. Posting, Transfer and Promotion

##### Posting

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

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

### Transfer

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

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

### Promotion

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

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

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



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

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

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

## V. Retirement, Discipline, Removal and Immunity

### Retirement

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

[Note: Pursuant to this principle elected judges should not be required to stand for re-election.]

This article is not intended to apply to international courts.]

## Discipline

Art. 13. Any disciplinary proceedings concerning judges should be before a court or a board composed of and selected by members of the judiciary.

Art. 14. All disciplinary action should be based upon standards of judicial conduct promulgated by law or in established rules of court.

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

[Note: Opinion was divided as to whether the disciplinary board should also include a minority of non-judges.

Disciplinary sanctions may include a variety of options ranging from censure or reprimand to the most drastic action of removal.

A common law judge who was unable to attend the meeting has suggested that articles 13 and 15 should be amended to read as follows: "13. Disciplinary proceedings against a judge shall be taken formally where it is desired that the judge be, for serious reason, removed from his office. Such disciplinary proceedings shall be taken in the first instance before a board composed of members of the judiciary selected by their peers and there shall be a right of appeal from the decision of such a board to a court.

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

## Removal

Art. 16. A judge should not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental in-

capacity, he has shown himself manifestly unfit to hold the position of judge.

### Immunity

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

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

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

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

## VI. Working Conditions, Administrative and Financial Arrangements

### Organisation of the Judiciary

Art. 18. Any hierarchical organisation of the judiciary and any difference in grade or rank should in no way interfere with the right of the indi-

vidual judge to pronounce freely in accordance with his appreciation of the facts and his interpretation of the law.

[Note: In some countries the judiciary is organised in strictly hierarchical order, prevailing even between members of the same court. In these circumstances the higher ranking judges, especially if they are likely to be asked to recommend a colleague for promotion, may even unwittingly exercise a restrictive influence on the independence of subordinate colleagues, or induce in them an unduly deferential attitude towards their superiors. Consequently it appears useful to enunciate this principle.]

#### Assignment of cases

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

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

#### Specialisation of Judges and Tribunals

Art. 20. Considering the increase in the volume and diversity of judicial matters, the creation of specialised courts contributes to efficiency and the effective administration of justice, which in turn enhances the independence of the judiciary. Nevertheless, specialisation should not preclude the periodic rotation of judges, assisted by appropriate in-service training.

#### Professional privilege

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

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

### Freedom of Association and Expression

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

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

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

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

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

Yet others saw no objection to judges having full freedom of association in political parties and playing an active and even leading role in them.

Some of those opposed to these latter views considered that there might be less objection to a judge being a member of a political party in a one party state.

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

#### Disqualification from hearing particular cases

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

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

#### Financial provisions

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

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

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

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

### Physical protection

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

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

## VII. The Role of the Judiciary in a Changing Society

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

[Note: Tensions and conflicts of the kind referred to have at times arisen when a constitutional or other court has invalidated reform legislation or executive action as being unconstitutional, or when there has been a series of decisions restricting the effect of reform legislation, such as trade union or land reform laws or programmes of nationalisation. It may be noted

that these tensions or conflicts usually arise in countries where the independence of the judiciary is in general respected and the judiciary is not subservient to the executive.

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

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

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

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

In some countries prosecutors although part of the Judiciary, are hierarchically organised and subject to the orders of the Executive. The latter thus has the means to exercise an indirect pressure on judges of the bench through influential prosecutors. It is preferable therefore that prosecutors



should, except in relation to specific matters specified by law, be independent of the executive power.]

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

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

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

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

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

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

# **DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE LEGAL PROFESSION**

## **("NOTO PRINCIPLES")**

*A Committee of Experts organised by the International Association of Penal Law and the International Commission of Jurists and hosted by the International Institute of Higher Studies in Criminal Sciences met at Noto, Sicily, on 10-14 May 1982 to formulate draft principles on the Independence of the Legal Profession. The participants included lawyers from the following organisations, who attended in their personal capacities:*

*African Bar Association  
All Asia Bar Association  
Amnesty International  
Andean Commission of Jurists  
Centre for the Independence of Judges and Lawyers  
Inter African Union of Lawyers  
International Association of Democratic Lawyers  
International Association of Penal Law  
International Association of Young Lawyers  
International Commission of Jurists  
International Union of Lawyers  
Japan Federation of Bar Associations  
LAWASIA Standing Committee on Human Rights  
Supreme Court Bar Association of India  
United Nations Secretariat, Crime Prevention and Criminal  
Justice Branch  
United Nations Secretariat, Division of Human Rights*

*The main purpose of the meeting was to seek to exchange information and formulate principles which might be of assistance to Dr. L.M. Singhvi, Special Rapporteur on the Study on the Independence and Impartiality of*

*the Judiciary, Jurors and Assessors and the Independence of Lawyers of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. Dr Singhvi was present at the meeting, and included the Draft Principles as an annex to his progress report (E/CN.4/Sub.2/1982/23) distributed to the Sub-Commission at its August 1982 meeting. He also included them as an annex to his final report (E/CN.4/Sub.2/1985/18, Annex III).*

## **DRAFT PRINCIPLES ON THE INDEPENDENCE OF THE LEGAL PROFESSION**

### **Definitions**

1. In these principles the term 'legal profession' refers to the persons qualified and authorised to practice before the courts and to advise and represent their clients in legal matters. The term 'lawyer' refers to a practicing member of the legal profession. The term 'bar association' refers to the recognised professional association to which lawyers within a given jurisdiction belong.

### **Scope**

2. These principles seek to state the nature of the independence of the legal profession, the reasons for it, its importance for society, the responsibilities which it entails, the ways in which it can and should be ensured and protected, and the standards and discipline needed in order to maintain it.

### **General principles**

3. A fair and equitable system of administration of justice and the effective protection of human rights and fundamental freedoms depend as much on the independence of lawyers as on the independence and impartiality of the judiciary. The independence of lawyers and of the judiciary

mutually complement and support each other as integral parts of the same system of justice.

4. Adequate protection of the human rights and fundamental freedoms to which all persons are entitled, economic, social and cultural, as well as civil and political, requires that all persons have effective access to legal services provided by an independent legal profession.

5. To enable the legal profession effectively to perform its proper role in the defence of these rights, lawyers must be able to counsel and represent their clients in accordance with their established professional standards and judgment without any restrictions, influences, pressures, threats or undue interference from any quarter.

6. Bar associations and other professional associations of lawyers have a vital role and responsibility to strive to protect their members and uphold and defend their independence against improper restrictions or infringements such as are frequently to be found.

7. The legal profession must serve more than a limited section of society; otherwise it cannot be considered as fulfilling the role of an independent profession. Bar associations have a responsibility to cooperate in making available the services of lawyers to all those in need of them, especially in deprived sectors of the community.

#### Legal education and entry into the legal profession

8. Access to legal education and entry into the legal profession shall be determined:

- with full respect for the right of everyone to an education permitting the full development of his potential,
- with full respect for the right of everyone to earn his living by work freely chosen or accepted,
- with due regard for the candidate's integrity, ability and commitment to uphold the ideals of the profession, and

- with a view to assuring the necessary legal services to all sectors of society.

9. No-one shall be denied a legal education or entry into the legal profession by reason of race, colour, sex, religion, political belief or opinion, national or social origin, property, birth or martial status, or for having been convicted of an offence for exercising his civil or political rights.

10. In order to ensure equal access for all sectors of the society and, where relevant, to eliminate the effects of past discrimination, special measures appropriate to the circumstances may be adopted to promote the training and entry into the legal profession of women, or persons belonging to national, ethnic, or racial minorities or socially disadvantaged groups.

11. In countries where there exist communities or regions whose needs for legal services are not met, particularly where such communities have distinct cultures, legal norms or languages, special measures should be taken to ensure that candidates for the legal profession from these communities or regions are encouraged and receive training appropriate to the needs of their communities.

12. Legal education shall be designed to promote, in addition to technical competence, awareness of the ideals and ethical duties of the legal profession, and of human rights and fundamental freedoms recognised by national and international law. The right of every person to legal assistance in the protection of his rights should be emphasized in all legal education.

13. It should be recognised that some practical experience as a part of legal education and continuing education are vital factors to ensure, maintain and enhance the level of professional competence required to render legal services. The necessary measures should be taken to this end.

14. Legal education, including programmes of continuing education, should seek to strengthen legal skills, increase ethical awareness, awaken

social concern and train lawyers to promote and defend effectively the rights of disadvantaged sectors of society and the public interest.

#### Education of the public concerning the law

15. Lawyers have a responsibility to assist in programmes to educate and inform the public about their legal rights and duties and the relevant remedies.

16. To increase the public's awareness of the principles of the rule of law and the importance of the independence of the judiciary and of the legal profession is an important means of ensuring that this independence is respected. Appropriate educational programmes should be undertaken to attain this objective.

#### Rights and duties of lawyers relevant to the independence of the profession

17. The duties of a lawyer towards his client include:

- advising the client as to his legal rights and obligations;
- taking legal action to protect him and his interests; and, where required,
- representing him before courts, tribunals or administrative authorities.

In doing so the lawyer shall at all times act diligently and fearlessly within the law in accordance with the wishes of his client and subject to the established standards and ethics of the legal profession.

18. As every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and as it is the duty of the lawyer to do so to the best of his ability, the lawyer is not in consequence to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

19. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

20. It is the duty of a lawyer to show proper respect towards the judiciary. However, this shall not prevent the lawyer raising proper objections, such as an objection to the participation or continued participation of a judge in a particular case, or to the judge's conduct of a trial or hearing.

21. If proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.

22. Save in respect of such proceedings and of disciplinary proceedings (see below), a lawyer shall enjoy complete civil and penal immunity for statements made in written or oral pleadings or in his professional appearances before a court, tribunal or other legal or administrative authority.

23. In relation to a person in custody the independence of lawyers is of particular significance in order to ensure that he receives full and adequate representation. Safeguards are required to avoid any possible suggestion of collusion, arrangement, or dependence between the lawyer who acts for him and the authorities. In particular:

- (a) A person taken into custody shall have a free and unfettered right to select a lawyer of his choice to act for him.
- (b) When a lawyer is engaged by the family or by some other interested person to represent a person in custody, that lawyer shall be entitled to have access to the person in custody to ascertain whether he wishes him to act or wishes some other lawyer to do so.
- (c) To meet cases where the person in custody has no lawyer it is the responsibility of the bar association to arrange with the authorities a system that enables him to be provided with a lawyer, or a choice of lawyers, in such a way that the choice or

appointment of the lawyer is not influenced by the police, the prosecution or a court.

- (d) A lawyer shall have such access to a client in custody as the lawyer considers necessary in accordance with his client's needs, and shall have the right to meet and correspond with his client with full respect for the confidentiality of their communications.
- (e) When a person in custody wishes to terminate or dispense with the services of a lawyer, the lawyer shall be entitled to communicate personally with him in order to satisfy himself that this decision has been taken freely by his client.

24. Lawyers shall have all such other facilities and privileges as are needed to fulfil their professional responsibilities effectively, including:

- absolute confidentiality of the lawyer-client relationship by virtue of which a lawyer may not in any circumstances disclose or be required to disclose information received professionally from a client, or his communications with a client, without the client's authority, this protection extends to the lawyer's files and documents.
- the ability to travel freely both within their own country and abroad for professional reasons. Any restrictions on such travel imposed on the general public should be relaxed to enable a lawyer to discharge his professional duties effectively.
- the right to seek, receive and, subject to the rules of his profession, to impart information and ideas relating to his professional work, without restriction either orally or in writing, and regardless of frontiers.

25. Lawyers perform a vital social function in representing and articulating rights and grievances in society and they shall enjoy the same freedom of association, freedom of belief and freedom of opinion and expression as other persons. In particular, they shall have the right to take part in public discussion of matters concerning the law and the administration of justice with no legal restrictions other than those applicable to other persons, and the right to join or form freely and without interference local,



national or international organisations, and they shall suffer no professional restrictions by reason of their beliefs or their membership in a lawful organisation.

26. Lawyers have a responsibility to study existing and proposed legislation, to examine the working of the system of administration of justice and to evaluate proposals for reform. They should also propose and recommend well considered law reforms in the public interest and should undertake programmes to inform the public about such matters. Through their professional associations they should be consulted about proposed legislation.

27. A lawyer shall be entitled to take a full and active part in the political, social and cultural life of his country whether through membership of a political party, legislative body, or non-governmental organisation. Any such party, body or organisation shall respect fully, and not seek to restrict, the independence of the lawyer when acting in his professional capacity.

28. Any rules or regulations governing the fees or remuneration of lawyers shall be designed to ensure that legal services are made available to public on reasonable terms, and that, in order to ensure their independence, practicing lawyers are able to earn adequate remuneration ensuring them a reasonable level of security, having regard to prevailing economic conditions. Such fees or remuneration may, however, be waived by a lawyer.

#### Social responsibility of lawyers

29. It is a necessary corollary of the concept of an independent legal profession that its members will seek to make their services available to all sectors of society, and to promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

30. The provision of legal services for the poor and disadvantaged goes beyond legal representation before the courts, and includes educating and

counselling them as to their rights, and the ways to assert and secure them. One means of achieving this is for lawyers to cooperate with organisations working in deprived communities, informing them about relevant laws and procedures by which the members of these communities can assert their rights and, where necessary, call upon the assistance of lawyers.

31. It is the responsibility of governments, having regard to available resources, to provide sufficient funding for legal service programmes. To the extent that governments do not finance such programmes, bar associations and other lawyers' organisations should themselves seek to promote and provide them as far as they can.

32. Lawyers engaged in legal service programmes and organisations, which are financed wholly or in part from public funds, shall enjoy full guarantees of their professional independence, in particular by:

- the direction of such programmes or organisations being entrusted to an independent board composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment; and
- the lawyers' remuneration being determined by a scale of fees agreed between the government authorities and the bar association.

### The Bar Association

33. There shall be established in each jurisdiction an independent and self-governing association of lawyers, recognised in law, (hereinafter called 'the bar association'). Legislation governing the legal profession shall ensure that, in order to enjoy the right of audience before the courts, all lawyers shall be members of the bar association.

34. The council or other executive body of the bar association shall be freely elected by all the members without interference of any kind by any other body or person. The association shall be so organised as to facilitate the full participation of its members and enable them to contribute to the fulfillment of its functions.

35. The functions of a bar association in ensuring the independence of the legal profession include:

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

36. The establishment of the bar association shall be without prejudice to the freedom of association of lawyers, and their right to form or join in addition other professional associations of lawyers and jurists.

37. Where a person involved in litigation wishes to engage a lawyer from another country having a similar legal system, the bar association should cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

38. In view of the importance of the independence of lawyers to their clients and to the public, and in order to enable the bar association to fulfill its function of preserving the independence of lawyers, the bar association shall be informed immediately of the reason and legal basis for

- the arrest or detention of any lawyer,
- any search of his person or property,
- any seizure of documents in his possession,
- any decision to take proceedings affecting or calling into question the integrity of a lawyer.

In such cases the bar association shall be entitled to make representations to the responsible authorities.

#### Disciplinary proceedings

39. The bar association shall freely establish and enforce in accordance with the law a code of professional conduct for lawyers.

40. Save in respect of proceedings for failure to show proper respect for a court, the bar association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers. Neither the public prosecutor nor any other representative of the executive shall participate in such proceedings. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the bar association with a view to its initiating disciplinary proceedings.

41. Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the bar association.

42. Rulings adverse to a lawyer may be appealed by him to an appropriate appellate body, which may be a court or an appeal tribunal composed of lawyers only, or of lawyers and judges in equal number or with a majority of lawyers.

43. Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedures, in particular

- (a) the right to be informed promptly of the charge and of the nature of the evidence against him,
- (b) the right to challenge the impartiality of the tribunal or members thereof,
- (c) the right to adequate time for the preparation of the defence,
- (d) the right to defend himself in person or by a lawyer of his choice,
- (e) the right to be present throughout the hearing,
- (f) the right to question adverse witnesses and to call witnesses for his defence,
- (g) the right to an expeditious hearing and determination of the charge,
- (h) the right to a public hearing on appeal, if the appellant so desires.

44. The principle of proportionality shall be respected in determining sanctions for disciplinary offences.

# **ICJ: THE RULE OF LAW AND HUMAN RIGHTS**

## **THE JUDICIARY AND THE RULE OF LAW**

### **I. The Judiciary and the Legal Profession under the Rule of Law<sup>1</sup>**

1. An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the executive or legislature with the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underlie it. It is implicit in the concept of independence set out in the present paragraph that provision should be made for the adequate remuneration of the judiciary and that a judge's right to the remuneration settled for his office should not during his term of office be altered to his disadvantage.

2. There are in different countries varying ways in which the judiciary are appointed, re-appointed (where re-appointment arises) and promoted, involving the legislature, executive, the judiciary itself, in some countries the representatives of the practising legal profession, or a combination of two or more of these bodies. The selection of judges by election and particularly by re-election, as in some countries, presents special risks to the independence of the judiciary which are more likely to be avoided only where tradition has circumscribed by prior agreement the list of candidates and has limited political controversy. There are also potential dangers in exclusive appointment by the legislature, executive, or judiciary, and where there is on the whole general satisfaction with the calibre and independence of judges it will be found that either in law or in practice there is

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<sup>1</sup> Congress of Delhi, 1959, Committee IV, cl. 1-6

some degree of co-operation (or at least consultation) between the judiciary and the authority actually making the appointment.

3. The principle of irremovability of the judiciary, and their security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence, particularly if he is seeking re-appointment, he is subject to greater difficulties and pressure than a judge who enjoys security of tenure for his working life.

4. The reconciliation of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial.

5. The consideration set out in the preceding paragraph should apply to: (1) the ordinary civil and criminal courts; (2) administrative courts or constitutional courts, not being subordinate to the ordinary courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other judicial functions (juries, assessors, justices of the peace, etc.) should only be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular positions. All such persons have in any event the same duty of independence in the performance of their judicial function.

6. It must be recognized that the legislature has responsibility for fixing the general framework and laying down the principles of organization of judicial business and that, subject to the limitations on delegations of legislative power which have been dealt with elsewhere, it may delegate part of this responsibility to the executive. However, the exercise of such responsibility by the legislature including any delegation to the executive should not be employed as an indirect method of violating the independence of the judiciary in the exercise of its judicial functions.

## II. The Responsibility of the Judiciary for the Protection of the Rights of the Individual in Society<sup>2</sup>

1. In a free society practising the Rule of Law, it is essential that the absolute independence of the judiciary be guaranteed. Members of the legal profession in any country have, over and above their ordinary duties as citizens, a special duty to seek ways and means of securing in their own country the maximum degree of independence for the judiciary.
2. It is recognised that in different countries there are different ways of appointing, promoting and removing judges by means of action taken by the executive and legislative powers. It is not recommended that these powers should be abrogated where they have been universally accepted over a long period as working well.
3. In respect of any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the judiciary, it is recommended:
  - (a) that these powers should not be put into the hands of the executive or the legislature, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the *Conseil supérieur de la magistrature* in the African French-speaking countries;
  - (b) that in any country in which the independence of the judiciary is not already fully secured in accordance with these principles, they should be implemented immediately in respect of all judges, especially those having criminal jurisdiction.
4. It is recommended that all customary, traditional or local law should be administered by the ordinary courts of the land, and emphasized that for so long as that law is administered by special courts, all the principles enunciated here and at New Delhi, for safe-guarding the Rule of Law, apply to those courts.

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<sup>2</sup> Conference of Lagos, 1962, Committee III, cl. 1-5



5. The practice whereby in certain territories judicial powers, especially in criminal matters, are exercised by persons who have no adequate legal training or experience, or who as administrative officers are subject to the control of the executive, is one which falls short of the Rule of Law.

## **THE LEGAL PROFESSION AND THE RULE OF LAW**

### **I. The Legal Profession under the Rule of Law<sup>3</sup>**

1. It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs. But it is recognized that there may be general supervision by the courts and that there may be regulations governing the admission to and pursuit of the legal profession.

2. Subject to his professional obligation to accept assignments in appropriate circumstances, the lawyer should be free to accept any case which is offered to him.

3. While there is some difference of emphasis between various countries as to the extent to which a lawyer may be under a duty to accept a case it is conceived that:

- (1) wherever a man's life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;
- (2) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;
- (3) it is the duty of a lawyer which he should be able to discharge without fear of consequences to press upon the court any argu-

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<sup>3</sup> Congress of Delhi, Committee IV, cl. 7-10

ment of law or of fact which he may think proper for the due presentation of the case by him.

4. Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience. This is a question which cannot be altogether dissociated from the question of adequate remuneration for the services rendered. The primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility.

## **II. The Responsibility of the Bar for the Protection of the Rights of the Individuals in Society<sup>4</sup>**

1. To maintain the respect for the Rule of Law it is necessary that the legal profession should be free from any interference.
2. (a) In countries where an organised bar exists, the lawyers themselves have the right to control the admission to the profession and the discipline of the members according to rules established by law.  
(b) In countries where an organised bar does not exist, the power to discipline lawyers should be exercised by the judiciary in consultation with senior practising lawyers and never by the executive.

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<sup>4</sup> Conference of Lagos, 1961, Committee III, cl. 6 - 7

3. All steps should be taken to ensure equal access to law for both rich and poor, especially by a provision for and an organisation of a system of legal aid in both criminal and civil matters.

### III. The Role of Lawyers in a Changing World<sup>5</sup>

1. In a changing and interdependent world, lawyers should give guidance and leadership in the creation of new legal concepts, institutions and techniques to enable man to meet the challenge and the dangers of the times and to realize the aspirations of all people.

The lawyer today should not content himself with the conduct of his practice and the administration of justice. He cannot remain a stranger to important developments in economic and social affairs if he is to fulfil his vocation as a lawyer: he should take an active part in the process of change. He will do this by inspiring and promoting economic development and social justice. The skill and knowledge of lawyers are not to be employed solely for the benefit of clients, but should be regarded as held in trust for society.

2. It is the duty of lawyers in every country, both in the conduct of their practice and in public life, to help ensure the existence of a responsible legislature elected by democratic process and an independent, adequately remunerated judiciary, and to be always vigilant in the protection of civil liberties and human rights.

3. Lawyers should refuse to collaborate with any authority in any action which violates the Rule of Law.

4. Lawyers should be anxiously concerned with the prevalence of poverty, ignorance and inequality in human society and should take a leading part in promoting measures which will help eradicate those evils, for while they continue to exist, civil and political rights cannot of themselves ensure the full dignity of man.

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<sup>5</sup> Congress of Rio, 1962, Committee III.

5. Lawyers have a duty to be active in law reform. Especially where public understanding is slight and the knowledge of lawyers is of importance, they should review proposed legislation and present to the appropriate authorities programmes of reform.

6. Lawyers should endeavour to promote knowledge of and to inspire respect for the Rule of Law, and an appreciation by all people of their rights under the law.

7. If lawyers are to discharge their obligations under the Rule of Law they will need to exercise individual initiative and to act through every available organization, including in particular self-governing lawyers' associations. Such associations must be entirely free of interference and control by the executive.

8. The Rule of Law requires lawyers of competence and integrity who are available to, and do in fact represent the whole community regardless of racial, religious, political, geographical or other differences. Lawyers should be numerous and diverse enough to serve the needs of the community and to ensure that every person can obtain adequate representation by a lawyer of his own choice.

Individual lawyers and their associations have the duty to work with judges, other officials and community organizations to provide indigent persons with adequate legal service.

9. The Rule of Law requires an authority which has the power to, and does in fact, exact proper standards for admission to the legal profession and enforces discipline in cases of failure to abide by a high standard of ethics. Those functions are best performed by self-governing democratically organized lawyers' associations, but in the absence of such associations the judiciary should act instead. Discipline for violations of ethics must be administered in substantially the same manner as courts administer justice. Associations exercising those functions must be open to all qualified lawyers without discrimination based on race, religion or political persuasion. Lawyers' associations should encourage reciprocal agree-

ments or other procedures to eliminate the requirement of citizenship as a prerequisite to the right to practise law.

10. (i) In order to ensure adequate representation, it may be essential in some cases to allow lawyers from foreign countries to appear.
- (ii) Lawyers' associations must take all necessary steps to ensure the representation of clients whose causes may be unpopular.

11. It is essential to the Rule of Law that the client be free to discuss all matters with his lawyer without fear of disclosure by the lawyer, either voluntarily or by compulsion.

12. In an interdependent world, the lawyer's responsibilities extend beyond national boundaries. They require his deep concern for peace, and support for the principles of the United Nations and the strengthening and development of international law and organizations. The lawyer should also promote an increased application of arbitration, adjudication and other legal procedures in the settlement of disputes among nations. Finally, the lawyer should support the negotiation and conclusion of international conventions and agreements on human rights and fundamental freedoms, thus leading to the day when the universality of the Rule of Law may be achieved.

13. At all times the lawyer should strive to be a visible example of the ideals of his profession-integrity, competence, courage and dedication to the service of his fellow men.

#### **IV. The Role of the Lawyer in a Developing Country<sup>6</sup>**

##### **Preamble**

Law and lawyers are instruments of social order. Without law, the evolution of mankind to its present stage of development would not have been

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<sup>6</sup> Conference of Bangkok, 1965, Committee III.

possible. Through the law, society is preserved and man is enabled to live and love and labour in peace from generation to generation.

The law is not negative and unchanging. It should be not a yoke, but a light harness holding society loosely but firmly together, so that it may move freely forward. Order is important, but it must be an evolving order; the law must be firm yet flexible, and capable of adapting itself to a changing world. This is especially so in a developing country.

Poverty, lack of opportunity and gross inequality in the Region<sup>7</sup> require leaders who understand the need for evolutionary change, so that every citizen may look to a future in which each may realise his full potential as an individual in a free society. The great need of the peoples of the Region requires action, lest freedom be utterly forfeited. Beset by threats from the right or left, the statesman must find means to advance the economic and social development of his country and countrymen, whilst preserving or establishing the institutions and the freedoms which are the cornerstones of a free society under the Rule of Law.

These problems require the lawyer to play a vital role in their solution. They cannot be solved by lawyers alone. But the life of man in society and his relationships with others are the subjects of the lawyer's special knowledge and study; in many parts of the Region lawyers are particularly well equipped to see these problems in perspective, and to devise solutions.

The lawyer must look beyond the narrower confines of the law, and gain understanding of the society in which he lives, so that he may play his part in its advancement. The inspiration of the lawyers of the world, with the ideals set forth in this Chapter under the heading "The Role of Lawyers in a Changing World", could play a large part in moulding free societies of the future, able to promote the full dignity of man, and to withstand the perils and dangers of the changing times.

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<sup>7</sup> The South East Asian and Pacific Region, with which the Bangkok Conference was primarily concerned.

With particular reference to developing societies it can be stated that:

1. The lawyer has a deep moral obligation to uphold and advance the Rule of Law in whatever sphere he may be engaged or in which he has influence, and he should fulfil that obligation even if it brings him into disfavour with authority or is contrary to current political pressures. He can give effect to many of the principles underlying the Rule of Law in his daily work; for the rest, it is his responsibility as a citizen in a developing community to apply them for the benefit of society and his fellow-men.
2. An indispensable aspect of the maintenance of the Rule of Law is the availability of lawyers to defend the civil, personal and public rights of all individuals and the readiness to act for those purposes resolutely and courageously. Such a readiness involves the obligation to take an active part in implementing and making effective schemes of legal aid for the poor and destitute.
3. The lawyer should endeavour:
  - (i) to secure the repeal or amendment of laws which have become inappropriate or unjust or out of harmony with the needs and aspirations of the people;
  - (ii) to review proposed legislation and delegated legislative enactments, and to ensure that they are in accord with the Rule of Law;
  - (iii) to ensure that the law is clear and readily accessible;
  - (iv) to promote legislation establishing the legal framework which will enable a developing society to advance, and its members to attain their full dignity as human beings.
4. The lawyer should assist in the work of administration; he should insist, nonetheless, that it be executed with respect for the rights of the individual and otherwise according to law, and strive to assure judicial review of all administrative acts which affect human rights.

5. Lawyers must bring to bear in the field of international relations the underlying principles of respect for law, coupled with a concern for all mankind, particularly the poor, the weak, the illiterate, and the oppressed.

6. Lawyers should be actively concerned with legal education and the provision of adequate incentives for teachers of law, and do their utmost to implement the principles enunciated hereafter in Chapter VII, as being particularly relevant in the context of the Rule of Law in developing societies. The Rule of Law, as a dynamic concept, requires that legal education should bear a realistic relation to the social and economic conditions obtaining in developing societies, so that future lawyers may be better equipped to perform their role in a constructive manner.

7. Lawyers should endeavour to enlist the aid of their professional associations to secure the acceptance by their members of the ideals set forth above.



## **Union Internationale des Avocats**

# **INTERNATIONAL CHARTER OF LEGAL DEFENSE RIGHTS**

### **STATEMENTS OF AIMS**

*(The Union Internationale des Avocats, founded in 1927, is the oldest international lawyers organisation, counting several thousand members in some sixty countries. Its purpose has always been to promote the essential principles of the legal profession: independence and freedom.).*

## **I. Fundamental Principles**

Article 1      The right to justice and a fair trial is a fundamental right recognized by the totality of international treaty documents and instruments.

The right to legal representation is a basic element in the administration of good justice.

This is inseparable from the independence of the legal system; without the existence of independent and impartial tribunals there can be no effective protection for the litigant.

Article 2      Effective representation of the parties is essential to the safeguard of fundamental rights.

Article 3      Every person must be able to exercise his right to justice, and this implies the right to a court hearing and the right of access to such a court (as such terms are recognised in Public International Law).

Every person has an equal right to have his case heard fairly and publicly by an independent and impartial court which shall determine his rights and obligations, or the validity of any action in criminal or civil proceedings

brought against him or adversely affecting his property; such right shall include an equality of arms between the legal weapons available to the defence and to the prosecution.

Article 4 Every person shall be able to call upon a representative of his choice to defend him.

In all states where the legal system provides for advice and legal representation to be given by a lawyer, everyone shall be entitled to call upon a member of the legal profession, whether such profession is organised in "orders", Bars or in any other way.

Every person shall have free and effective choice in selecting his lawyer.

Article 5 The participation of the defending lawyer must be effective. This means that he has the duty to apply adequate competence to this work.

Article 6 Application of the principle of the primacy of the law implies the recognition of the rule whereby a person accused of any crime is presumed innocent until his crime has been legally established by public trial in which he has been provided with all necessary guarantees for his defence.

This general principle is not compatible with any disposition which may reverse the burden of proof, which must remain with the prosecution.

Personal guilt must be proven in every case; no notion of collective responsibility is permissible.

No person shall be condemned for acts of commission or omission which at the time were not a crime according to national or international law. In the same way no penalty shall be exacted that is more severe than that applicable at the time the crime was committed. (The provisions of conventions regarding crimes against humanity shall be excluded from this clause).

Rules of procedure cannot adversely affect the fundamental rights of legal defense, in accordance with the principle "no punishment outside the law."

Article 7 States must commit themselves to:

- (a) guarantee that any person whose rights and liberties are at issue shall have an effective remedy, even when the attempt to violate these rights has been perpetrated by someone acting in the exercise of his official position;
- (b) guarantee that the competent administrative or legislative authority shall be independent and impartial, in accordance with the state's legislation, and shall pronounce without undue delay on the rights of the individual and provide opportunities for legal remedy;
- (c) guarantee that the competent authorities comply with every justified claim.

Article 8 The chief object of the controls exercised by the courts on the executive shall be:

- (a) that the executive should act within the limits of its powers as defined by the Constitution and constitutional laws;
- (b) that any person whose rights are infringed or threatened by an administrative authority shall have an absolute right of appeal before the courts and shall be protected against the consequences of any action recognised by the courts as illegal, arbitrary or unreasonable;
- (c) that the exercise by the executive of its discretionary powers shall not be beyond examination by the courts who will investigate whether such exercise is legally valid, justified by good reasons and whether it conforms to the general principles of law;
- (d) that the powers validly conferred on the executive shall not be misused.

Where it is necessary to determine how the administrative authority has used its powers, the courts will assess whether or not the administration has the power to refuse to produce certain documents on the grounds of their confidential nature.

If a claim involves a violation of one or more fundamental rights, the courts will be entitled to invoke the Universal Declaration of Human Rights and the regional and international conventions adopted in the General Assembly of the United Nations, at least in their evaluation of the claim or of how to proceed.

## **II. Judicial Procedure**

Article 9      Judicial proceedings must be public.

The court may be closed to the public by the judges during part or all of the trial either in the interest of public order, as may be permissible in a democratic society, or where the interests of the privacy of the parties involved requires this and they seek it. Every sentence passed in a criminal or civil matter must be made in public, except where the interests of minors are concerned or where the trial is concerned with matrimonial differences or the care of children.

Article 10    Any person accused of breaking the law is entitled to at least the following guarantees:

- (a) to be informed as soon as possible, in a language he can understand, of the nature and the grounds of charges against him;
- (b) to have the necessary time and means to prepare his defence and to communicate with the counsel of his choice;
- (c) for his case to be heard without undue delay;
- (d) detention pending trial must be the exception rather than the rule;
- (e) to be present at the trial, to defend himself and to be defended by someone of his choice; if he is not represented, to be informed of his right to be represented and, whenever justice requires that he should be represented, to have such representation without financial cost, if he lacks the means to pay;
- (f) to have access sufficiently in advance and prior to the trial, to the record;

- (g) to interrogate or have interrogated the witnesses for the prosecution and to obtain and interrogate, pursuant to the same conditions, the witnesses for the defence;
- (h) to have the free services of an interpreter if he does not understand or speak the language used at the hearing;
- (i) not to be forced to give evidence against himself nor to admit guilt;
- (j) to the protection of the principle of "non bis in idem."

**Article 11** The task of the prosecution is not to obtain a conviction at all costs. The facts in the case must be presented objectively.

No person charged is obliged to enter a guilty plea.

No person charged, nor any witness, may be subjected to physical or psychological compulsion, including any procedure that might undermine his will or human dignity.

No postal nor telephonic communications shall be intercepted, except in exceptional circumstances covered by the law, in line with the criteria of a democratic society and with the authority or on an order from the competent legal authority.

No search of the defendant's home may be made without his consent or an order of a competent authority.

Evidence obtained in violation of the above-mentioned principles may not be used against the defendant.

### **III. The Defense**

**Article 12** Fundamental principles for criminal defence

A free defence assumes the liberty of the defendant; a lawyer representing a client in a criminal case must be allowed to prepare, in complete freedom, a defence which corresponds to the requirements of the legal system. He shall be allowed to communicate freely with the client and to

plead on his behalf without restrictions by any organisation or official party and without any arbitrary restriction being placed on the exercise of his professional skill.

### **Article 13 Duties of lawyers arising out of the rights and guarantees of legal representation**

The duties of the lawyer in regard to his client consist of:

- (a) advising the client as to his rights and legal obligations;
- (b) taking such existing legal measures as are necessary to protect him and his interests;
- (c) representing and assisting him before the courts or administrative authorities, as well as during the police investigations.

In carrying out his tasks, the lawyer shall at all times act with complete freedom, diligently and courageously, according to the law, respecting his client's wishes and the ethics of his profession, without concerning himself with restrictions or pressures to which he might be subjected by the authorities or the public.

Every person and every group of persons has the right to call upon the services of a lawyer to represent his or their interests or case within the limit of the law, and the lawyer has the duty to act, to the best of his ability, towards this end. In consequence, neither the authorities nor the public should associate the lawyer with his client or with his client's case, however popular or unpopular it may be.

No lawyer shall be victimised nor threatened with civil or penal sanctions, whether administrative, economic or otherwise, for having advised or represented a client or defended his case.

No court or administrative authority shall refuse a lawyer the right to appear before the court on his client's behalf.

If a lawyer faces proceedings for an offence against the court, he shall not come before any judge who took part in the trial which gave rise to

such proceedings. Such matter shall be brought before the competent jurisdiction or professional organisation.

Except in such cases as here referred to, a lawyer shall enjoy civil and criminal immunity for statements which he makes in good faith in his pleadings, whether written or oral, or in the exercise of his profession before a court or any other legal or administrative authority.

The lawyer shall have the right to accept or refuse any case. With regard to legal aid or dock briefs, the lawyer shall have these same rights, provided he gives good reason.

Article 14 Lawyers must ensure that all rights necessary to the effective execution of their professional responsibilities, are maintained, notably:

- complete confidentiality in the relationship between the lawyer and his client, pursuant to which a lawyer may under no circumstances reveal or be expected to reveal any instructions received professionally from his client, nor any communications with the client, unless the client has so authorised; such protection is extended to the lawyer's documents and files;
- the right of free movement, both within his own country and abroad, in the discharge of his professional duties; any restrictions on movement imposed on the public at large should be modified to allow a lawyer to pursue his professional obligations, under the control of an independent and impartial court which respects the norms of democratic society;
- the right to research and receive information and ideas, according to the rules of the profession, without any restriction either oral or written.

Lawyers play an essential part in representing and exposing rights and complaints in society and they must be granted freedom of association, of religion, of opinion and of expression. In particular they must have the right to take part in public discussion on the law and the administration of justice, as well as the right to belong to or freely to set up, without interference, local, national or international organisations; they must not be

subjected to any professional restriction because of their beliefs or their membership in any recognised organisation.

Lawyers have the obligation to study current legislation, and current legislation must be available for legal examination, for the proper working of the legal system and the understanding of proposals for reform. Lawyers should also be able to put forward and recommend legal reforms, after carefully evaluating them in terms of the public interest, and they should undertake programmes to inform the public in these fields. Through their professional associations they should be consulted about legislation in the course of preparation.

#### **IV. Structure of the Profession**

##### **Article 15    The Bar<sup>1</sup>**

In each judicial area there are one or more independent autonomous lawyers' associations recognized by the law, whose council or other executive arm is freely elected by its members without interference of any kind by any person. The existence of such an organization must not in any way prejudice the right of lawyers to form any additional associations of lawyers nor to belong to such associations.

##### **Article 16    Functions of the Bar**

The functions of the Bar, in ensuring the independence of the legal profession, are among other things;

- (a) to promote and defend the cause of law, without fear and with total impartiality;
- (b) to maintain the honour, dignity, integrity, competence, morality, ethical standards and discipline of the profession;
- (c) to uphold the role of lawyers in society and to preserve the independence of the profession and the defence;

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<sup>1</sup> Bar is used to denote a professional and independent association or organisation.



- (d) to protect and defend the dignity and independence of the judiciary;
- (e) to promote free access by the public to the law and, in particular, to legal aid;
- (f) to promote the right of everyone to have his case heard fairly and in public by a competent, independent and impartial court, according to valid legal procedure, in all matters;
- (g) to promote and uphold reform of the law, to comment upon and encourage public discussion of the substance, interpretation and application of existing or projected legislation;
- (h) to promote the requirement of case legal training of the highest level as a pre-condition for professional access;
- (i) to ensure that there is free access to the profession, without any discrimination whatsoever, to anyone who has the necessary professional competence and an honourable reputation; to assist those newly admitted to the profession;
- (j) to foster mutual help between members of the profession and to give assistance to members of their families when circumstances demand;
- (k) to become affiliated with international lawyers' organisations and to take part in their activities.

Article 17 When anyone involved in a dispute seeks the help of a lawyer from another country, the courts and the Bar must co-operate in helping the foreign lawyer obtain the right to practise before the host country courts.

So that the Bar may be allowed to exercise its function of protecting the independence of lawyers, the Bar must be advised immediately of the reasons for the arrest or detention of a lawyer and for the same reasons the Bar should receive prompt notice of:

- (i) any search of the person or belongings of a lawyer;
- (ii) any seizure of documents in his possession;
- (iii) any decision relating to applicable procedures that might affect or call into question his integrity.

In such circumstances the Bar is entitled, through its president or his representative, to follow accepted procedure and to ensure in particular that professional secrecy is observed.

**Article 18    Legal structure and access to the legal profession**

Access to the profession is open to any person holding the required qualifications and skills and is not closed to anyone on account of race, sex, religion, belief, nor on account of national or social origin, wealth, birth or civil status.

**Article 19    Education of the public in relation to legal matters**

The Bar and lawyers have a responsibility to inform the public as to the principle of the primacy of the law and the indispensable independence of the judiciary and the legal profession. The public must likewise be informed of its rights and duties as well as of the appropriate remedies available.

**International Bar Association**

**MINIMUM STANDARDS OF  
JUDICIAL INDEPENDENCE**

**Adopted at the IBA's Nineteenth Biennial Conference  
held in New Delhi, October 1982**

*(The International Bar Association is a federation of 124 Bar Associations and Law Societies from 69 countries, representing over 2.5 million lawyers.)*

**A. Judges and the Executive**

1. (a) Individual judges should enjoy personal independence and substantive independence.  
(b) Personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.  
(c) Substantive independence means that in the discharge of his judicial function a judge is subject to nothing but the law and the commands of his conscience.
2. The Judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.
3. (a) Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.  
(b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in coun-

tries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.

4. (a) The Executive may participate in the discipline of judges only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
  - (b) The power of removal of a judge should preferably be vested in a judicial tribunal.
  - (c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.
5. The Executive shall not have control over judicial functions.
6. Rules of procedure and practice shall be made by legislation or by the Judiciary in co-operation with the legal profession subject to parliamentary approval.
7. The State shall have a duty to provide for the executive of judgments of the Court. The Judiciary shall exercise supervision over the execution process.
8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.
9. The central responsibility for judicial administration shall preferably be vested in the Judicial or jointly in the Judiciary and the Executive.
10. It is the duty of the State to provide adequate financial resources to allow for the due administration of justice.
11. (a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.

- (b) In countries where the power of division of judicial work is vested in the Chief Justice, it is not considered inconsistent with judicial independence to accord to the Chief Justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.
  - (c) Subject to (a), the exclusive responsibility for case assignments should be vested in a responsible judge, preferably the President of the Court.
12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
13. Court services should be adequately financed by the relevant government.
14. Judicial salaries and pensions shall be adequate and should be regularly adjusted to account for price increases independent of Executive control.
15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
- (b) Judicial salaries cannot be decreased during the judges' services except as a coherent part of an overall public economic measure.
16. The ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges or of the Judiciary as a whole.
17. The power of pardon shall be exercised cautiously so as to avoid its use as interference with judicial decisions.
18. (a) The Executive shall refrain from any act or omission which pre-empt the judicial resolution of a dispute or frustrates the proper execution of a court judgement.

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

## **B. Judges and the Legislature**

- 19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.
- 20. (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation unless the changes improve the terms of service.
  - (b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.
- 21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before *ad hoc* tribunals.

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

- 22. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirements at an age fixed by law at the date of appointment.
- 23. (a) Judges should not be appointed for probationary periods except for legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of the appointment.
  - (b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.
- 24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.

25. Part-time judges should be appointed only with proper safeguards.
26. Selection of judges shall be based on merit.

#### **D. Discipline and Removal of Judges**

27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.
28. The procedure for discipline should be held *in camera*. The judge may however request that the hearing be held in public, subject to final and reasoned disposition of this request by the disciplinary tribunal. Judgements in disciplinary proceedings, whether held *in camera* or in public, may be published.
29.
  - (a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.
  - (b) All disciplinary actions shall be based upon standards of judicial conduct promulgated by law or in established rules of court.
30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.
31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent and be composed predominantly of members of the Judiciary.
32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

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

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

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

## **F. Standards of Conduct**

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

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

37. Judges shall not hold positions in political parties.

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

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

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

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



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

### **G. Securing Impartiality and Independence**

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

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

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

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

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

# INTERNATIONAL CONVENTION FOR THE PRESERVATION OF DEFENSE RIGHTS

*"The search for peace and cooperation between peoples, an objective endorsed by leaders the world over, depends on the preservation of justice and the absolute respect of human rights and fundamental liberties.*

*For this reason, the lawyers assembled in an international colloquium in Paris - lawyers who are, after all, the guardians of these precepts - decided to adopt an international charter to uphold the following principles:*

- *Equality before the law*
- *Presumption of innocence*
- *The right to a fair trial, and especially freedom in the choice of a lawyer."*

## Article 1

All persons have the right to representation by the lawyer of their choice, even if that lawyer is not a citizen of the state in whose name justice is administered.

## Article 2

The defendant must be informed of his or her rights, at the very latest when being charged. Above all, defendants must be advised that they have the right to name a lawyer with whom they can freely communicate.

## Article 3

The defendant cannot be denied the rights mentioned in article 2 before being charged, except in the case of the application of rules defined as a law of state. In this case, the conditions, maximum duration, and reasons for this exception to defense rights must be given.

#### Article 4

No circumstance can justify denying a defendant free and confidential communication with his or her lawyer during the investigation and trial.

#### Article 5

No defendant can be tried without having free access to all the elements of the investigation, either directly or through his or her lawyer, and without having sufficient time to prepare his or her defense.

No new charges can be brought against the defendant until he or she has had the time and means to present the arguments of his or her defense.

#### Article 6

Access to the hearing, an essential guarantee of defense rights, must be open without discrimination.

#### Article 7

During the hearing, defendants have the right to speak freely and fully, and to communicate with their lawyer or lawyers. The defense always speaks last.

#### Article 8

At any stage of the procedure, if it becomes apparent that the defendant or his or her lawyer does not completely understand the language in which justice is being administered, the state must provide a competent and independent interpreter.

#### Article 9

Lawyers are guaranteed complete freedom of expression during hearings. They shall be neither harassed nor prosecuted for acts carried out in the exercise of their mission of defense. The state is required to protect them.

## Article 10

During the investigation or the hearings, the defendant or his or her lawyers may demand that any documents, papers, records, findings, or evidence that they consider to be necessary to the defense be recorded and included in the case file.

## Article 11

The undersigned orders and professional organizations proclaim their adherence to the rules described above. The refusal to recognize these rules is incompatible with the administration of free and impartial justice.

The signatories promise to include, or work towards including this convention in their internal regulations and make its application mandatory.

They will take all steps required with their governments to give this convention the status of an internal judicial standard.

Filed with the Paris Lawyers' Order, *Ordre des Avocats à la Cour de Paris*, on June 26, 1987.

Bar Association signatories to the Convention:

American Bar Association  
Barreau d'Abidjan  
Barreau d'Alger  
Barreau de l'Ouest Algérien  
Chambre Fédérale des Avocats Allemands  
Bar Association of Amsterdam  
Bar Association of Antwerp (Belgium)  
Federación Argentina de Colegios de Abogados  
Bar Association of Athens  
Austrian Bar Association  
Colegio de Abogados de Barcelona  
Barreau de Belgique  
Barreau du Bénin

Barreau de Beyrouth  
 Barreau de Bruges (Belgium)  
 Barreau de Bucarest  
 Ordre Français des Avocats du Barreau de Bruxelles  
 Ordre Néerlandais des Avocats du Barreau de Bruxelles  
 Budapest Bar Association  
 Barreau du Burkina Faso  
 Barreau du Cameroun  
 Barreau de Charleroi (Belgium)  
 Chambre des Avocats de Cologne  
 Barreau de Côte d'Ivoire  
 Barreau de Dakar  
 Barreau de Djibouti  
 Barreau de Gand (Belgium)  
 Barreau de Genève  
 Barreau de Guinée  
 Bar Association of the Hague  
 Barreau de Haïti  
 Hungarian Bar Association  
 Barreau de Hull  
 Bar Association of Israel  
 Barreau de Liège (Belgium)  
 Louisiana Bar Association  
 Barreau de Luxembourg  
 Colegio de Abogados de Madrid  
 Barreau du Mali  
 Association Nationale des Barreaux du Maroc  
 Barreau de Meknes  
 Colegio de Abogados de Mexico  
 Barreau de Montréal  
 Barreau du Niger  
 Congreso Nacional de Abogados de Paraguay  
 Barreau de Paris  
 Conseil National du Barreau de Pologne  
 Barreau du Portugal  
 Barreau du Québec  
 Bar Association of Rome

Bar Association of Rotterdam  
Barreau du Sénégal  
Sydney Bar Association  
Bar Association of Tongeren (Belgium)  
Barreau du Togo  
Ordre National des Avocats de Tunisie  
Bar Association of Turin  
Barreau de Verviers (Belgium)  
Zweibrücken Bar Association (Germany)

# **SELECTED INTERNATIONAL INSTRUMENTS**

## **Universal Declaration of Human Rights**

### **Article 10:**

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

### **Article 11:**

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

## **International Covenant on Civil and Political Rights (ICCPR)**

### **Article 14:**

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

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he

does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

## **African Charter on Human and Peoples' Rights**

### **Article 7**

1. Every individual shall have the right to have his cause heard. This comprises: ...

- (c) the right to defence, including the right to be defended by counsel of his choice;
- (d) the right to be tried within a reasonable time by an impartial court or tribunal. ...

### **Article 26**

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

## **American Convention on Human Rights**

### **Article 8**

#### **RIGHT TO A FAIR TRIAL**

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusa-



tion of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: ...

- c) adequate time and means for the preparation of his defense;
- d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
- e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

## **The European Convention on Human Rights**

### **Article 6**

1. In the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ...

3. Everyone charged with a criminal offence has the following minimum rights:

- (b) to have adequate time and facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

...

## **Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment**

*(Adopted by the General Assembly of the United Nations on 9 December 1988 by Resolution 43/173)*

### **Principle 15**

Notwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.

### **Principle 17**

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

### **Principle 18**

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.

2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.

3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations,

when it is considered indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within the hearing, of a law enforcement official.

5. Communications between a detained or imprisoned person and his legal counsel mentioned in this principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

### **General Comment 13 of the Human Rights Committee on Article 14 of the ICCPR:**

2. In general, the reports of States parties fail to recognize that article 14 applies not only to procedures for the determination of criminal charges against individuals but also to procedures to determine their rights and obligations in a suit at law...

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice. In particular, States parties should specify the relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent, in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfer and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative.

4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which

try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situations, and respect the other conditions in paragraph 1 of article 14.

5. The second sentence of article 14, paragraph 1, provides that "everyone shall be entitled to a fair and public hearing". Paragraph 3 of the article elaborates on the requirements of "fair hearing" in regard to the determination of criminal charges. However, the requirements of paragraph 3 are minimum guarantees, the observance of which is not always sufficient to ensure the fairness of a hearing as required by paragraph 1.

9. Subparagraph 3 (b) provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is "adequate time" depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confiden-

tiality of their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

11. Not all reports have dealt with all aspects of the right of defence as defined in subparagraph 3 (d). The Committee has not always received sufficient information concerning the protection of the right of the accused to be present during the determination of any charge against him nor how the legal system assures his right either to defend himself in person or to be assisted by counsel of his own choosing, or what arrangements are made if a person does not have sufficient means to pay for legal assistance. The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.

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