

INDEPENDENCE OF JUSTICE IN THE WORLD

By

DR. L.M.SINGHVI

LL.B., LL.M., S.J.D., LL.D

Senior Advocate, Supreme Court of India

Honorary Bencher and Master, The Middle Temple (England)

Formerly President, Supreme Court of India Bar Association

Special Rapporteur on the Impartiality and Independence of
the Judiciary, Jurors, Assessors and the Independence of
Lawyers (U.N. Human Rights Sub-Commission)

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INDEPENDENCE OF JUSTICE IN THE WORLD

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DR. L.M.SINGHVI

I

I am beholden to Mr. Justice Charles D. Gonthier of the Superior Court of Quebec and President of the Canadian Institute for the Administration of Justice for his kind and thoughtful words of welcome. I am deeply conscious of and overwhelmed by the singular honour the Canadian Institute for the Administration of Justice and Mr. Justice Maurice E. Lagace have done me in inviting me to give the opening Keynote Address on the Independence of Justice in the World at the inaugural session of this national seminar of international dimensions. I confess, the theme is an affair of the heart with me, and it is a pleasure to return to the charming and heartwarming city of Montreal which was the propitious venue of the World Conference on Independence of Justice in 1983 which was an important culminating point for the coordination and consolidation of the team work on the independence of justice at a series of previous international conferences. I should add that, I am elated by your flattering choice of ^aquote from my U.N. report to encapsulate the purpose of the Seminar. Above all, I welcome the opportunity and the privilege of sharing with the Canadian community of *lawyers* and judges and my understanding of the philosophy of independence of justice and my perceptions of the problems of that evolving and enduring fundamental social and jural concept in action. I approach the task entrusted to me with a sense of trepidation, but I am reassured by the presence of my illustrious "fellow traveller", Mr. Justice Deschenes, whose acute understanding of the issues of independence of justice is as profound as is his commitment to that noble cause, and who will, I am sure, more than make up for my shortcomings. I recall with pleasure the occasion of the

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valedictory banquet, When on behalf of the Conference, Mr. Justice Deschênes ceremonially presented to me the Universal Declaration on The Independence of Justice and made me a trustee and a custodian of the fruits of a worldwide process of consultation and deliberations which had started with an initiative in 1978 and 1979 to which I was a party as a member of the United Nations Human Rights Sub-Commission for Prevention of Discrimination and Protection of Minorities.

In its resolution 5E(XXXI) of 13 September 1978, the Sub-Commission decided to request the Secretary-General to prepare "a preliminary study with regard to such measures as have hitherto been taken and the conditions regarded as essential to ensure and secure the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers, to the end that there shall be no discrimination in the administration of justice", for submission to the Sub-Commission at its thirty-second session in 1979. One of the purposes of the Secretary-General's preliminary report was to submit to the Sub-Commission proposals concerning the outline and the main orientations of a comprehensive study of the problems involved. The preliminary report of the Secretary-General(E/CN.4/Sub.2/428) provided a fresh starting point, a framework of methodology and a contextual setting for the task entrusted to the present Special Rapporteur. As pointed out in paragraph 7 of the preliminary report of the Secretary-General, the substance and geographical scope of information available to the Secretariat was so limited that it could not constitute a sufficient basis for a truly comparative study of the subject. The Sub-Commission thought it necessary to elect a Special Rapporteur and proposed my election as Special Rapporteur to the Human Rights Commission which in turn made a recommendation to that effect to the Economic and Social Council of the United Nations. In 1980, I was

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armed with an official United Nations mandate entrusting me with the task of preparing a report on the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers to the end that there shall be no discrimination in the administration of justice and that human rights and fundamental freedoms may be maintained and safeguarded. At that point of time, the International Commission of Jurists(ICJ) and the Centre for the Independence of Judges and Lawyers(CIJL) formed by ICJ played, and have indeed ever since played, an important role in fostering the idea of a United Nations approach to the concept of the independence of justice and the problems of its operationalization which were clearly central to the human rights concerns of the United Nations. They were joined, in course of time, by numerous international and national organizations based in different parts of the world.

In my Preliminary Report (E/CN4/Sub.2/L.731 of 14 August 1980)which I submitted within a few weeks of my election as Special Rapporteur by the U.N. Economic and Social Council in 1980 and which received worldwide attention and strong support in the Sub-Commission, I presented the main thrust of my argument in defence of the concept of the independence of justice, its many problem areas, and the threats and perils by which independence of justice was often embattled and besieged, the semantics and the basic vocabulary of the concept of "independence"as I understood it, the critical and interdisciplinary approach of social science and the methodology of comparative law I proposed to follow, and the recommendations which I had in mind tentatively. Among my provisional proposals at that time was the idea of an International Declaration or an International Covenant and Draft Principles on the subject matter of my study. In a sense, my work as Special Rapporteur was linked to the landmark contribution of Chief Justice Abu Ranat of Sudan who was elected as the Special Rapporteur on "Equality in the Administration of Justice" in 1963 whose

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report (E/CN 4/Sub 2/296) , published in 1972, was taken note of by the General Assembly by a commendatory Resolution.

At its thirty-third session in 1980, the Sub-Commission noted with appreciation the Preliminary Report submitted by me (E/CN.4/Sub.2/L-731) and invited governments, specialized agencies, regional and inter governmental organizations as well as non-governmental organizations to transmit to the Special Rapporteur, on the basis of a questionnaire to be prepared by me, views and materials relevant to my study.

Following the initiative of the Sub-Commission and the presentation of the Preliminary Report by me, the question of the independence of judiciary evoked world-wide interest and has been discussed widely. Principles were formulated or discussed, compared, vetted and modified in various meetings, particularly those at Syracuse, Noto, Paris, New Delhi, Montreal, Vienna, Varenna and Milan which I attended and at Jerusalem, Tokyo and Lisbon which I did not attend. In this connection, the IBA project on Minimum Standards of Judicial Independence, executed with great erudition by my esteemed friend Professor Shimon Shetreet was the most notable. The book "Judicial Independence: The Contemporary Debate" edited by Shetreet and Deschenes grew out of that project and remains as contemporary as when it was published in 1985. Besides ICJ and IBA , numerous international and national organizations as well as many eminent individuals showed great readiness to assist me in my task as the Special Rapporteur. Many of these efforts at the non-governmental level which preceded the memorable mainstream meeting at Montreal provided necessary inputs for the Universal Declaration on the Independence of Justice at the World Conference on the Independence of Justice held in 1983 in which I had participated actively and of which I had the privilege of being the General Rapporteur.

The Montreal World Conference of 1983 was unique in its global amplitude of non-governmental institutional representation and cross-sectional diversity, in the exceptional calibre of its

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participants and in the high quality of their deliberations, and in the singleminded devotion and diligence of our Canadian hosts represented particularly in the person of my esteemed friend, the then Chief Justice of Quebec, who was the moving spirit of that milestone meeting.

As Special Rapporteur, I submitted to the Sub-Commission progress reports in 1981 (E/CN.4/Sub.2/481/and Add.1), in 1982 (E/CN.4/Sub.2/1982/23) and in 1983 (E/CN.4/Sub.2/1983/16) and had annexed the draft Synopsis of my study, the Questionnaire which was to be sent by the Secretary General of the UN to Member States on my behalf, and the reports and recommendations of various international conferences from time to time. By resolution 1984/11 the Sub-Commission, having considered the preliminary and progress reports submitted by the Special Rapporteur, requested him to submit his final report to the Sub-Commission at its thirty-eighth session, in 1985, and decided to consider it as a matter of priority, with a view to the elaboration of a draft body of principles.

By resolution 1983/38, the Sub-Commission, while considering the question of the new international economic order and the promotion of human rights, requested the Special Rapporteur to give consideration to the most appropriate means by which the international community could contribute to strengthening legal institutions, especially in developing countries, with a view to promoting full respect for human rights. Meanwhile, the Special Rapporteur also received numerous and elaborate responses to his questionnaire from individuals, organizations and Member States of UN.

In its resolution 16, entitled "Guidelines to ensure the independence of judges and to improve the selection and training of judges and prosecutors", the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders had also called upon the U.N. Committee on Crime Prevention and Control to include among its priorities the elaboration of

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guidelines relating to the independence of judges. I was closely associated with the finalization of the draft guidelines at the inter-regional Preparatory Meeting at Varenna in September 1984 as the chairman of the Working Group and as the General Rapporteur of the inter-regional meeting. The Draft Guidelines finalized at Varenna were submitted to and adopted by the Seventh United Nations Congress on Prevention of Crime and Treatment of Offenders held in Milan in August 1985 and were welcomed by the General Assembly of the United Nations by its resolution 40/146 of 13 December 1985, wherein the General Assembly invited Governments to respect them and to take them into account within the framework of their national legislation and practice.

When I presented my study to the Sub-Commission, (E/CN 4/Sub.2/1985/18 with Addenda 1 to 6 dated 31 July 1985 and Addendum 5/Rev.1 dated 24 August 1987) I had annexed the Montreal document as well as my own revised Draft Declaration on the independence of justice which drew liberally on the Montreal document which in turn had assimilated and synthesised a series of international documents prepared at the previous meetings and conferences. In 1985, my Report could not be discussed fully and, therefore the item was postponed to the 1986 session of the Sub-Commission which could not be held owing to several financial constraints upon the U.N. budget. For the 1987 session of the Sub-Commission, I revised my earlier draft declaration in the light of comments and observations received by me from the expert members of the Sub-Commission, spokespersons of the governments of Member States and representatives of non-governmental organizations in consultative status (E/CN 4/Sub.2/1985/18 Add.5/Rev. 1 dated 24 August 1987). My Report was discussed at length in August, 1987 and evoked a gratifying measure of positive response and constructive support, although the gestation period for the Declaration has been further extended so that it may be circulated in the meanwhile to Member States and non-governmental organizations for eliciting their comments. Among the foremost

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protagonists of my report and the Draft Declaration in the Sub-Commission during its recent session in August, 1987 in Geneva was Mr. Justice Jules Deschenes to whom I owe a tribute of friendly affection and admiration for his informed, enlightened and vigorous advocacy.

With all that advocacy, understanding and approbation of my work and the valuable and significant inputs of the international community of lawyers and judges, we seem only to be inching towards the goal of an officially proclaimed universal framework of principles under the auspices of the United Nations. As Mr. Justice Deschenes would put it philosophically, with his robust and cautious optimism, the wheels are turning. And happily, we are still at it to make the wheels move. The report and the declaration have yet to travel from the Sub-Commission to the Human Rights Commission. It may take two or three years before the General Assembly would take it up on its agenda. During this intervening period, a purposeful effort to build up world public opinion for a universal declaration would be of great value.

Once such a universal or international declaration is proclaimed, we would have to undertake on a worldwide basis the real task of disseminating its rationale, of setting up monitoring mechanisms, effectuating and translating its goals into reality, and helping ourselves by positive measures, in the context of the genius and the autonomy of each legal system, to institutionalise, operationalize, augment and improve the quality of the independence of justice in all its aspects and ramifications.

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II. THE CONCEPT, ~~AND~~ THE CONTEXT AND THE CONTEMPORARY SETTING

The concept of independence of justice is as variegated as different legal systems and cultures and yet it is quintessentially universal. Equally ubiquitous and varied are the impediments to the independence of justice which come in different shapes, sizes and combinations. If the principle of the independence of justice system has emerged triumphant through a succession of historic struggles and if there is today a common global level of cognition and consensus on the question of impartiality and independence of courts and tribunals, and of jurors, assessors and lawyers, which may well be described compendiously as "independence of justice", it is because the principle is implicit in the concept of justice itself and has an intrinsic strength and momentum of its own, drawing sustenance from the ethos of democracy and rule of law and from the inevitable conflicts of claims and interests in every society and the need for their fair resolution. In different legal systems with their distinct orientations, the differentiated roles and goals of adjudication have given rise to a general functional notion of separation of powers, professionalism of judges and lawyers, and an equation of autonomy and accountability of judges and lawyers in the perspective of the right of the people to the independence of justice.

The constitutional landscape of the world provides a unique canvas on which the theoretical and empirical acceptance of the principle of the independence of justice is visibly highlighted. Trans-national constitutional jurisprudence provides the contextual and comparative pattern of broad principles for a consensual fabric in which the diversities of different systems are woven together. The core principle of independence of justice is an integral part of State responsibility for denial of justice in public international law and is an essential element of the law and practice of human rights. The precise functional content

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and institutional configuration of the concept of independence of justice is determined in each legal system and in the community of nations by the dialectics of autonomy and the dynamics of accountability. The interacting equation of autonomy and accountability defines the role and relationship of judges and lawyers vis a vis other social institutions and institutional participants. Independence of justice is a product of that interaction; it is also a decisive factor in that interaction as an umpiring institution. Inevitably, the process and the product of that interaction is country-specific and culture-specific.

We all know that even if two countries had the same constitution and the same set of laws, they might develop quite differently, they would encounter different problems and would devise different solutions, they might use the same vocabulary and yet the meanings and nuances of the self-same words may differ. At the same time, we also know that there is a great deal in common between different countries and cultures, that all members of the family of nations share certain common, commitments, concerns and aspirations, that even radically different systems of government have, through the ages, voluntarily acknowledged their acceptance of certain common norms, that nation states today have an international accountability, that peace and justice are indivisible, and that on the question of the independence of justice, there is a broad unity of principle in the midst of infinite variety and diversity. It is in this perspective that it is legitimate to speak of the Canadian or the Indian or the French or the Nigerian or the Argentinian reality and to speak in the same breath of the reality and the compulsions of a world-view of the independence of justice. We speak of that world-view not by mandating and prescribing any particular model for one and all, nor by judging one system on the supercilious and presumptuous ethnocentric touchstone of another, but by learning

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from each other's experience and by working out, in sincere humility, a set of acceptable community standards fashioned by common denominations of what is and what ought to be, viewed realistically in the perspective of what may be reasonably possible. My enunciation may appear to be in the abstract but it is by no means an airy or empty generalization. Generalizations made by pooling, percolating and distilling particular experiences become the raw material for norms which are necessarily value-based but which accommodate the reality of those particular experiences rather than denying or obliterating them. Generalizations are somewhat like the ratio decidendi which have a precedential value. A principle is laid down in a judgment based on the particular facts of the case and may yet be applied to another case if that case is not wholly distinguishable. It is true that eminent judges are known to have remarked to the effect that general propositions do not decide particular cases and that a judgment is like a one-way railway ticket valid only for a particular journey, and yet, a framework of principles has been developed in many legal systems, from case to case interweaving the particular into the general and applying the general to the particular. Legislation, codification, restatement and minimum standards are excellent examples of methods of generalization and of elucidation and application of general principles. It would be apposite in this context to refer to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which embody acceptable community standards and are based on such generalizations and provide manifold instances of elucidation and application of general principles. A host of international instruments, conventions, declarations, covenants, statutes and principles as well as judicial decisions bear testimony to this method of generalization, of elucidation and application of general principle and codification of state practice.

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The Universal Declaration of Human Rights embodies the broad principle of impartiality and independence, particularly in articles 7, 8 and 10. Article 7 declares the principle of equality before law and equal protection of law against any discrimination. Article 8 declares that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". Article 9 declares that no one shall be subjected to arbitrary arrest, detention or exile. Article 10 expressly provides that "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". (emphasis added).

The International Covenant on Civil and Political Rights addresses itself to the issue of remedies in specific terms in article 2(3) which provides:

"Each State party to the present Covenant undertakes:

"(a) To ensure that any person whose rights or freedom as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

"(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

"(c) To ensure that the competent authorities shall enforce such remedies when granted".

Implicit in the injunctions embodied in article 6(1) of the Covenant that "no one shall be arbitrarily deprived of his life" and in article 9(1), that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law" is the principle of an impartial, independent and lawfully competent adjudication. Article 14 is an express guarantee of the principle of impartiality and independence and declares, inter alia, that "all persons shall be equal before the courts and tribunals", that "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" and that everyone shall be entitled to certain guarantees in the criminal process.

At a Seminar on Implementation of International Standards on Human Rights (ST/HR/SER.A/15, 1983, para 42), participants from different countries shared the view that "... enforcing the rule of law was in large part the role of the courts ... that an independent judiciary was crucial, and was the key to the process of enforce-ability."

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A comparison between the Montreal Universal Declaration prepared by a fairly representative international group and the declaration on the Independence of Justice in Canada which was prepared by a Special Committee of the Canadian Bar Association (The Canadian Bar Association Committee Report on The Independence of the Judiciary in Canada, 1985) shows that the Canadian Declaration is substantially the same as the Universal Declaration. A worldview of the independence of justice thus became a part of the Canadian reality with only a few minor and marginal adjustments because we had already taken the Canadian reality and the realities of other systems into account in preparing the Universal Declaration.

Take for instance the unanimous judgment of the Supreme Court of Canada in Valente V. The Queen which was rendered in 1985 and reported in on December 19 of (1985) 23 C.C.C.(3d)193 and in which the Supreme Court recognised security of tenure, financial security and institutional independence with respect to matters of administration having a bearing on the exercise of judicial functions as essentials of judicial independence. In that case, Howland, C.J.O and later, the Supreme Court of Canada spoke not of any peculiarly Canadian concept of judicial independence but of a widely shared worldview in respect of the independence of the judiciary. The following observation of the Supreme Court of Canada in that case has a substantial worldwide validity:

"Judicial control over the matters referred to by Howland C.J.O. - assignment of judges, sittings of the court and court lists- as well as the related matters of allocation of courtrooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence."

Similarly, if and when the Universal Declaration on the Independence of Justice proposed by me along with my U.N. Study comes to be adopted by the United Nations, it would have relevance

as a framework of norms for all the countries of the world. There need be no dichotomy or cleavage on those universal norms which represent the meeting point for different societies and different legal systems. For instance, we have defined and elaborated in the Draft Declaration the objectives and functions of the judiciary, the concept and content of independence, jurisdiction of courts over all issues of a judicial nature, permitted derogations in times of grave public emergency and conditions to which such derogations must always be subject, principles of non-interference by other branches of government judicial functions, entitlement of judges to certain fundamental freedoms, qualifications, selection and training of judges and their tenure, posting, promotion, transfer, immunities, privileges, disqualifications, discipline and removal, and court administration. These standards are clearly of a more or less universal nature and national systems must strive to comply with them. to establish a reasonable level of independence of justice.

These general norms on the independence of justice are capable of being applied and enforced in each and every legal system in particular situations. Detracting from them may be taken to dilute or abridge judicial independence. Complaints of such abridgement would ordinarily be voiced and dealt with within each system. There would be countries where we will find a high degree of compliance with these norms and others where there is need for better and fuller compliance. In different countries, these norms may be observed in different ways and styles. In countries with bills or charters of fundamental rights and with powers of judicial review of legislation, the concept of independence works differently than those where judicial powers are limited to the function of interpreting the law made by legislatures. The concept operates differently in different kinds of democratic systems with varying degrees of openness and

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with different kinds of party organizations. Even within the same system, different courts and tribunals manifest different patterns of independence or the lack of it, depending on individual and temperamental variations of judges and members of tribunals as well as on the ways in they are trained and recruited, to whom they are accountable, who has ~~to~~ the power to post, transfer, promote or discipline them, and how secure their tenures and how autonomous their institutional arrangements and support systems are. The same is the case with the independence of lawyers whose independence and competence depends on the quality of legal education, conditions of entry into the legal profession, ^{re} cognition of their rights and duties in the legal profession, their sense of obligations ^{and} professional ethics, the solidarity of the Bar Associations and the strength of the traditions of the legal profession. Each one of these nuts and bolts is vital to the concept of the independence of justice in the contemporary world. No legal system can afford to be complacent about these components and concomitants of the concept of independence. Nor is there any model of perfection anywhere in the world. What is more, it is an evolving concept, not a final finished product, nor a static, lifeless fossil. There are old and persisting denials of justice and there are new injustices to be remedied. There are new definitions and new and emerging perceptions of justice for the justice systems to cope with. Judges and lawyers will always have a role to play in those encounters and adjustments and they cannot play that role without the independence of justice, without its credibility, and without a high degree of autonomy and accountability, ^{of} which their integrity, competence, creativity, professionalism and code of ethics as well their sensitivity and their sense of personal, institutional and functional independence and their sense of intrinsic social accountability of the judicial function are inseparable ingredients.

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III. DENIAL OF JUSTICE AND STATE RESPONSIBILITY: A MODERN APPROACH

Each legal and political philosophy, every system and scheme of government promises to do justice and right. By the same token, the denial of justice has always been regarded traditionally both in foro domestico ^{a/} and in international law as a legal wrong, a serious lapse and a disgrace. A close study of the denial of justice in traditional law affords a striking and instructive insight into the concept of impartiality and independence of the judiciary as well as the question of State responsibility for maintaining an impartial and independent system of justice.

Denial of justice in international law has been historically linked to the classical institution of private reprisals. The rationale of the legality of reprisals was necessarily the moral lapse resulting in a denial of justice. It may appear to us today to be somewhat anachronistic and archaic that private reprisals even by private individuals were recognized as a form of remedy in international law and it is true that it must have led to self-serving auto-interpretation on the part of those who felt aggrieved or annoyed. Resort to private reprisals later yielded to the doctrine of State responsibility for the denial of justice ^{b/}.

The Institute of International Law formulated ^{c/} the principle of

^{a/} Chapter XVIII of Forum Judicium (also known under the nomenclature of Liber Judicorum, Codex Legum and Visigothic Code) laid down that if any one should file a complaint against another before a judge, and the latter should refuse to hear him, or deny him the use of his seal, or under different pretexts, should delay the trial of his cause, not permitting it to be heard through favour to a client or a friend, and the plaintiff could prove this by witnesses, the judge would give to him to whom he has refused a hearing, as compensation for his trouble, a sum equal to that which the plaintiff would have received from his adversary by due course of law. The Magna Carta, in 1215, provided in its chapter 40: "To no man will we sell, to no man will we deny or delay, right or justice". The right of access to tribunals for everyone was enacted in France by the Napoleonic Code, which made punishable the crime of "denial of justice" or the refusal of any judge to render a judicial decision "under the pretext of the silence, obscurity or insufficiency of the law".

^{b/} See da Legnano, Tractatus de Bello, de Represaliis et de Duello (1360), ch. CXXIII and CL.

^{c/} See 22 American Journal of International Law (1929), supp. pp. 330 ff.

state responsibility in 1927 at Lausanne thus:

"V. The State is responsible on the score of denial of justice:

1. When the tribunals necessary to assure protection to foreigners do not exist or do not function.
2. When the tribunals are not accessible to foreigners.
3. When the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.

"VI. The State is likewise responsible if the procedure or the judgement is manifestly unjust, especially if they have been inspired by ill-will toward foreigners, as such, or as citizens of a particular State".

52. Article 9 of Harvard Law School Draft Convention on Responsibility of States ^{a/} formulated the principle of State responsibility for denial of justice in the following terms:

"A state is responsible if an injury to an alien results from a denial of justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgement. An error of a national court which does not produce manifest injustice is not a denial of justice".

53. An interesting example is provided by the case of Robert Brown. In that case, the international arbitration tribunal affirmed that the claimant had acquired substantial rights of a character entitling him to an interest in real property or to damages for the deprivation of the rights stemming therefrom, concluded that the Government of the South African Republic had deprived him of those rights under such circumstances as to amount to a denial of justice within the settled principles of international law. The tribunal stated:

"... we are persuaded that on the whole case, giving proper weight to the cumulative strength of the numerous steps, (legislative and judicial), taken by the Government of the South African Republic with the obvious intent to defeat Brown's claims, a definite denial of justice took place... All three branches of the government conspired to ruin his enterprise. The Executive department issued proclamations for which no warrant could be found in the constitution and laws of the country. The Volksraad enacted legislation which, on its face, does violence to fundamental principles of justice recognized in every enlightened community. The judiciary, at first recalcitrant, was at length reduced to

^{a/} Ibid., (1929); supp. pp. 133 ff.; 23 A.J.I.L. (1929) supp. p.173.

submission and brought into line with a determined policy of the executive to reach the desired result regardless of constitutional guarantees and inhibitions. And in the end, growing out of this very transaction, a system was created under which all property rights became so manifestly insecure as to challenge intervention by the British Government in the interest of elementary justice for all concerned, and to lead finally to the disappearance of the State itself" d/.

Clyde Eagleton concluded b/ that a denial of justice "is a failure in the administration of domestic justice towards an alien". Referring to many opportunities for the perversion of justice during the actual course of the trial, the author says: "If the court is under the arbitrary control of other agencies of the government, it will obviously be unable to render justice. The judge may exceed his jurisdiction, or be guilty of fraudulent or collusive practice. The case must be conducted with regard to due process of law, but the process meant is that of the country in which the trial occurs" c/. The author makes it clear that denial of justice may occur not only when the courts refuse or deny redress for an injustice sustained by a foreigner but also when the courts themselves perpetrate injustice. No doubt, the aggrieved person must first seek and exhaust local remedies, no doubt great respect is due to domestic courts and their variations of laws as well as practice and procedure, but it is also expected that the domestic judicial system must measure up to an international standard d/.

a/ American and British Claims Arbitration Tribunal, under the agreement of August 18, 1910, Nielsen's Report, pp. 198-199. See Freeman, op.cit., p.101, and Clyde Eagleton, The Responsibility of States in International Law, N.Y. University Press (reprinted by Kraus Reprint Company, New York, 1970), 1928, p.117.

b/ Op. cit., note 35.

c/ Ibid., pp. 119-120.

d/ Ibid., pp.114-122. See also Moore, Digest, VI, pp. 259, 266, 269-270, 656, 748; Moore, Arbitrations, p.3140, 1216-1217, 3126, 3129, 2081, 3051, 3138, 3123, 3317, 3251, 1634, 3160, et. al.; Hyde, International Law I, p.497, p.268, 219, 285.

in respect of the denial of justice should go a long way in allaying the apprehensions of the developing nations a/.

The substantial transposition of State responsibility for denial of justice from the bilateral sphere to the multilateral forum of the international community has a profound significance for the development and observance of minimum community standards in the administration of justice postulated and implied in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and a host of other declarations and reports. Professor Jessup observed perceptively that as a consequence of the embodiment in international law of the duty to respect rights of man, the topic formerly known in international law as "the responsibility of States for injuries to aliens" might be transformed into "the responsibility of States for injuries to individuals" b/. In this connection, the Inter-American Conference held in Mexico in 1945 also affirmed that "international protection of the essential rights of man would eliminate the misuse of diplomatic protection of citizens abroad, the exercise of which has more than once led to the violation of the principles of non-intervention and of equality between nationals and aliens, with respect to the essential rights of man" c/. According to F. V. Garcia-Amador d/, the concept of "the international standard of justice" was generally accepted by traditional theory and practice as one of the basic criteria for determining the responsibility of the State for injury to aliens, but this criterion had frequently clashed with the principle of equality between nationals and aliens e/.

a/ See C. F. Amersinghe, State Responsibility for Injuries to Aliens, Oxford, 1967. In this book the author confines himself primarily to injuries to aliens by the denial of access to courts, effect of special courts, absence of independent courts, and illegally constituted courts (pp. 97-99); the author however, observes en passant that "the conception of the fundamental rights of man has increasingly influenced international life", (p.279), and roots of State responsibility "go deeper to the need for justice as a basic human aspiration" (p.285).

b/ Phillip C. Jessup, A Modern Law of Nations, New York, 1948, p.97 ff.

c/ Quoted in F. V. Garcia-Amador, "State Responsibility in the Light of the New Trends of International Law", 1955 (49), A.J.I.L. p.339 at p.343.

d/ Ibid., p. 344.

e/ Ibid., p. 344.

The infirmity of the traditional view was that stateless persons were deprived of diplomatic protection, serious difficulties arose in multi-nationality and dual nationality cases, and even the protection of nationals was subordinated to the will and interest of a State rather than to the "intrinsic" merit of the claim of denial of justice made by an individual who was the actual aggrieved party and a prospective beneficiary a/.

To sum up, we have in the traditional theory and practice of State responsibility for denial of justice to aliens a suggestive framework which can be adapted, consolidated and restated in the light of fundamental freedoms and basic human rights. One can clearly see the present as a bridge between the past and the future. Five prerequisite elements of the traditional theory and practice which can contribute to universal justice and to universal principles of impartiality and independence of the judiciary may be described as follows:

(a) the existence of identifiable norms of civilized society in respect of an adequate, effective and reasonably expeditious machinery for the administration of justice;

(b) the independence, impartiality, objectivity, integrity, probity and honesty of judges and tribunals;

(c) an adherence to and respect for international law, treaty obligations and duties of the State;

(d) reasonably, easy and equal access to the justice system for nationals and aliens alike;

(e) responsibility of a State for any miscarriage or denial of justice in international law attributable to any branch or organ of the State.

62. Justice may be difficult to define a priori, but denial of justice is relatively easier to identify. There already exists a widely shared wealth of ideas on what denial of justice is, how it arises and what may be done to

a/ According to H. Lauterpacht, International Law and Human Rights (New York, 1950), p.41, "intrinsically, there is nothing - save the traditional doctrine on the question of the subjects of international law - to prevent the tortious responsibility of the State from being combined, in the international sphere, with the responsibility of the organs directly liable for the act or omission in question".

IV. JUSTICE AND THE JUSTICE SYSTEM

It is trite to say that the duty of the judiciary is to do justice. A judge must do right and justice as he sees it irrespective of the parties before him. And he must see, he must endeavour to see, law and justice in the right perspective. That approach is a matter of the conscience of the judge and that perspective is a matter of his training and the ethos he has imbibed. That approach and perspective is for the judge individually as well as for the judiciary, collectively and institutionally. The conscience of a judge must be clear and sensitive, he must have the capacity to overcome the "sub-conscious empire of his predilections". He must respect the letter and the spirit of the law and the role and the purpose of the law in the society in which he lives. A judge often legislates because in order to interpret he has to apply or evolve a norm. He gives meaning and content to law by exercising a judicial choice. His credo is that he will deny justice to no one. In so far as he can help it, that is. Because a judge is not a law unto himself, his function is to adjudicate in accordance with law and do justice so far as he can. It is not open to him to defy the discipline of law or to transgress legitimate limitations imposed upon him institutionally and functionally. Justice then is a part of his striving. Law is the reality which surrounds him, and legal justice is a part of the larger goals of justice in society which embraces and envelops law.

Goals of modern social organization, within States as well as internationally have much in common. These goals represent aspects of justice, freedom and peace for individuals, groups and nations. They find expression in contemporary legal diversities and pluralities of style and institutions. Through these diversities there runs a thread of unity in terms of shared values and common goals. The Charter of the United Nations and the basic documents of specialized agencies and world bodies, the work of the Economic and Social Council, and a number of bodies constituted by it or in consultative status with it bear eloquent testimony to these shared values and common goals.

The rule of law is the composite essence of freedom, justice and peace. Modern constitutionalism is an ideological synonym of rule of law. Without entering into the philosophical thicket of positivism, natural law, realism and other jurisprudential schools of thought, we can say without hesitation that modern law, particularly in the field of human rights, seeks to make those who are weak strong, and those who are strong, just. In other words, that the community regards as just and proper should be translated and reflected into enforceable law. Legality should have legitimacy and what is legitimate should be legal, lawful and legally enforceable. But the question always is what is legitimate and what is just and how are legitimacy and justice protected and enforced.

Most definitions of justice are remarkably open, leaving each age or social group or nation or community to pour its own content into them or to adapt them to its own notions and conceptions a/. These definitions not only provide working rules but also adumbrate ideas, ideals and institutions b/. Quintessentially, law is the road to justice c/, though sometimes it may appear in actual operation to impede justice. Definitions of law also define justice because the manifold functions of law are aimed at achieving or maximising justice. In functional terms, law seeks: (a) to maintain public order and social peace; (b) to settle disputes and resolve conflicts; and (c) to define, protect and reform certain relationships and their equations in society and to regulate them. The contours and often the content, of these functional activities are provided by the prevailing conceptions of justice.

The roots of justice and its varied conceptions lie in the soil of morality. In an ancient Hindu conception d/, justice was Dharma, that which sustains. It was the flower of righteousness. For the ancient Greeks e/, it was virtue; to Aristotle, justice consisted in treating equals equally and unequals unequally, a doctrine of distributive justice or what Dean Roscoe Pound called "consultative justice". According to the Institutes of Justinian, justice means "to give every man his due". Aquinas regarded that in order to do justice all men were to be treated equally and impartially. In the conception of natural law, the ethical foundation of justice was regarded as moral instinct common to all men, or as a divine dictate written on men's hearts. Justice thus was regarded as a social virtue.

a/ See Roscoe Pound, Jurisprudence, (West Publishing), 1959, in five volumes, particularly Vol. I, Part 2; Vol. II, Part 3 (chapter 13); Vol. III, Part 4 (chap. 14); Vol. IV, Part 6 (chap. 21).

b/ See Julius Stone, see also Hans Kelsen, What is Justice? Univ. of California, 1971, p.397. At the end of his essay, Kelsen says: "Justice to me is that social order under whose protection the search for truth can prosper", ibid., p.24.

c/ An outstanding contribution to the theme is by Roscoe Pound, Justice According to Law, Yale University Press, First edition 1951 p. 98.

d/ See generally Jayas^wur^{al}, Hindu Polity.

e/ See Plato, Republic, IV. 443 and Aristotle, Nichomeachean Ethics II. 4.3; V.I.3. See Allen, Aspects of Justice: see also J. R. Lucas, On Justice, Clarendon Press, Oxford, 1980.

Divergent theories and definitions of justice, however, do not detract from the fact that all theories of justice and every system and ideology of government converge on the consensus that justice is the goal of the modern State. Equally, it is universally accepted that freedom, justice and peace are indivisible and the international community must endeavour to promote them. There are different approaches to justice and there is often a difference of perspective or emphasis of idiom. Social situations and economic structures are different in different countries and so are the responses of law. The source of law and the content of justice may vary and diverge from country to country. The concept of justice according to law seeks to harmonize the autonomy of each legal system, but as Professor Julius Stone says: "Positive law in the last resort must sustain criticism by other than its own standards if it is not to degenerate into the commands of naked power" ^{a/}. In a vast majority of cases, judges, in different countries may come to the same conclusions but there are bound to be cases where laws and conceptions of justice would be divergent and judges would reach quite different conclusions.

Even within the same systems, laws change, conceptions of justice are metamorphosed and solutions of the past are found to be unacceptable or otiose. In certain matters, judges at different levels, indeed in the same court, find it difficult to agree. The point, however, is that every system is committed to do justice and right, every judge is under an oath to dispense justice and every system accepts the fundamental postulate of the impartiality and the independence of judges (including jurors and assessors where they exist) and the independence of lawyers. Again there are different structures of judicial administration. Each constitution has its own pattern of distribution of powers. Judges are differently recruited and promoted. But the central fact is that judges everywhere are declared to be independent and expected to be impartial. ~~The present Special Rapporteur~~ of the view that no single pattern of judicial organization, powers and functions can or need be mandated in the world to secure the independence and the impartiality of the judiciary, jurors and assessors, and the independence of lawyers.

What is required is a universal acceptance of and adherence to the basic principles and minimum standards of impartiality and independence, the denial of which should be taken to be denial of justice and violation of basic human rights and fundamental freedoms. These universal principles

^{a/} Stone, The Province of Jurisprudence, p. 234. Also see A. J. Kerr, Law and Justice, Grahamstown, South Africa, 1963.

and minimum standards should be based on a commonly acceptable consensual denomination, based on historical experience, and accommodating structural diversities and operational angularities of different systems, without making any concession to deviant or destructive subterfuges circumventing and obliterating the principle itself. In respect of the subtle but marginal variations and historical and ideological problems, each system has to be left, by and large, to its own devices to evaluate itself and to work out its own indigenous solutions. If there is no insistence on a particular make or model, we would find that a broad framework of consensus already exists on the principles of independence and impartiality of justice and therefore an international convention or a universal declaration is well within the realm of feasibility in the contemporary world. In the words of Dean Roscoe Pound, experience developed by reason and reason tested by experience have taught us how to go far toward achieving a practical goal of enabling men to live together in politically organized communities in civilized society with the guidance of a working idea ^{a/}. The independence of justice is such a working idea and we have the experience of legal and social history tested by reason and purpose and that reason and purpose tested by experience to evolve a practical set of universal norms to preserve, protect, promote and reinforce the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers.

^{a-/} Pound, Justice According to Law, op. cit., p.29.

V. THE CONCEPT OF IMPARTIALITY AND INDEPENDENCE

The contemporary international order is premised on the intrinsic and ultimate indivisibility of freedom, justice and peace. It is clear that in the world in which we live, there can be no peace without justice, there can be no justice without freedom and there can be no freedom without human rights. Human rights have economic, social and cultural as well as civil and political dimensions. All these dimensions are intimately intertwined. The observance of human rights in an organized society postulates a humane legal system and an efficacious remedial framework. Rights may sometimes exist without effective legal remedies but there is an inexorable process in every system to produce and perfect a remedy where it recognizes a right. Ubi jus ibi remedium. Where a right is matched by an efficacious remedy, and a supportive social and political culture, the system of law and justice inspires confidence and becomes an instrument of freedom, human dignity and peace. Viewed in a practical and concrete perspective, rights are defined and realized through the remedial process. The remedial process is thus pivotal to any system of rights. The twin principles of impartiality and independence in the administration of justice give to the remedial process its character, credibility, integrity and efficacy.

Historical analysis and contemporary profiles of the judicial functions and the machinery of justice shows the world-wide recognition of the distinctive role of the judiciary. The principles of impartiality and independence are the hallmarks of the rationale and the legitimacy of the judicial function in every State. The concepts of the impartiality and independence of the judiciary postulate individual attributes as well as institutional conditions. These are not mere vague nebulous ideas but fairly precise concepts in municipal and international law. Their absence leads to a denial of justice and makes the credibility of the judicial process dubious. It needs to be stressed that impartiality and independence of the judiciary is more a human right of the consumers of justice than a privilege of the judiciary for its own sake.

Judges must be impartial and independent and free from any restrictions, influence, inducements, pressures, threats or interference, direct or indirect, and they should have the qualities of conscientiousness, equipoise, courage, objectivity, understanding, humanity and learning, because those are the prerequisites of a fair trial and credible and reliable adjudication. In the discharge of their judicial functions, judges should be independent not only of the Executive and the Legislature but also of their judicial colleagues and superiors. No doubt judges may discuss and deliberate among themselves when they sit in full court or as a bench and may influence each other. Equally, judges singly and as benches or in full court may be bound by the actual decisions or the interpretations of law pronounced by Superior Courts in the judicial hierarchy, but a judge or a bench of judges or the court cannot be called upon to pronounce a particular judgement. A judge has a right and an obligation to adjudicate fairly and in accordance with law as he sees it. He must think fairly and see reasonably. Law is his master. He is subject to the discipline of law. He is open to correction and his view of law may be reversed or dissented from by a co-ordinate forum or a forum of higher rank. Judicial decisions are also open to professional and public criticism. In clear cases of misbehaviour, judges may even be impeached, removed or recalled on specified grounds and in accordance with established procedures. In some jurisdictions they may be made liable in civil and criminal law but not so as to impair or undermine the impartiality and independence of the judiciary.

The primary nature of the judicial function in all jurisdictions is to adjudicate according to law. In certain systems, the judiciary may review legislation to test its validity but that is a power, more appropriately a function, entrusted to the judiciary by the organic or constitutional laws of those systems. In the discharge of its primary judicial function, the judiciary may resort to strict or liberal construction, depending on what the system accepts or what the exigencies of the case demand. This is a matter of technique or tradition and sometimes of individual predilection. What we are fundamentally concerned with in this study is the principle of impartiality and independence of the judiciary as a universal principle which is broadly accepted and acknowledged by all legal systems. The principle of impartiality and independence of the judiciary does not depend on the existence of a particular kind or manner or breadth of judicial review; it is a characteristic of the judicial function and it depends on certain basic institutional and structural conditions, on the culture and ethos of society and its legal system, and on the character, temperament and ability of the individual judge and of the Judiciary as a whole.

Independence and impartiality are, in the ultimate analysis, personal virtues and a matter of mental attitude and temperament, but they are also norms of institutional as well as professional ethos which nurture and sustain them. The intimate conscience of the judge, the Kantian "moral law within and the starry Heaven above us" is a part of the professional and social culture of law and administration of justice.

The concept of impartiality is in a sense distinct from the concept of independence. Impartiality implies freedom from bias, prejudice and partisanship; it means not favouring one more than another; it connotes objectivity and an absence of affection or ill-will. To be impartial as a judge is to hold the scales even and to adjudicate without fear or favour in order to do right. Impartiality of judges is a hoary concept. The concept of independence is of later, more modern origin. Independence postulates not only freedom from dependence, but also a positive attitude of independence. In a literal sense, independence means absence of external control or support. A dictionary definition ascribes to it the state of being "not dependent on another for support or supplies." An independent organ should not be in a position of subordination to another organ or branch. It should be autonomous and self-governing and should be free to discharge its duties and functions without let or hindrance. An independent judiciary has to be free from the control and subordination of the Executive as well as the legislature. However, the concept of independence is relative and is generally applied in functional terms. The degree of autonomy and independence and the form and manner of dependence varies from country to country. So does the quality of independence in functional and operative terms.

Impartiality is the core concept. It is primarily personal, but operationally it runs into and coalesces with the concept of independence. In the contemporary understanding of the concept, the two concepts are inseparable. Thus for example when a Canadian judge was inducted to a seat on the Supreme Court of Canada, he told his colleagues and others that: (a) he had no expectations to live up to, save those he placed upon himself; (b) he had no constituency to serve, save the realm of reason; (c) he had no influence to dispel unless there was a threat to this intellectual disinterestedness; and (d) he had no one to answer to, save his own conscience and his personal standards of integrity. The bold statement of the judge sought to include both the concepts of independence and impartiality from the personal angle of a judge and the institutional position of the judiciary.

Though the judge observed later that the euphoria of the occasion was an excuse for a touch of hyperbole in his statement, he was essentially and personally as a relative proposition rather than as an absolute expression encased in rigid and categorical terms. A judge or a legal system is not and cannot be an island. The ideal of judicial independence is not that a judge should be isolated, unrelated or unconnected. It implies an intrinsic quality of the freedom and discipline to act in accordance with standards of moral, professional and institutional conduct. The independence of the judiciary is a part of the discipline of law and of the ecosystem of a constitutional State. The responsibility of a judge to constitutional and legal norms forms the foundation and the real rationale of judicial independence.

In the Conclusions of the International Congress of Jurists on the Role of Law in a Free Society^{a/} it was noted that the independence of the judiciary implies freedom from interference by the Executive or Legislative with the exercise of the judicial functions, 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 underline it." The duties of a juror and an assessor and those of a lawyer are quite different but their independence equally implies freedom from interference by the Executive or Legislative or even by the judiciary as well as by others in the fearless and conscientious discharge of their duties in the exercise of their functions. Each one of them has an allotted and accepted role and a body of rules and conventions to guide him. Jurors and assessors, like judges, are required to be impartial as well as independent. A lawyer, however, is not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases, and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference.

The independence of the legal profession often sustains and supports the independence and impartiality of judges, jurors and assessors because the legal profession has a knowledgeable understanding of the operating realities of the administration of justice and their vigilance is well-advised and meaningful. A lawyer is of course not licensed to act in any manner he likes but he is bound to and is entitled to do the best he can for his client within the framework of law and his professional ethics and etiquette. Independence means in a primary sense functional autonomy, accompanied by forms of accountability designed to protect that independence.

^{a/} International Commission of Jurists, Role of Law in a Free Society, (New Delhi, 1959).

VI. IN DEFENCE OF THE CONCEPT OF IMPARTIALITY AND INDEPENDENCE

In his Preliminary Report, the Special Rapporteur had noted ~~that~~ ^{has} that the very concept of independence had been questioned from theoretical, ideological and empirical standpoints in order to demonstrate its limitations. Such questioning is based on assumptions and conclusions to the effect that the judiciary is an elite institution, that it is a part of the power structure of the State, that law and the judiciary are merely superstructural and have no autonomy of their own, and that the courts have generally supported the status quo and the establishment. These assumptions and conclusions should not necessarily be taken as wholesale attempts to deny or denigrate the concept of impartiality or the principle of the independence of the judiciary. Many of these conclusions arise from vigilant analysis and may help to bring about true and real independence of the judiciary. Theoretical constraints, ideological complaints and empirical conclusions which question the reality of independence give us not only the counsel of caution but also provide profiles of predilections which in judicial behaviour have the propensity and the potential to degenerate into partiality, bias, and unwitting attitudinal lapses of prejudice.

Studies of political justice a/ and of law and politics in judicial appointments and the attitudes of judges b/, critical surveys and classifications of judicial behaviour, and searching probes in the politics of the judiciary c/ are invaluable and welcome aids to the principles of impartiality and independence of the judiciary. They establish that the independence of judiciary is not an absolute concept, that neither fanatical iconoclasm nor blind idolatry are appropriate, that the judiciary is a part of the established order and has often to render justice according to law, that judicial independence and impartiality is not a final finished product of standard specifications, that there is room for improvement in different directions, and that despite their limitations, the principles of impartiality and independence are axiomatic, essential and indispensable.

Political justice is an expression of double meaning. In one sense, it means justice in the political order or in the body politic. It means the assurance of equality and the avoidance of political discrimination or deprivation. In another sense, political justice has a pejorative connotation. It means in that sense the external and subordinating influence of politics upon justice, or the dominance of political or partisan considerations in the administration of justice. It is often a dubious variety of justice of which instances are not unknown to any legal system. The Dreyfus case, often regarded as the cause célèbre of "political" justice, was only one of the many instances. In fact, the genus of political justice abounds in a variety of species and their incidence is widespread and numerous. Law and politics are inevitably and inextricably intertwined but "political justice" in its dubious sense is not the rule. Law often follows politics, although in turn it also controls, regulates and monitors

a/ See, e.g., Otto Kirchheimer, Political Justice (The Use of Legal Procedures for Political Ends), Princeton, 1961, p. 452.

b/ Robert Stevens, Law and Politics (The House of Lords as a Judicial Body, 1800-1976), Weindenfeld and Nicolson, London, 1979, p. 701.

c/ J.A.G. Griffith, The Politics of the Judiciary.

politics and politicians. Judges adjudicate political disputes in the light of the law. Legislative power is obviously political in nature. In a wider sense, all powers are necessarily political. However, the premises on which legislative, executive and judicial powers and functions are granted and exercised differentiates them.

Judicial power is separate and distinct in respect of its premises, technique and style. The judiciary is generally speaking a distinct organ of every polity, irrespective of the extent to which the principle of separation of powers is accepted in that system. When judges or the judiciary become obsequious pawns in the game of politics, when they are bereft of independence and impartiality, and when they are employed to subserve the fiats of the executive or the legislature irrespective of law, what they administer is political justice. That would be universally regarded as an abuse of law and a mockery of justice. It is well to remember that judges and the judicial process enjoy a reputation for independence and impartiality and for conscientious and courageous application of law without any hostility or rancour, and that is why political régimes tend to resort to them for authenticating and legitimizing what they do.

Political justice operates not only in crude, clear-cut ways but also in grey areas; but it is impermissible to look askance at every admixture of law and politics and to condemn such an admixture as nothing but political justice in the pejorative sense. After all, judges are creatures of the time and the society in which they live. The judiciary is not immune to a variety of influences. Dr. Robson said that "Public policy is nothing more or less than the expression of certain social sympathies and antagonisms of judges, certain ethical ideals which have taken definite form in particular decisions, and in that way become crystallized into stable doctrines" ^{a/}. An English judge who has been accused of prejudice against trade unions denies the charge and says: "If you know your history you will know that in this field for 100 years law and politics have been mixed up together. Politics have influenced the law, and the law has influenced politics. Many of the cases that come before the courts are fraught with political consequences. The very decision of them becomes the subject of political controversy. The columnists comment on them. Pressure groups press for legislation to overrule them. All this is unavoidable. But none of it means that the judges themselves are political." ^{b/} The judge tells his readers: "If you should look into the cases in which I have taken part, you will see that sometimes the judgements have been in favour of trade unions; and sometimes against them. In every case I have decided in accordance with the law as I believe it to be." No judge can do better. However, what a judge believes to be the law, and how he comes to that belief are related to his training and legal culture, his personal, social and professional background, his unconscious and subterranean predilections, and his conscious commitment to be fair, objective, impartial and independent. To monitor these factors is to be concerned and vigilant about the principles of independence and impartiality in action rather than to disclaim the principles.

Long ago, H.J. Laski showed that in the United Kingdom, between 1832 and 1906, out of 139 judges appointed, 80 were Members of the House of Commons at the time of their nomination and 11 others had been candidates for Parliament; that

^{a/} Robson, Justice and Administrative Law, p. 240 quoted by Slesher, op.cit., p. 133.

^{b/} The Rt. Hon. Lord Denning, The Closing Chapter, London, 1983, 158.

of the 80, 63 were appointed by their own party while in office; and 33 of them had been either Attorneys-General or Solicitors-General a/. As Laski put it: "It is not necessary to suggest that there will be conscious unfairness; but it is, I submit, possible that such judges will, particularly in cases where the liberty of the subject is concerned, find themselves unconsciously biased through over-appreciation or executive difficulty ... Nothing is more disastrous than that any suspicion of the complete impartiality of the judges should be possible".

Griffith concedes that today being a member of a political party seems to be neither a qualification nor a disqualification for appointment. b/ He, however, shows that in his country, four out of five full time professional judges are products of public schools and of Oxford or Cambridge c/. He joins issue with Lord Justice Lawton who claimed generally in his Riddell Lecture, in 1975, that it was a common misconception that the judiciary were drawn from the moneyed classes and educated at leading public schools and at Oxford or Cambridge. Lord Justice Lawton claimed that judges were a microcosm of society d/.

The controversy does not negate the value of judicial impartiality and independence. It leads us to conclude that it is desirable to make an effort to equalize opportunities of higher university and professional education and of recruitment to the Bar and the bench. Perhaps a certain element of subjective prejudice might always colour the process of adjudication for "judges are human with human prejudices". e/ But a well-trained judiciary is expected to overcome those prejudices to the maximum extent possible and to provide an open and credible system which can provide more impartial and independent personnel and fairer and more equal procedures than any other institution. Griffith, however, adds another dimension to the issue of independence and impartiality. His thesis is that the principal function of the judiciary is "to support the institutions of government as established by law" f/, that judges are concerned to preserve and to protect the existing order g/, that "in both capitalist and communist societies, the judiciary has naturally served the prevailing political and economic forces" h/. The basic truth of Griffith's thesis is undeniable. Judicial institutions form a part of the whole system.

The judiciary is interrelated and interdependant. It draws sustenance from and gives sustenance to other institutions. It upholds the law and the law upholds it. It represents a synthesis of stability and change. In every society, the existing order of law and institutions of government reflects the prevailing political and economic forces. It cannot be otherwise. At the same time it is inherent in the dialectical process of life and law that the old

a/ J.A.G. Griffith, The Politics of the Judiciary, 1978, p. 20.

b/ Ibid., p. 24.

c/ Ibid., p. 215.

d/ Ibid., 214.

e/ Ibid., p. 215

f/ Ibid., p. 28.

g/ Ibid., p. 29.

h/ Ibid., p. 31.

order changes yielding place to the new. The change is brought about by new perceptions, new alignments, new combinations of political and economic forces, new dilemmas, new quests, and new definitions of right and justice. In the ebb and flow of ideas and institutions, judges and lawyers do not stand still. They are not mere passive spectators. They participate in the process and bring to bear upon it their skills and techniques and their commitment to the ideal of doing and obtaining justice for all manner of men.

Judges and lawyers need to be independent to accomplish that mission, though they would always be limited by the system and its basic outlook. The judiciary too cannot disown the system of which it is a part but can still be impartial and independent within the limits imposed by the system. The fundamental fact remains that no other institution except the judiciary can offer greater hope or brighter promise for the task of impartial and independent adjudication and dispute resolution.

No matter what judges do or fail to do, controversies on the question of "politicization" of the judiciary will always remain because the judiciary does not function in a vacuum. It is possible to increase professionalization of the judiciary and reduce its politicization by changing methods and sources of recruitment and by placing security of tenure and prospects of promotion beyond the reach of any patronage by the executive and the legislature. But the modern judiciary would still have to decide questions which are political in nature, have political consequences and which inevitably bring the judges within the range of political fire. As H.W.R. Wade pointed out "Today no apology is needed for talking openly about judicial policy. Twenty or 30 years ago judges questioned about administrative law were prone to say that their function was merely to give effect to the will of Parliament and that they were not concerned with policy. In reality they are up to their necks in policy as they have been all through history, and nothing could illustrate this more vividly in our own time than the vicissitudes of administrative law." ^{a/} When Lord Denning said in a speech in the House of Lords that if British judges were given power to overthrow Acts of Parliament, they would become politicized and referred to the somewhat forbidding examples of the constitutions of the United States of America and India in respect of conflicts which arise in those countries from time to time between the judges and the legislature,

Lord Hailsham replied to those who opposed powers of judicial review to invalidate Parliamentary legislation in words which are as telling as they are graphic: "They are under the curious illusion that the judges are not already in politics. Lord Diplock, as one of the authors of the Anisminic decision, practically abolished an Act of Parliament about the Foreign Compensation Commission. What about Gouriet? ... What about the Laker dispute? How about the Tameside education dispute? What about the decision in validating Mr. Roy Jenkins' policy on wireless licences? How about the various decisions of this House and the Court of Appeal on the Race Relations Act? And what about their recent decisions on the trade union legislation? ... If they (the judges) assume jurisdiction they are in politics; if they decline jurisdiction they are in politics. All they can hope to be is impartial" ^{b/}

^{a/} H.W.R. Wade, Constitutional Fundamentals (The Hamlyn Lectures), 1980, pp. 61-62.

^{b/} Ibid., pp. 76-77.

VII. INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY AND ITS ACCOUNTABILITY³²

Constitutions of all hues and colours either explicitly declare or implicitly recognize the principle of the independence of the judiciary. Their methods of securing the principle of independence may vary, in matters of detail, their modalities may sometimes run counter to the principle; but the object of the independence of the judiciary is, as it were, a part of the universal refrain of the anthem common to all constitutional documents. The principle grew by historical evolution, became a catalyst in the dialectics of power and its control, and is today as ubiquitous as law itself as is evident from a contemporary survey of constitutions. What emerges from this is not merely a compilation of a quantitative consensus on the principles of the impartiality and independence of the judiciary, inclusively referred to as independence. There is in fact a coherent world profile of judicial independence and it is not merely a matter of ritual verbiage. Many constitutions of modern States not only contain declarations on the independence of the judiciary but also embody specific machinery provisions to safeguard that independence. Most others postulate the independence of the judiciary as an implicit condition. These declarations and implicit premises on the independence of the judiciary constitute an irrefutable sheet-anchor argument for the conclusion that there exists a world-wide agreement on the principle of independence. That argument has a qualitative significance. It is true that there are diversities of institutions and a wide variation in the actual situation in respect of the independence of the judiciary, but that does not detract from the fact that there is virtually a global chorus of homage to that principle. To interpret the significance of that homage as mere constitutional cosmetics or hypocrisy is to miss the point that a constitutional declaration is not always a description of the existing situation but is also an articulation of an aspiration and a mandate that constitutions and laws are meant to perform the function of standard-setting, and that an occasional lapse or even repeated transgression of an accepted standard impliedly affirm the standard in principle. A fall from an accepted community standard may have its reasons and explanations but it does not necessarily become the rule. There are many States in which the norm is enshrined in their constitutional documents and there are provisions of an institutional framework to secure its observance, but the judiciary in those States is not what it should be. Can it be said that the norm is not real because the actuality is not what the norm mandated? The living constitution is always a mix of the ideal and the actual and both are a part of an inter-acting reality. It would be sheer cynicism to condemn a constitutional document as a mere façade which cloaks political reality. On the other hand, a blind formal approach to the letter of the law without an understanding of the context in which it operates and the perversions which erode it operationally, may lead to an effeteness or naive complacency. For the purpose of formulating standards, the accepted norms should be the primary basis; the de facto lapse or a wholesale collapse of the system can only provide notes of caution and signal the need for vigilance so that curative measures are taken and the appropriate lessons are learnt in the formulation and implementation of standards. The country profiles, which will be summarized in an addendum to this report, underline the analogous rationale and a large measure of the common denomination of basic standards, norms and modalities in different constitutional documents.

A survey of the constitutions of the world shows that the judicial function is universally recognized as distinct and separate in the system of government. Judiciary is also described in some constitutional systems as a separate and equal branch or as a co-ordinate and co-equal organ of the government. The Constitution of the United States of America speaks of the judicial power being vested in the Supreme Court and in such inferior courts as the Congress may ordain and establish. In the 1958 Constitution of France, the judiciary is described as an authority and not as a power (art.64). Both in the United States of America and France, the principle of separation of powers was a part of the intellectual faith of their respective revolutions.

106. The principle of separation of powers has particular relevance to the principle of independence of the judiciary. It has had different historical antecedents and manifestations in different countries. The French Revolution proclaimed the ideal of strict separation of powers and compelled the Ordre judiciaire to refrain from encroaching upon or interfering with legislative and administrative action. a/ The Americans adopted the doctrine in the form of checks and balances and raised it to the status of fundamental constitutional principle, making the judiciary the umpire of the constitutional process. The edifice of an extensive judicial review system has been built upon the foundation of separation of powers in the United States of America. b/

107. Historically, separation of powers became necessary to the independence of the judiciary because that was the way the functional integrity of the judicial function could be maintained. In due course, the two concepts of separation of powers and independence of the judiciary became allies in the new constitutionalism of limitation of government by law c/ and protection of civil and political rights. As Alexander Hamilton said long ago: "...the complete independence of the courts of justice is peculiarly essential in a limited constitution ... without this all the reservations of particular rights or privileges would amount to nothing." Chief Justice Marshall pressed the doctrine of separation of powers into service for laying the foundation for judicial review and claimed that it was the province and duty of the judicial department to say what the law is, particularly if law be in opposition to the Constitution. d/

108. Strict separation of powers or extensive judicial review are not, however, an invariable inseparable condition of the principle of judicial independence. Separation of powers is found in many countries in sharply drawn demarcations of power in a classic Montesquiesque form; e/ in many others it is found in a restricted form. In the latter there are mutual checks and balances. There is a separation of the executive, legislative and judicial powers, but the

a/ See, e.g. Sir Otto Kahn-Freund, "Common Law and Civil Law - Imaginary and Real Obstacles to Assimilation", in New Perspectives, pp. 137-159.

b/ See M. Shapiro, Law and Politics in the Supreme Court.

c/ See generally, H. McIlwain, Constitutionalism, Ancient and Modern, 1947.

d/ Marbury v. Madison (1803) LCr. 137.

e/ See l'Esprit des Loix, VI, 6, extracted and quoted in Vile, Constitutionalism and Separation of Powers (1967).

executive and the legislature are intertwined as in the case of Great Britain, which Montesquieu took as his model for his thesis, though perhaps somewhat mistakenly. The judicial function is, however, distinct as well as separate in almost all the constitutions of the world and the judiciary is meant to exercise functional independence in the task of judging. Many constitutions show that in principle the judiciary is independent and subject only to the law. The doctrine of separation of powers in relation to the principle of the independence of the judiciary postulates broadly: (a) a degree of professionalism in the judicial functions; (b) the insulation of the judiciary in respect of appointment, promotion, posting, transfer, removal, emoluments and other conditions of work and service from external and extraneous influence of the legislature and the executive; (c) the recognition of the autonomy of judicial administration and norms of non-interference by the legislature and the executive in the role assigned and entrusted to the judiciary; (d) accountability of the judiciary tempered by the principle of the independence of the judiciary.

Judicial and legal professionalism have contributed substantially to the principle of the independence of the judiciary. The complexity of law and the difficult task of interpreting, applying or declaring the law have created a distinctive educational curriculum and intellectual discipline. The judiciary as a class has come to acquire a distinctive professional ethos and culture, to which the entrants to the judiciary pledge their allegiance. The honour and the dignity of the judicial office and the sanctity of the judicial function reflected in the judicial oath become articles of faith for the members of judiciary. Professionalism sustains a sense of community and continuity and fosters a value system committed to integrity and excellence. Legal education plays an important part in the process of initiation. Selection of individuals on the basis of their competence, and integrity emphasizes the professional dimension. The appointment of a judge and his sense of belonging to the institution of judiciary united by a common professional creed completes the process of acculturation in the ethics of independence. Indeed lay judges and magistrates are also assimilated to the ethics of the professional judiciary. There are different methods of recruitment to the judiciary in different countries. Broadly speaking, there are four models of judicial appointments: (a) appointments by direct selection (inter alia, by means of competitive examinations) and promotions from the cadre of career judiciary; (b) appointments from the legal profession; (c) an admixture of (a) and (b); (d) elections. Each method has its strong points and shortcomings. A system of elections puts a premium on democratic and periodic accountability but suffers from insecurity and uncertainty of tenure. A judiciary constituted by public examinations tends to be cast in the mould of a civil service aloof from the community of lawyers and without the outlook of an independent profession. A judiciary drawn exclusively from the practising Bar tends to be more accountable to the Bar than any other segment of the society, although it does help to ensure their (judges') independence of mind. a./ These different methods and models are mostly a product of history and habits of mind and cannot easily be replaced. The basic principle which meets with universal approval is that candidates chosen for judicial office shall be individuals of integrity, ability and sound legal training. In the case of lay judges and magistrates, however, legal qualifications are not required, although a course of instruction can be of

a./ See Niall MacDermot, Safeguarding the Independence of Judges and Lawyers, I.C.J. April, 1980 (unpublished paper).

great value for them. It is axiomatic that judges should be appointed or elected on relevant, proper and intrinsic considerations. Nepotism, favouritism and partisanship and ignoring professional merit in the matter of making judicial appointments would undermine the professional ethos and morale of the judiciary. By the same token, discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status creates inbuilt imbalances in the composition of the judiciary and makes it unfit as an independent and impartial instrument of justice. Indeed, in many countries, it is necessary to go one step farther. Years of past prejudice and discrimination should be overcome by a conscious effort to correct the imbalances in the composition of the judiciary by broadening access thereto for all sections of the society. The judiciary should reflect the society in all its aspects so far as practicable without losing its identity and professional character. It cannot perhaps be a microcosm of the society in a full sense but it should be and should not appear to be aligned exclusively to any particular linguistic, geographical, religious, ethnic or ideological group. Even in one party States, the judiciary should reflect different regions, backgrounds and identities. The judiciary is a human institution and its composition and complexion is a factor of crucial importance. A measure of representative diversity is conducive not only to social image and credibility of the judiciary but also to its real independence and impartiality. An affirmative approach in moderation, particularly in favour of those who may have been excluded in the past also helps to greater equality in the administration of justice.

Another aspect which has a direct bearing on the independence of the judiciary relates to the authority which exercises the power of appointing judges. There are some countries where judges are co-opted and appointed by or in effective "consultation" with the judiciary itself or by judicial service commissions which consist wholly or predominantly of judges and members of the legal profession. In such cases there is a minimum of outside interference. In most countries, however, appointments are made by the executive or the legislature, after some consultation with the judiciary and sometimes additionally with the legal profession. In some countries such as India, recruitment to and promotions within the judiciary below the High Courts fall in the domain of the High Courts, appointments to the High Courts and the Supreme Court are made on judicial advice and in consultation with Chief Justices, and the appointment to the office of Chief Justice ordinarily goes by seniority. The system is so modelled as to maximize judicial autonomy and non-interference; in practice, however, the executive does have a large say without always being able to have its way. The commonly accepted principle which emerges on a world-wide basis is that the executive or the legislature may participate in making judicial appointments but there should always be an element of consultation with and deference to the judiciary and only those with the necessary professional qualifications and attributes of integrity, ability and independence should be appointed. These personal qualities constitute the most durable safeguard of judicial independence. Institutionally, it is also necessary to ensure that once a judicial appointment is made, the judge should not remain under the supervisory control of the executive or the legislature in the discharge of his judicial functions.

The case of lay judges, magistrates, and justices of peace, elected or appointed, stands on a footing which is necessarily different from that of the professional career judges or lawyers who are elevated to the judiciary. No legal qualifications are necessary for such lay judges, magistrates and justices.

of peace who make a significant contribution to the administration of justice. Non-lawyers and assessors also play an important role in administrative tribunals and courts of specialized jurisdictions. These lay judges are a part of the judiciary and belong to its hierarchy, ethics and discipline. They discharge a quantitatively substantial burden of adjudication and are controlled by the judiciary. There is considerable debate on the pros and cons of the lay magistracy but there is no doubt or dispute that the lay magistracy should be given proper professional orientation, instruction and initiation. As laymen, they bring to bear upon their work a non-technical common sense approach to the administration of justice, but in doing so they require the same ethics of integrity and independence which are essential for a judge. They are not and need not be lawyers but they are nevertheless judges and have to decide according to the relevant evidence and the applicable law.

Among the non-conventional approaches both in respect of adjudication and representation, India provides another example of local village justice systems, the history of which goes back several thousand years ago to the Vedas. Similar institutions flourished in other ancient civilizations. Traditionally, they were manned by elders and by wise and learned members who functioned more as judges than as legislators. After the advent of independence, there has been a revival, though somewhat half-hearted, of the traditional institution of Nyaya Panchayat for the dispensation of justice and amicable resolution of disputes at the village level. In a limited way, the Nyaya Panchayats have proved their utility by reducing the level of litigation, diminishing the work of regular courts and inculcating an atmosphere of peace and harmony in the rural population. The principle of impartiality and independence of the lay judges of the Nyaya Panchayats are not statutorily recognized and protected, but these principles are also fully respected by transferring cases to regular courts whenever there arises any apprehension or complaint. By and large, Nyaya Panchayats succeeded in commanding the faith and confidence of the disputants and the lay judges who served as members of these bodies maintained their impartiality and integrity. A study showed that disputants in about 90 per cent of the cases in the district which was studied were satisfied with the adjudication of the Nyaya Panchayats and in more than 50 per cent of the remaining 10 per cent in which parties sought revision, the judgements of the Nyaya Panchayats were upheld. The criticism that the Nyaya Panchayats had become tools in the hands of rich and influential persons was not substantiated. ^{a/} Another study with which the author of this report was associated showed that the system of consensual people's justice in periodic assembly of the people living in a tribal area guided by a Gandhian social worker was quite effective in the settlement of disputes, thus avoiding a recourse to formal and time-consuming legal proceedings in regular courts. ^{b/} Grassroots justice through local and informal fora of adjudication and dispute resolution, particularly in the rural communities of the third world countries, for small local claims and disputes, both civil and criminal, have unique significance. They have the advantage of saving time and expense and avoiding the artifices of the formal legal system. These advantages should be viewed not with elitist condescension, but in a positive spirit and with respect for the basic goodness of the common people and their ability to

^{a/} See generally, Dr. R. Kushawaha, Working of Nyaya Panchayat in India (A case study of Varanasi District, ICPS. 1977, and foreword to the book by Dr. L.M. Singhvi).

^{b/} From Takrar to Karar (From Dispute to Settlement). A Study by Dr. Upendra Bakshi.

cope with a certain range of legal problems. The problem is that lay judges who are called upon to perform the judicial functions may neither have much education nor enough training, and they may be prone to be swayed by current local gossip or sentiment or other influences.

113. At the same time, it should not be forgotten that many of these lay judges are deeply moved by their traditional ethical value system and regard the function of judging as "divine" and its duties inviolable. There is need to inculcate and reinforce in them the principles of impartiality and independence and to impart a basic course of training to them so that they may be fully socialized within the judicial system.

As a consequence of their professional identity and functional independence, members of the judiciary enjoy freedom of belief, thought, speech, expression, association, assembly and movement. These freedoms are guarantees of basic human rights and every individual is entitled to them as facets of human dignity. Judges are entitled to these freedoms not only as individuals but also as judges because these freedoms are essential to, or useful in, the task of judging which necessarily involves: (a) the freedom to think, consider, study, analyse, and believe (the freedom of thought and belief); (b) the freedom to speak, express and pronounce (the freedom of speech and expression); (c) the freedom to aid and assist in the effective enjoyment of the freedom of thought and belief and the freedom of speech and expression as well as to improve professional knowledge, skill and abilities, to represent and defend individual and collective interests and to protect and promote the principle of judicial independence from erosion, encroachment, or neglect (the freedom of association, the freedom of assembly, and the freedom of movement).

Throughout the world these freedoms are declared as fundamental. Most constitutions enshrine these freedoms as basic guarantees in express terms to all citizens generally. Nor is there any denial in any constitution of these freedoms to judges in absolute or specific terms. Freedom is however always relative and is subject to reasonable social regulation, control and limitation. In the case of judges, limitations on those freedoms arise from the nature of their functions and the status, dignity and honour of their office.

The degree of judicial freedom of speech and expression and the extent of their freedom of assembly, association and movement are subject to reasonable restrictions which are conditioned by traditions, social and cultural attitudes and political organization. ^{a/} There is obviously a considerable gap in these matters between, for example, a country where judges do not exercise their voting rights and a country where judges contest popular elections for their judicial office. In many countries the freedom of association of the members of the judiciary does extend to active membership of political bodies and political activity except in so far as there may be incompatibility or a conflict of interest. In Switzerland, as in many other countries, membership of a political party is frequently a condition of continuing in office. During the formulation of the West German Judges' Law in the late 1950s, the Canadian model of non-voting judges was expressly rejected, and proposed prohibitions regarding political activity beyond voting and party membership were not adopted. In many

^{a/} See generally, G. Mancini, Politics and the Judges - The European Perspective, (1980) 43 M.L.R.1. See also H. Patrick Glenn, Limitations on Judicial Freedom of speech in West Germany and Switzerland (1985) 34 International and Comparative Law Quarterly, pp.159-161.

countries judges have their trade unions and even rights of collective bargaining whereas in others trade union activity by judges would be regarded as a fall from the grace of judicial office. It is not possible to enact a universal international principle permitting or proscribing judicial participation in trade union activity. On the other hand, a reasonable measure of the freedom of association guaranteed by international norms and conventions cannot be denied to judges. It is universally accepted that judges may enjoy the freedoms discussed above, but subject to the overriding consideration that judges shall always conduct themselves in such a manner as to preserve the dignity of their office and their individual as well as institutional impartiality and independence. As a minimum standard, there is no objection to judges having the freedom to form and joining (or not to join) associations of judges to improve their professional knowledge, skill and abilities and to take collective action to protect their judicial independence.

Judicial freedom of speech and expression is also subject to similar limitations. The overriding principle is that judges should always conduct themselves in such a manner as to preserve the dignity of their office and their individual as well as institutional impartiality and independence. What is becoming for a judge to say, whether it detracts from the dignity of judicial office or its independence are essentially matters of attitude and usage. In a recent decision, the Swiss Federal Court held, in 1982, that the judicial freedom of speech does not permit a judge to enter into political controversy in relation to concrete events (konkreten vorkommnissen). ^{a/} The West German Federal Constitutional Court rendered a decision in 1983 ^{b/} holding that judicial freedom of speech is guaranteed only to the extent that its exercise is not incompatible with the obligation of restraint inherent in judicial office as understood by traditional principles. The West German decision resulted from the signing by a Lower Saxony Civil Court judge of a petition published in a newspaper in support of a teacher who had been dismissed for political activities and whose case for reinstatement was pending before a labour appeal court. The Swiss decision arose from the activities of a local elected Zurich judge who participated in the distribution of political tracts calling for the suspension of certain legal proceedings involving a large number of young people. These two instances help to highlight the limits upon judicial freedom of speech and expression in two situations in two European countries. It may be noted that continental judges have generally exercised greater individual political freedom than their common law counterparts, so that such limits will go farther in common law jurisdictions where the Shakespearean counsel is often more apposite: "Give every man thine ear, but few thy voice". // Those few should be the brethren of the judges with whom of course there must be candid and honest communication and deliberation and the secrecy of those deliberations of the conference of judges must always be scrupulously preserved. Woodrow Wilson sketched in 1908 a vignette of judicial reticence and its rationale in words which represent the essential principle: "The most reticent men in Washington are the members of the Supreme Court of the United States. It would of course be a great breach on the part of any member of that Court to discuss any question involved in a pending case which the Court was considering or was about to consider; but his obligation of reticence goes much further than that. Almost any piece of public policy that

^{a/} See Glenn, supra.

^{b/} Ibid.

touches the individual, though it be never directly, may sooner or later come before the Supreme Court. Every member of the Court, therefore, feels bound to keep his opinions upon such matters to himself". ^{a/}

Among the traditional safeguards of judicial independence, the most notable is that of security of tenure. It means that a judge has a guaranteed right to reach the mandatory age of retirement or until the expiry of his term of office and may not be removed except for incapacity or proved misbehaviour. It also means that the term of office, emoluments and other conditions of service of judges (such as, e.g. age of retirement), shall not be altered to their detriment. This is an elementary safeguard and is found in most legal systems. When this elementary safeguard is destroyed and judges are put on the sufferance of the executive or military Governments, the independence of the judiciary is the first victim.

The principle of security of tenure may appear to be an elementary safeguard of judicial independence in the world today, but it is well to remember that it took many historic struggles to establish it on a firm footing as the most fundamental of all the safeguards. An illustrative reference to British history would be instructive.

In the sixteenth and seventeenth centuries, the judiciary in England and Scotland was substantially a part of the royal establishment, though the judicial functions were exercised essentially by judges or on their advice. Judges held office at the King's or Queen's pleasure and could be removed unceremoniously and without cause. They could also be suspended. The King sometimes merely forbade them to sit in court. In the landmark case of *Commendams*, Sir Edward Coke, Chief Justice and his companion judges were not prepared to accept the royal direction not to proceed to judgement until they had conferred with the King, whereupon they were summoned before King James I and all the judges, except Coke, were coerced to comply. In certain cases, the King would consult the judges in advance on the legality of a particular act and the judges would then hear and decide the same matter, though they might have rendered an extrajudicial opinion earlier. Judges received their salaries from the King out of royal revenue and at the discretion of the King. Their promotion was entirely at the pleasure of the Crown. They could also be transferred from one judicial office to another as was Sir Edward Coke from the office of Chief Justice of the Common Pleas to that of the Chief Justice of the King's Bench in 1613. But the principle of the independence of the judiciary, independent of the favours and the anger of the Crown, was taking hold of the public mind and was beginning to assume the status of a moral norm.

In the struggle between the King and Parliament, judges became targets and victims but in the long run the judiciary benefited from that struggle. As judges were under the royal thumb, they incurred parliamentary odium and their activities were labelled by the Commons as "illegal", "contrary to fundamental law", and "corrupt". The Chief Justice of the King's Bench was impeached in 1680 by the House of Commons for having "traitorously and wickedly endeavoured

^{a/} Woodrow Wilson, Constitutional Government in the United States, 1908, pp.122-123.

countries, a Minister of Justice is the Attorney-General and performs several quasi-judicial functions. In most countries, the burden of advocating the point of view of the judiciary before the executive and the legislature in various matters and of securing budgetary allocations and appropriations falls on the Minister of Justice. As a bridge between the judiciary, the legislature and the executive, the Minister of Justice are in a vantage position to defend and strengthen the security of judicial tenures and the independence of the judiciary.

Security of judicial tenure during good behaviour is expressed in constitutional terms by insulating the judiciary from executive interference. Judges are not irremovable in any system but removal procedures in respect of judges are specially designed to ensure that they may not be removed except for incapacity or misbehaviour, that they may be removed only by the legislature or by the judiciary itself or by a special authority and by a special procedure meant to safeguard the security of tenure and the rights of the judge concerned. In England and many other countries Parliament has the power of removal by means of an address to the head of the State in respect of judges serving in the higher judiciary but the power is rarely used. Since the Act of Settlement (1700), the power has been used only once in England in 1830.

. In Scotland, judges hold office ad vitam aut culpam which makes them irremovable except on the ground of culpable conduct. In many countries there is a system of impeachment of judges. It has been suggested that theoretically it is possible for a judge to be dismissed or impeached not only for misconduct but for any other reason which might induce the legislature to pass the requisite address a, or to impeach the judge. Happily, this has not been so. The legislatures have generally shown due respect to the judiciary and a large measure of self-restraint. Other procedures for the removal of judges of the higher judiciary are also deferential to the principle of security of tenure, but judges of inferior rank at the lower rungs of the judiciary might be said to receive a lesser degree of protection in certain jurisdictions. They are dealt however with generally by the judiciary itself or by bodies composed predominantly of judges. The Ombudsman, the Complaints Tribunals, the Judicial Commission and similar other bodies in different countries which play an important part in such proceedings are trustworthy for judicial accountability and do not undermine the security of judicial tenures unreasonably.

. The concern for the independence of the judiciary led to provisions of life tenures for judges in certain constitutional systems. Most modern constitutions, however, lay down a mandatory age of retirement. There is much to be said for a constitutionally fixed mandatory age of retirement. In some countries the senility of judges who enjoy a life term poses a delicate and difficult problem. A judge who cannot perform the functions of his office in a satisfactory manner cannot inspire confidence. Senility in a judge detracts from the dignity of judicial office; a senile judge can neither be judicial nor independent. A mandatory age of retirement operates uniformly and avoids invidious individual distinctions. It makes way for younger judges in the fullness of their maturity and vigour and strikes a balance between security of tenure and the efficiency of judicial functioning. In 1959 the United Kingdom changed the life tenure of all newly

a / See E.O.S. Wade and G. Godfrey Phillips, Constitutional and Administrative Law, Ninth edition (by A.W. Bradley); p. 316.

appointed judges in the higher judiciary to compulsory retirement at the age of 70. Most written constitutions provide for a mandatory retirement age which varies from country to country and from one grade or rank to another within the same country. Thus in India, Supreme Court judges retire at 65, High Court judges at 60 and District judges and judges below that rank at 58. In England the age of retirement for magistrates is 70 years; for circuit judges 72 years; and for judges of the Supreme Court 75 years. A reasonable age of retirement providing for a reasonable span of service and an adequate pension are aspects of security of tenure in an extended sense.

A proper age of retirement depends on life expectancy, employment opportunities for the younger candidates at the junior levels of the judiciary and the age of retirement in public employment generally. Adequacy of pension also depends on similar factors. In principle, judicial tenure age of retirement, salaries, other perquisites of office and pension deserve particularly favourable attention and should be appropriate to the status, dignity and responsibilities of judicial office.

Owing to rapid and constant inflation, and the consequent erosion of the value of money, it is not sufficient merely to adhere to the old constitutional formula that judicial emoluments shall not be reduced or altered to the detriment of judges. What is necessary is to provide an independent machinery and a fair formula to ensure that judicial emoluments and pensions are effectively augmented to neutralize inflation and thus free judges from financial anxieties.

In some ~~developing~~ ^{developing} countries, the problem is one of extreme inadequacy of judicial emoluments and pensions. The principle that there should be adequate salaries and pensions for judges, commensurate with the status, dignity and responsibility of their office and that judicial salaries and pensions should be regularly linked and fully adjusted to price increases is incontrovertible. To implement that principle is difficult where a paucity of resources, economic under-development or spiralling inflation do not permit public services to be adequately compensated. Judges in some of these countries are compensated as civil servants but not as adequately as they should be. Judges tend to compare their emoluments with the earnings of successful lawyers in private practice rather than with other civil servants or other professionals in government service, and by that standard they are rather ill-paid. It is noteworthy that in some countries the more successful lawyers are not willing to accept judicial office.

Although there is a strong case for the immediate improvement of salaries and pensions of judges to safeguard and strengthen their integrity and independence, the problem is far from simple. There is also a strong justification for certain perquisites like housing for judges in certain jurisdictions where it is extremely expensive and difficult to rent living accommodation.

The appointment of part-time judges, ad hoc judges, temporary and probationary judges (with probationary periods following their initial recruitment or appointment, particularly where the powers of appointment and confirmation are exercised by the judiciary itself), justices of the peace and lay magistrates is wide-spread throughout the world. Obviously it cannot be changed overnight or

even over a long period of time. The system has its justification in practical viability and traditional acceptability. What is necessary is to provide appropriate safeguards. For instance, the Constitution of India provides for the appointment of ad hoc judges or for requesting retired judges or judges of another court to attend the court and function as judges but this is a power vested in the judiciary itself.

It is a universally accepted principle that the assignment of a judge to a post within the system of judicial administration or within a particular court to which he is appointed or the assignment of cases to a judge or the composition of benches and preparation of cause lists are internal administrative functions which have to be carried out by the judiciary itself. In some systems these functions are the prerogative of the presiding judge; in others they may be carried out in a collegiate manner and by a process of consultation or delegation among the judges concerned. In no case however can any outside intervention be countenanced, nor can litigants or their lawyers be allowed to choose a particular judge. It cannot be overemphasized that the posting of judges and assignment of cases should be insulated from outside interference and motivated malpractices for the sake of the principles of impartiality and independence. It is also important that promotions within the judiciary should be based on an objective assessment of the judge's integrity, independence, professional competence, experience, humanity and commitment to uphold the rule of law. Judicial promotions on the basis of extraneous considerations are a species of reprehensible nepotism and have a tendency to corrupt and demoralize the judiciary. The enemy is not merely executive interference. A more dangerous enemy is the lack of objectivity among judges and their subjective proclivities and questionable personal preferences. Fundamental to the working of the system are the professional integrity and objectivity of the judges who are called upon to recruit and promote judges or advise or concur in the matter of judicial postings, promotions and transfers.

Another problem which has a bearing on the principle of independence arises from the transfer of judges without their consent in certain jurisdictions. In many countries, the transfer of judges is a routine matter as a part of the career of judicial officers. Except where the transfer of judges is a part of a system of regular rotation, the transfer of a judge without his consent may be punitive in motive or effect, and such transfers have a tendency to interfere with judicial dignity and independence. In India where there were several rounds of constitutional litigation relating to the transfer of certain High Court judges, the Supreme Court has laid down that judges may be transferred without their consent as a part of a policy of national integration or for other valid and reasonable policy considerations but that any punitive transfer is impermissible. ^{a/} It follows that an individual judge should not withhold his consent to transfer unreasonably if the proposed transfer is not improperly motivated, in which case it should be open to the judge to challenge the transfer. There are certain assignments which require judicial skills and the reputation of judicial objectivity and independence. In many countries judges are called upon to inquire into matters of public importance. In principle, these assignments may not necessarily conflict with the concept of independence so long as they are made with the concurrence of the judiciary and the consent of the judge concerned, but

^{a/} See, e.g., the Indian Supreme Court judgement in S.P. Gupta v. President of India and others reported in A.I.R. 1982 Supreme Court 149.

there are obvious risks arising out of judicial involvement in political controversies. The executive may sometimes employ the device of appointing a judge to make an inquiry for its own party for political reasons or in order to obtain judicial legitimation of an essentially political decision or policy.

There are inherent dangers in asking judges to participate in executive policy making or to manage or administer policies, programmes or schemes under the executive or on its behalf.

Advisory opinions are rendered by courts in many constitutional systems. It is one of the most important aspects of the jurisdiction of the International Court of Justice. ^{a/} Advisory jurisdiction has no doubt many uses, particularly in international affairs. It provides valuable and authoritative judicial guidance, at a critical juncture, defuses and resolves controversies before they become intractable, and helps to avoid confrontations between different organs of government. Advisory jurisdiction has the disadvantage of involving the judiciary in a legitimating function in controversial issues at a hypothetical stage prior to adjudication and thereby pre-empting the independent exercise of judicial power at the proper stage of an actual dispute. If an advisory opinion is merely advisory, it can be ignored with impunity, undermining the dignity of the judiciary. If it has any binding effect, the judiciary itself is bound and estopped from determining the actual dispute judicially in a manner different from the opinion given in a hypothetical reference. If the judiciary is to avoid being used by the executive or the legislative, the courts should be able to decline jurisdiction in matters which are not of a judicial nature. In a leading case, the Supreme Court of India held with reference to its advisory jurisdiction under article 143 (b) that the Supreme Court was entitled to return the reference by pointing out the impediments in answering it. ^{b-/}

An important practical aspect of judicial independence relates to the control of the courts over their staff, the preparation of their budget and the making of the rules of practice and procedure. As country profiles in this chapter show, courts in different countries have varying degrees of autonomy in respect of these subjects. In this connection, the Canadian report by (the then) Chief Justice Jules Deschenes of the Supreme Court of Quebec, "Masters in Their Own House", is of representative relevance for the present study. The report calls for moving beyond fundamental traditional independence of the judiciary ensured by the security of tenure of judges and for obtaining a progressive measure of autonomy, particularly in the areas of (a) rules of practice and procedure; (b) budget of the judiciary and its staff and services; and (c) appointment and control of court staff. The report identifies three successive stages of relationships with

^{a/} See, Keith, The Extent of the Advisory Jurisdiction of the International Court of Justice (1971); Pratap, The Advisory Jurisdiction of the International Court (1972); Pomerance, The Advisory Function of the International Court in the League and U.N. Eras (1973); Waldock, Aspects of the Advisory Jurisdiction of the International Court of Justice (1976); Reisman, 68 A.J. (1974), 648-71.

^{b/} In Re The Special Courts Bill, 1978 (Special Reference No. I of 1978), A.I.R. 1979 Supreme Court 478.

the executive and the legislature, namely, consultation, decision sharing and independence and recommends steps to ensure that court employees fall under the judicial authority for recruitment, retention, promotion, education and training, position classification and the structure of the personnel system. It proposes that the budget estimates prepared by the judiciary and approved by a special committee of the legislature should be included in the government estimates submitted before the legislature for adoption. Broadly, the report favours the view that the ultimate administrative authority should rest with the collegial body of judges, which should be the judicial council of each province and territory. Opinion in Canada was not uniform on the modalities of arriving at financial and administrative independence outlined by the author of the report, and disclosed a typical range of responses to institutional change. The Ministers of Justice were unanimously opposed. They argued that the judiciary cannot claim the privilege of spending proceeds of taxes which it is not responsible for levying. Others pointed out that few judges have an aptitude for administration. They argued that once the judiciary takes charge of court administration it will lose its advocate, the minister, and the judiciary will find itself competing with the other services of the Department of Justice for budget allocations. Many leading members of the legal profession saw numerous risks in adopting the suggestion. They felt that the ministers would always do better in obtaining funds for justice than the judiciary ever could on its own. They also felt that in any case it was only a pipe dream because Governments will never divest themselves of their control of the administration of justice. Judges too were divided. Those who favoured the idea were of the view that judges are in the best position to know the budgetary needs of the courts and that the administrative staff of the courts should be answerable to the judiciary and not to the executive. Those who opposed the suggestion felt that it would be demeaning for the judiciary to go and beg for funds before the legislature, that the system would lead to reprehensible lobbying, that this model would be incompatible with the principle of ministerial responsibility, and that there would be a possibility of poor administration, of fraud or bias and of abuses and empire-building which would bring a bad name to the judiciary.

In the United Kingdom, court administration and the budget of the judiciary are in the hands of the executive under the authority of the Lord Chancellor, who is the head of the judiciary, a member of the cabinet and the presiding officer of one of the two Houses of Parliament. Administrative staff work closely with the presiding judges. The High Court of Australia is empowered, under the High Court of Australia Act 1979, to administer its own affairs. The Governor-General appoints a Clerk of the High Court, who is nominated by the Court. The Clerk administers the registry and other business of the Court as the Court directs. The Court prepares the annual budget estimate, which is submitted to the Minister of Finance and it receives the funds voted by Parliament. In New Zealand, a Royal Commission in 1978 recommended the creation of a judicial commission consisting of three representatives of the judiciary, two of the Government and two from the law society, to exercise uniform control over case flow and the day-to-day administration of the courts; to recommend appointments to the judiciary; to arrange study and refresher programmes for judges and to deal with complaints. In Nigeria, the Attorney-General sees to all administrative affairs relating to the judiciary including personnel and budgeting and the judges are not involved in these matters in any way. However, the Court registrar appears before the

Financial Committee of the Legislature. No judge ever appears before the parliamentary committee. In the Federal Republic of Germany, the Minister of Justice, both Federal and State, appoints the Court's support staff. The staff, however, must answer to the President of the Court. The Federal Court submits its budget estimates to the Ministers of Justice who in turn transmit them to the Minister of Finance. The budget estimates are finally placed before Parliament. The Supreme Constitutional Court prepares its own budget and presents it directly to Parliament. There is considerable demand for greater control of the budget for judicial affairs in the hands of the judiciary. In India, the Supreme Court and the State High Courts prepare their own budgets though they are finalized by the executive which submit them to the legislatures for appropriations. The High Courts have complete control over the subordinate judiciary and the Court's support personnel. The Courts administer their own budgets. Conditions of service are, however, subject to the concurrence of the Government and its legislative powers. Ordinarily it would not be thought proper for a judge or a committee of judges to appear before the legislature or any of its committees. The courts in Colombia and Costa Rica, for example, enjoy larger autonomy.

The American model which was also examined by the Deschenes study offers yet another equation. There are, in fact, many systems in vogue in the United States, though there are common features to be found among them. The American federal judicial system exercises complete authority over its own staff. It administers its own budget with no intervention by the executive, but subject to Congress for its appropriations. The Supreme Court is represented before the Congress by two of its judges who are aided and accompanied by the members of the Court's staff. Yardwood and Cannon describe it as the Supreme Court's annual trek to the Capitol. The two authors were of the view that by appearing in person the Supreme Court judges lend irreplaceable prestige to their request and have an opportunity to make their case as only they can make it. They go to the Capitol as representatives of a co-ordinate branch of the Government. According to the Deschenes study, the American experience should help us to discern the problems of ensuring the judiciary's administrative independence in a federal system.

It would be trite to say that each country and each legal system has to find its own answer on the degree of budgetary and administrative autonomy of the courts. Each system must provide its own ground rules, conventions and modalities of institutional balance. It may well be that the ultimate control of the purse strings must necessarily remain in the legislature but that control has well-defined limits in the framework of the principle of independence of justice, and no doubt there is a substantial measure of working autonomy both in the matter of its budget and the supervision and control of its administrative personnel to be provided and safeguarded. That autonomy can be secured by consultation mechanisms and mechanisms for making decisions more or less on the basis of the perceptions of the judiciary in respect of essential budgetary, administration and personnel needs by constitutional conventions or by adopting any of the many analogous practices or some of the recommendations in the Deschenes report.

Legislatures are elected and are no doubt accountable to the people and are responsible for levying taxes, but that argument cannot be stretched to the point where the legislature may grant only a stifling budget to the judiciary and deny it adequate salaried support staff and services or full functional control over its

staff. The executive and the legislature cannot, because they have a popular mandate, deny to the judiciary its basic dignity, autonomy, self-respect and independence. Constitutional conventions, an organized legal profession and informed public opinion as well as institutional reforms and readjustments are important guarantees against any encroachments by the executive or the legislature against the judiciary. These guarantees would have to be strengthened throughout the world in order to preserve the independence of the judiciary and to ensure the observance of the following main principles: (a) adequate resources shall be provided on a priority basis for the administration of justice and a proper provision shall be made for appropriate facilities for the courts, for judicial and administration personnel, for operating budgets and generally for maintaining judicial independence, dignity and efficiency; (b) the judiciary shall prepare its own budget estimates and the budget shall be finalized and adopted in collaboration with the judiciary administration; (c) the main responsibility for internal court administration and management including the assignment of cases in accordance with law or rules of the Court to individual judges and the supervision and disciplinary control of administration personnel and support staff, shall vest in the judiciary.

The question of the powers and functions of the presiding judge is also important. In many courts the presiding judge is more than primus inter pares both in administrative matters and in the performance of judicial duties and exercise of disciplinary powers. He is responsible for the formation of benches, assignment of causes, preparation of cause lists and control of court administration. He is the visible symbol of the court. In many jurisdictions, the presiding officer shares those powers and functions in a collegiate way with his colleagues although he does enjoy a pre-eminent position and precedence. The variations in the position of the presiding judge and the extent of his powers are peculiar to each system but those powers represent the cohesion and the autonomy of the judiciary. That cohesion and autonomy are safeguarded so long as the courts are not divided by internal dissension and jealousy, and hierarchial organization does not interfere with the right of each judge to pronounce his judgement freely.

A reference may be made at this stage to two contextual factors of pivotal importance in relation to the concept of the independence of the judiciary: (a) the nature and range of rights; and (b) the scope of judicial remedies. These two factors delineate the jurisdiction of courts in a legal system. A consequence of the doctrines of separation of powers and judicial independence in the perspective of modern constitutionalism is that the judiciary must have jurisdiction either directly or by way of review over all issues and disputes of a judicial nature, and judges should be individually free and institutionally independent.

The competence of judges to adjudicate questions of a judicial nature was guaranteed as far back as the Magna Carta which provided in article 24: "No sheriff, constable, coroners or other royal officials are to hold lawsuits that should be held by the royal justices". Article 17 of the Magna Carta established that "Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place". There was the seed of professionalism based on legal learning and judicial ethics in article 45 which promised: "We shall appoint as justices,

sheriffs or other officials only men that know the law of the realm and are minded to keep it well". Similarly, the freedom and independence in the exercise of the jurisdiction vested in the judiciary postulating processual and substantive rights, fair trial safeguards and a framework of remedies was a part of the Magna Carta. These ancient guarantees have yet to become a living reality throughout the world.

The problems of maintaining the impartiality and independence of the judiciary are particularly accentuated in the dynamics of rights and remedies when the judiciary is called upon to review the validity of legislative enactments or executive actions. By comparison, it is easier for the judiciary to administer the law impartially between citizen and citizen. In the performance of its public law functions of administering the law between citizen and State and securing the observance of human rights and the rule of law, there are inevitable conflicts between the judiciary on the one hand and the executive and the legislature on the other. These conflicts arise in the matrices of legal rights and institutionalized judicial remedies. It is true that judicial remedies are not the only remedies. Nor can rights be safeguarded merely by a provision of judicial remedies. All branches of government must co-operate to make rights effective and there should be an awareness of duties in order that rights may be naturally and spontaneously protected. But when the executive and the legislative branches or particular individuals or groups infringe or fail to protect any social or individual right, the enforcement of which lies within the jurisdiction of courts, judicial remedies provide the only sanctuary of safeguards. Judicial remedies do not offer a panacea; there are many wrongs in a social or moral sense for which there may be no judicial remedy. That is why, when a judicial remedy is invoked, the most complex threshold question relates to the jurisdiction of courts. It is a matter not merely of the letter of the law. The determination of the question of jurisdiction and the interpretation of the letter of the law itself depends on the traditions of the legal system which include the outlook of the judiciary and the legal profession and the expectations of the community. It depends, some would say, on the balance of power in the society.

No one can claim today that the application of the generalities of a Constitution to the great issues which face a country is a simple exercise or that the task of interpretation involves nothing more than reading the words of the statute and spelling out their meanings. The meaning of words often takes its colour from the social setting and the spirit of the times, although there is the discipline of law and the wisdom of judges to put it in perspective. Difficult choices and far-reaching consequences are inevitably involved in the judicial task. Judges have to make those choices with a high degree of objectivity, integrity and independence. A judge is committed to the fundamentals of law and to the core of his conscience. He must free himself, as far as it is humanly possible, from all personal preferences. He must be free from fear and should have no axe to grind. Even so, judicial choices are seldom free from controversy. If the courts recklessly exceed their jurisdiction they are guilty of adventurism; if they abdicate jurisdiction they are timorous, irrelevant and redundant, and are not worth their salt. The judiciary is not and cannot be a knight errant tilting at windmills. Nor can it afford to be a sleepy watchman or an absent-minded umpire. A powerless judiciary can retain its meaningless independence which would make mockery of the judicial institution. The metier and the mission of the judiciary is to exercise and evolve its jurisdiction with courage, creativity and circumspection and with vision, vigilance and practical wisdom. Judicial activism and self-restraint are facets of that courageous creativity and pragmatic wisdom.

A crisis is always a testing time for the judiciary. In the sway of the battle of rights and remedies, the judiciary has to preserve its equipoise in preserving and performing its jurisdictional role. Sometimes even that may be construed as an impediment by an authoritarian executive with or without the backing of the legislature. That is when the independence of the judiciary is besieged by social and political forces inimical to it, irrespective of what it does or does not do. Sometimes as having assumed a jurisdiction which is not vested in it, sometimes it is criticised for having exceeded its jurisdiction and sometimes it is questioned as an irresponsible institution which cannot be permitted to impose its will or wisdom on the people or their elected and accredited representatives.

That judges make law in the process of interpreting and applying the law is not a new discovery of our times. Jeremy Bentham used the term "Judicial Law" to emphasize the view that the judge, though nominally doing no more than declaring the existing law, may be said in truth to be making it. a/ Long ago, Francis Bacon warned: "Judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law, or give law." Oliver Wendell Holmes put it succinctly; "Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice." b/

Activist judges use the prerogative of choice with a single-minded zeal and in a purposeful manner, but judges who may not be judicial activists, nevertheless, have to exercise their options between competing claims and contentions. Whether they like it or not, their vocation of judging necessarily involves them in a measure of law making. As Lord Radcliff described the predicament of a judge: "A judge might commend himself to the most rigid principle of adherence to precedent, might close his day's work every evening in the conviction that he had said nothing and decided nothing that was not in accordance with what his predecessors had said or decided before him: yet even so, their words, when he repeats them, mean something materially different in his mouth, just because twentieth century man has not the power to speak with the tone or accent of the man of the seventeenth or the eighteenth or the nineteenth century. The context is different; the range of reference is different; and, whatever his intention, the hallowed words of authority themselves are a fresh coinage newly minted in his speech. In that limited sense time uses us all as the instrument of innovation." c/

There is today, throughout the world, a candid and realistic acknowledgement of the law-making functions of the judiciary. Whatever the system, there is always some measure of creativity in the process of finding, declaring and

a/ See Sir Garfield Barwick, "Judiciary Law: Some Observations Thereon", (1980) 33 C.L.P. 239, 240.

b/ Oliver Wendell Holmes, "Law in Science and Science in Law" in Collected Legal Papers, pp. 210, 239.

c/ Viscount Radcliffe, "The Lawyer and His Times", in Not in Feather Beds, Some Collected Papers (London, Hamish Hamilton, 1968) pp. 265, 271.

applying the law. Jurisdictions with wider amplitude of judicial review admit of greater judicial creativity and more active intervention by the judiciary. It is, however, to be remembered that judicial law making is quite different from legislative law making.

Legislation is regarded as part of a democratic self-government based on the franchise and the consent of the people. The judiciary does not have the mandate of the people for legislation. The judiciary does not have at its disposal resources which are required for law making. They have no research apparatus of their own to probe social questions and consequences. They deal with issues and controversies at the micro level as between parties and not at the macro level. Lord Devlin put it bluntly when he said that judicial law making is unacceptable because it is undemocratic. He gave expression to that sense of democratic distrust of excessive judicial power in his Chorley Lecture: "It is a great temptation to cast the judiciary as an élite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably, however, long and winding the path, to the totalitarian State". ^{a/} It is true that a measure of law making and a value-protecting approach are both inevitable and legitimate but the real anxiety and apprehension is one of degree of creativity or activism. Judges cannot be excluded altogether from "making law" but they cannot tread on legislative toes or take in their own hands the reins of executive government. The Constitution may draw the line but if any organ, particularly, the judiciary, does not adhere to those lines of demarcation, it may imperil the institutional balance and harmony. In no country or system are those lines drawn with unquestionable clarity. Nor can any lines of demarcation in such matters be static.

As one distinguished jurist put it: "The law making role of the judiciary at any one time is a function of many variables". ^{b/} Those variables call for strict adherence to rules of conduct and social and professional accountability, lest the function of judicial law making, activism or creativity should be suspect in the public mind and exceed margins of tolerance. Judicial independence must for its own sake and for the sake of institutional credibility and functional balance, be tempered by judicial accountability and the ethics of judicial conduct.

In the phraseology adopted by many constitutions, judges are subject only to the authority of the law. That formula is meant to proclaim the principle of the independence of the judiciary and the ultimate supremacy of the law. It means that the judiciary is not subordinate to any other organ of government and judges are free and independent in the discharge of their judicial functions. It also means that the independence of the judiciary is an integral part of the rule of law and is a necessary condition for its practical realization. Judicial independence is a component and instrumental value and is subject to the superior authority of the law and the inclusive set of values which provide the foundation for the rule of law. The basic premise and purpose of the rule of law is that no authority shall exercise arbitrary power and no branch or organ of government is entitled to despotic absolutism or autocracy. The basic concept of the rule of law thus subsumes both the independence of the judiciary and its accountability.

^{a/} Mauro Cappelletti, op.cit., p. 56

^{b/} Jaffé, English and American Judges as Lawmakers, p. 16.

The concept of independence does not mean absolutely rigid separation and the concept of accountability is not a euphemism for judicial subordination. Accountability implies a control system, a system of dos and don'ts of ethics and a system of checks and balances. In that perspective, the two concepts are not only consistent and compatible, but also complement, supplement and sustain each other and are inseparable. In the contemporary world, judicial accountability is particularly emphasized by the extraordinary growth and the ubiquitous reach of judicial power in modern societies as well as the democratic and rational insistence on functional justification of what any authority does. In operational harmony, judicial accountability and independence limit, rationalize, reinforce and legitimize each other, balancing power with responsibility. As one comparative scholar has put it: "there is a world-wide trend towards subjecting judges to scrutiny to improve judicial conduct and performance [...] to insure judicial accountability without reducing too far the political insulation of independence". ^{a/} The concept of judicial accountability is as old as the concept of judicial independence. It is not a new invention of our age. The democratic and functional thrust of our times has however made the demands and pressures for judicial accountability more pointed, forthright and frontal. If the principle of the independence of justice is to be effectively protected, preserved and extended, its alliance with accountability should be maintained and kept in good repair without allowing one to eclipse the other.

Every legal system embodies the principle of judicial accountability but its nature, extent, form and manner in different countries disclose overlapping patterns of diverse proportions and combinations. Broadly speaking there are the following main types of accountability often intertwined with each other:

- (a) moral accountability of the judge;
- (b) hierarchical accountability of the judge;
- (c) accountability to the intellectual constituency and the professional community of judges and lawyers;
- (d) disciplinary accountability of the judge;
- (e) civil liability accountability of the judge;
- (f) accountability of the State to pay damages with or without consequential recovery from the judge;
- (g) accountability in terms of criminal proceedings and penal sanctions;
- (h) accountability to the electing, co-opting, appointing or evaluating authority;
- (i) accountability in terms of removal provisions and procedures;
- (j) public accountability of the individual judge and of the judiciary as a class;
- (k) constitutional and political accountability;
- (i) in terms of the powers conferred upon the judiciary and duties cast upon it in the legal system; and
- (ii) in terms of answerability to another branch of the Government.

It is not proposed to discuss each type of judicial accountability separately or at length as the description in the classification itself provides an introduction to its particular nature and the identity of those to whom the judges or the judiciary as a class are or may be accountable.

The moral accountability of the judge is primarily a matter of his intimate conscience. In the forum of his conscience, a judge is accountable first and foremost to himself. His sense of right and wrong as an individual human being, as a citizen and as a judge guides him spontaneously, monitors his conduct, prevents him from going wrong and censures him when he goes wrong. A judge who

^{a/} Stanley Anderson, "Judicial Accountability: Scandinavia, California and the U.S.A." 28(1980) The American Journal of Comparative Law, pp. 393-420.

puts to sleep that still small voice within him cannot easily be at peace with himself. The sense of moral accountability in a conscientious judge makes him his own best watchman. It puts him on guard; it makes him see clearly when some extraneous factor might cloud his perspective or warp his objectivity; it gives him courage when courage is in short supply; and it gives him faith and fortitude even if he is alone in his innermost convictions.

The moral conscience of a judge is neither some ancient myth nor a magic incantation of words. It is the sense of the judge and the essence of judging. It is rooted in the nature of the judicial function. It is nursed by the tradition and training of the judiciary. It flows from the oath and the ethos of the judicial office. Written and unwritten rules of ethics and judicial custom and usage provide a frame of reference and define standards of integrity which are at the same time meant to secure judicial independence.

To judge without affection or ill will and fear or favour, a judge has to cultivate objectivity and detachment as a mental habit and attitude, and he must not judge if he is or appears to be or is likely to be interested in the parties or the subject-matter in any way. Every legal system provides for excluding a judge from adjudicating a case on grounds of conflict of interest and incompatibility. *Nemo Juxta sua causa* is an old principle with elaborate modern applications to ensure that justice is done and that justice shall not only be done but shall be seen to be done.

A judge cannot ordinarily hold any office which is incompatible with his judicial office and inconsistent with his judicial independence. The basic norm is that a judge cannot accept any position in any capacity unless it is clear that such functions are combined without compromising judicial independence. There are many countries, however, in which it is customary for a judge to accept an assignment outside the judiciary, but during that period the judge does not perform any judicial function. An extra-judicial assignment should not, however, become a form of executive patronage. In many of the states in India, it is customary for a judicial officer to serve for a specified period in the department of law and justice of the State Government. The services of the judicial officer are on loan to the Government by the higher judiciary. During the period the judge serves in the department of Law and Justice, he does not function as a member of the judiciary except to retain his right to return to his judicial post. There are some countries where traditionally judges do not even vote lest it should affect their impartiality and independence or impair the principle of separation of powers. Canada is an example in point where federal judges appointed by the Governor General cannot vote in federal elections. ^{a/} On the other hand, the Lord Chancellor in the United Kingdom is the head of the judiciary, the presiding officer of one of the two Houses of Parliament, and a cabinet minister. In many countries, Ministers of Justice play an important part in councils of judiciary as well as in appointments, removals and disciplinary control. In many jurisdictions where judges are elected or in one-party states judges are not quite aloof from politics or the political party which nominates and sponsors them. In multi-party systems, party labels are obviously not desirable or credible badges of identification for judges but in the constitutional

^{a/} See, however, Gerald A. Beaudoin, "The Democratic Rights", in Tarnopolsky and Gerald A. Beaudoin, Canadian Charter of Rights and Freedoms, Toronto 1982. See also P.S. Miller and C. Baar, Judicial Administration in Canada, Montreal, 1981, and W.R. Lederman, "The Independence of the Judiciary" 1956 (34) Canadian Bar Review, 769 and 1139.

forms which one finds in different parts of the world one would have to rest content with the broad functional principle that once a person is elected or appointed a judge, he should not serve in any capacity if it compromises his judicial independence and he should not perform his judicial and other functions concurrently if the independence of his status and functions as a judge is impaired. Incompatibility and conflict of interest rests on an analogous footing.

In respect of conflict of interest, the rule is simple but its application is not always easy. It is well understood that a judge cannot hear or decide a case in which he or any of his relations might be interested, but what happens if he has strong views in a matter. A judge cannot ordinarily engage in any commercial activity and a judge would also be considered to be disqualified to hear a case in which a company in which the judge holds any shares was a party, but what happens if a good friend of the judge holds shares in that company. In such cases, a judge has to answer his conscience. It is an established rule that a judge cannot hear a case if he has had anything to do with the case previously in any capacity, but what happens when a judge might have strong prejudices in respect of certain offences or classes of people. In the ultimate analysis, a judge has to learn to overcome his subterranean empire of prejudice and predilections. On many of the questions of incompatibility, conflict of interest and disqualification, a judge is accountable both to his conscience and in law. A judge may be challenged on many of these grounds; parties may apply for the transfer of the case; a grievance may be filed on any of these grounds in appeal to a higher court. Newspapers may make comments. Public opinion may be outraged. Lawyers and judges would look down upon a judge who disregards moral and professional norms of conduct.

Operationally, the appellate accountability of a judge is one of the most important safeguards against bias, prejudice or error of fact and of law. The existence of an appellate forum and easy access to it has a chastening effect and contributes to a high degree of accountability. Judicial organization in all countries of the world is hierarchical which provides a framework of appellate correction, discipline and accountability; it also imparts a sense of institutional identity, strength and cohesion; collegiate judicial working at one or the other level provides for professional interaction and builds up a sense of unity and community and reinforces collective institutional independence. The very existence of a remedy of resort to a higher forum enlivens a sense of accountability. A judge whose decisions are subject to appeal is independent in the discharge of his judicial duties. No superior or co-ordinate judge can ask or influence him to decide a particular case in a particular manner. The appellate procedure helps to make him more responsive and responsible to the discipline of law upon which he must depend for his independence. A reversal or a stricture of disapproval by a court of superior jurisdiction may or may not harm his judicial career but the possibility of it has a salutary effect. A system of appeals in a legal system also establishes a two-way channel of communication and interaction between different levels of the hierarchy.

Appellate judges generally have the lower courts and the legal community in mind as reference groups to whom they feel a certain professional accountability.^a In many countries judicial work is subjected to a close

^a See, e.g. Alan Paterson, The Law Lords, 1982; and Louis Blom-Cooper and Garvin Drewry, Final Appeal, (A Study of the House of Lords) in its Judicial Capacity), 1972.

study by academic court watchers and commentators whose criticisms call the judges to account. It cannot, however, be said that judges in many countries feel that they are accountable to academic analysts and authors in any special way, even though judges and barristers in a country like England have occasionally remarked that writers in a highly prestigious law journal now constitute the final Court of Appeal. ^{a/} In the United States academic writings appears to have considerable impact on the judiciary. In many countries where the judiciary is recruited wholly or substantially from the legal profession and where there is professional and social proximity between the bench and the Bar, the legal profession is regarded as a final judge of the judges and their performance. The judiciary is thus accountable to the members of the legal profession and those of the legal community generally, who apply the critical apparatus of their learning and experience to what the judges do. In a sense, this accountability of the judiciary to the cogniscenti in the field of law and judicial administration is essentially accountability to the public who may scrutinize the work of the judiciary not merely from the narrow viewpoint of specialists but also from the point of view of the general public and the consumers of justice. Equally, a judge is accountable in a general sense to other fora of public information, debate, comment and communication, besides being primarily accountable in the forum of his own conscience.

There is another more positivist and institutional sense in which the judiciary is accountable. This accountability is found as a survey of the constitutions of the world shows, in terms of inspection and assessment of judicial work, disciplinary sanctions and removal or recall procedures. In most countries, higher echelons of the judiciary are not subject to the same kinds of inspection or assessment procedures as the judiciary below a certain rank. For instance, in India, district judges and judges below that rank are under the control and superintendence of the High Courts, for inspection, assessment, promotion and disciplinary sanctions but the judges of the High Courts and the Supreme Court are subject only to a procedure of removal for incapacity or misbehaviour by an address of both Houses of Parliament by a special majority. In many countries, however, the Minister of Justice or the Council of the Judiciary exercises extensive disciplinary functions. These disciplinary, recall and removal procedures have been evolved in different legal systems not to impair the independence of the judiciary but to secure their accountability and ensure their good behaviour consistent with public interest. The procedure of recall is a kind of ultimate democratic sanction. An analysis of the country profiles which form a part of this chapter and that of several other constitutions which have been studied by the Special Rapporteur for the purpose of the present study shows that the powers of removal, and application of disciplinary sanctions have tended to shift from the exclusive domain of the executive and are shared by one or more or all of the three branches of government.

In many countries, removal of a judge for incapacity or misbehaviour is the only sanction provided by the Constitution in case of a member of the higher judiciary, e.g. India, England, and the federal judiciary of the United States and such removal was only by a parliamentary address or impeachment. According

^{a/} See Paterson, *op.cit.* p. 13, see e.g. R. Magarry, "Law as Taught and Law as Practised" 9 J.S.P.T.L. (1966) 176; Lord Wilberforce, "Educating the Judges" 10 J.S.P.T.L. (1968) 254; T.B. Smith, "Authors and Authority" 12 J.S.P.T.L. (1972) 3.

to article II, Section 4 of the Constitution of the United States a federal judge may be impeached for "treason, bribery, or other high crimes and misdemeanors". The procedure consists of an impeachment by the House of Representatives followed by a trial by the Senate. In many other countries, the power of disciplinary sanctions including removal vests in composite bodies which have parliamentary and judicial, and in some cases, executive representation. In some cases disciplinary jurisdiction is entirely in the hands of the judiciary except for the members of the highest court. In Finland as in certain other countries, judges are under the supervision of superior courts and the Chancellor of Justice. A judge in Finland, may be brought to trial for misconduct in an ordinary court of law; inferior judges are prosecuted before one of the courts of appeal, appellate judges before the Supreme Court, and Justices of the Supreme Court before the Court of Impeachment. a/ In Sweden, the 1809 Instrument of Government provided for Riksdagens Justitieombudsman (which may be referred to in an abbreviated form as JO) as a parliamentary watchdog to supervise the observance of laws and statutes. b/ The JO receives complaints concerning the courts and examines the question whether the judge has been acting illegally, though the JO cannot revise the decision itself in any way. c/ The JO only has the power to investigate and report and not the power to issue a direction or a mandate.

Unlike the Swedish prototype; the Danish Ombudsman has no power to deal with judicial administration. In Denmark complaints relating to the behaviour of judges may be made either to the president of the court concerned or with a Special Court of Complaints, through the Chief Public Prosecutor. The president of the court concerned may give an appropriate warning to the judge for neglect or carelessness as well as for improper or unseemly conduct. The jurisdiction of the Special Court extends to all professional judicial personnel and their official acts inside as well as outside the courtroom. The Special Court may criticize, disapprove or censure judicial behaviour, may impose fines on judges and may, in a rare case, remove a judge. It has also jurisdiction to reopen cases. It consists of five members when considering the reopening of cases. These five members include a judge from each of the three levels of courts, an academic jurist and a practising attorney. However, only the three judges sit when adjudicating complaints against judges, although it was reported that a proposal was mooted for a court composed exclusively of non-judges. d/

In several American States, there are commissions on judicial performance and conduct. Among these, the work of California and New York Commissions has been studied by many scholars. In California e/ the Constitution was amended in 1960

a/ See Bo Palmgren and C.H. Lundell, Court Organization and Procedure in Finland.

b/ For a comparative study, see, Stanley Anderson, "Judicial Accountability: Scandinavia, California and the U.S.A." 1980 (Vol. 28) The American Journal of Comparative Law, pp. 393-420.

c/ L.W. Gellhorn, Ombudsman and Others: Citizens' Protectors in Nine Countries, 1966.

d/ See Anderson, op.cit., p. 396. fin. 9.

e/ California Constitution, art. VI, s. 8.

to establish the Commission on Judicial Qualifications (later renamed Commission on Judicial Performance). It is composed of five judges appointed by the State Supreme Court, two attorneys appointed by the State Bar, and two lay persons appointed by the Governor and confirmed by the majority vote of the State Senate. Its main function is to control the behaviour of judges and "to get rid of unfit judges". It seeks to improve the standards of judicial conduct, to exercise a corrective influence, to discipline and to remove judges who are not fit to hold judicial office. At the federal level in the United States, the idea of providing for any procedure for removal other than impeachment was vehemently opposed by some as a step towards "chilling judicial independence". a/ On the other hand, there was a considerable body of opinion for a system of disciplinary control and less cumbersome removal (as compared to impeachment) of judges who were not fit to hold judicial office. b/ There has been a demand to have such commissions composed of judges only.

Removal and disciplinary procedures are diverse and cannot be combined into a single institutional formula for universal application. The procedure of removal by impeachment and parliamentary address is no doubt cumbersome and time-consuming. It was meant to be so because removal was to be made difficult. Parliamentary removal procedures today would operate in a blaze of publicity. It can only be resorted to in an obvious case of incapacity or grave and palpable instances of misbehaviour. The procedure was evolved to insulate judges against the absolutism of royal prerogatives and arbitrary pleasure, to put their tenure on a secure footing on the basis of good behaviour, and to make them accountable in a public and collegiate forum. In many countries the procedure continues to be regarded as a salutary safeguard for the independence of the judiciary while asserting the basic constitutional principle of accountability. An Indian legislative enactment made the setting into motion of parliamentary removal procedure extremely difficult and interposed a judicial commission to inquire into the charges.

Richteranklage in the Federal Republic of Germany empowers the Bundestag to initiate the procedure against a judge alleged to have violated the basic principles of the Constitution. The Federal Constitutional Court is vested with the authority to decide the accusation; a two-thirds majority is required to find a judge guilty of the charge of violating the "basic principles" of the Constitution. c/

The problem, however, is that these procedures are, as Lord Bryce put it with reference to judicial impeachment in the United States, "a heroic medicine, an extreme remedy, proper to be applied against an official guilty of political

a/ Kaufman, "Chilling Judicial Independence" 88 Yale and J. 681 (1979).
See, however, Raoul Berger, Impeachment: The Constitutional Problems (1973).
See also Chandler v. Judicial Council 382 U.S. 1003 (1966) and 398 U.S. 74 (1969).
See also Senate Hearings 94th Congress, second session, 25 February 1976.

b/ Braithwaite, Who Judges the Judges (1971).

c/ See Mauro Cappelletti, op.cit., pp. 23-24.

crime, but ill-adapted for the punishment of "small transgressions".^{a/} Apart from the problems of parliamentary removal procedure, there is a growing body of opinion in favour of an internal forum of judicial accountability. As compared to the parliamentary intervention, in cases of an extreme nature of rare occurrence, a judicial commission or a council of judiciary or a court of complaints is obviously simpler and more straightforward, it is also more efficacious, expeditious, discreet and accessible.

From the point of view of harmonizing the twin principles of independence and accountability, the parliamentary removal procedure should be pressed into service only on a finding or a recommendation of a court or a tribunal predominantly composed of judges; it should offer full and fair opportunity for defence to the judge concerned. Two basic safeguards also appear to be advisable in the case of judicial commissions: (a) the composition of the tribunal or the Commission should be such as to include a substantial majority of judges who should serve as members of the tribunal or the Commission on a regular basis; (b) the disciplinary complaints procedure before the tribunal should be confidential at the initial stage and should be held in camera unless the judge concerned requires the proceedings to be held in public. The proceedings should be based upon established standards of judicial conduct and on a scrupulous respect for the rights of the judge. The proceedings should ensure fairness to the judge and a full opportunity of explaining and defending his conduct. The Commission or the tribunal should be required to give a reasoned order which should be subject to an appeal.

There are many jurisdictions in which a judge is subject to civil and criminal liability in addition to internal disciplinary sanctions and other forms of accountability such as removal. The justification for making a judge liable in terms of criminal sanctions and civil consequences in many systems is that the commission of a criminal offence or a tortious act is not a part of the judge's official work and therefore deserves no immunity. It is also argued that internal disciplinary action and other sanctions against a judge do not offer a remedy for a civil wrong and afford no relief to a member of the public who has been wronged by an act or omission of a judge in his official capacity. On the other hand, there is an obvious threat to the independence of the judiciary if he is frequently hauled up in a criminal or civil court in a vexatious manner by a cantankerous and disgruntled litigant. The principle of accountability in such cases has to be tempered by or should yield to the principle of the independence of the judiciary to the extent necessary and desirable.

The position of liability and immunity of judges in different legal systems suggests a threefold classification: (a) countries where there is no special immunity for judges or where liability of the judge is limited and is qualified by procedural preconditions; (b) countries where judges or certain classes of them are not liable, at least in civil proceedings; (c) countries where the State is liable for reparation or damages to the victim of a judicial wrong and the State reserves to itself the right to sue the judge at fault to recover the damages paid to the aggrieved person.

^{a/} Ibid., p. 24, fn. 97.

According to Rheinstein, criminal liability for wilful abuse of judicial office is one of the oldest and most universally applied safeguards. a/ He recalled that among Aztecs the acceptance of bribes by a judge was a capital crime and that Twelve Tables prescribed the death penalty for the corrupt judge. b/ Penal sanctions were often imposed against judges in ancient and medieval times either because they committed grave wrongs and abused their judicial office or because they incurred the wrath of those in the contemporary powers structure. The displeasure of the executive power is obviously no longer a legitimate basis for penal sanctions, but an abuse of the judicial function continues to be subject to criminal liability. In most countries, judges do not enjoy absolute immunity from criminal prosecution. In Poland, Greece, Italy and India, for example, judges are subject to those provisions of the penal law which apply to public servants, such as bribery, corruption and wilful abuse of office. There is, however, in these and many other countries a special procedure of prior approval and authorization (called "sanction" in Indian law of criminal procedure) as a pre-condition for the prosecution of a public servant including a judge. In Poland, the authorization of the competent disciplinary council is required. c/ In Yugoslavia d/ and Czechoslovakia e/, the prior approval of the assembly which elected the judge is necessary. According to Cappelletti, the procedure of authorization by an appropriate body in the Union of Soviet Socialist Republics is an important procedural limitation of judicial criminal liability. f/ He points out that in France, article 681 of the Code of procédure pénale establishes a special procedure in case of crimes et délits commis dans l'exercice des fonctions, dont les magistrats ou les personnes assimilées sont susceptibles d'être inculpés, in particular, the court competent to adjudicate shall be designated by the Chambre Criminelle of the Cour de Cassation. In Israel, "(a) criminal prosecution against a judge cannot be filed except by the Attorney-General himself, and before a [...] court of general jurisdiction at the second instance [...] sitting in a panel of three judges". In Belgium, "if a magistrate commits a crime he will have the right to be judged by a superior court [...] the court of appeal."

a/ See generally M. Rheinstein "Who Watches the Watchmen", Interpretations of Modern Legal Philosophies, Essays in Honour of Roscoe Pound, 1947, referred to by Mauro Cappelletti, "Who Watches the Watchmen", The American Journal of Comparative Law, Vol. XXXI, Winter 1983, No. I. The Special Rapporteur acknowledges with thanks the valuable assistance rendered by Professor Cappelletti in making the results of his comparative study available to him.

b/ See Mauro Cappelletti, op cit., p. 36 fn. 158.

c/ Ibid.

d/ See "Judicial Staff", prepared by Jernej Vrhunec and review by Dusan Cotic and Milka Jaukovic, Yugoslav Survey, Vol. XXII, No. 4 (November 1981), pp. 85-94.

e/ Cappelletti, op. cit.

f/ Ibid., p. 36.

In the United States of America, the Supreme Court has ruled that the performance of judicial duties does not require or contemplate any immunity from criminal prosecution. In Gravel v. United States a/, the Court dispelled certain lingering doubts about the question of judicial immunity from criminal liability by differentiating it from civil liability and by its dictum to the effect that "on the contrary, the judicially fashioned doctrine does not reach so far as to immunize conduct prescribed by an Act of Congress." b/ Lord Denning had observed in a court of Appeal decision in 1975 that there are in England "perfectly adequate checks - such as the remedies of criminal law - capable of protecting individuals from the less than upright judge", c/ but he also added that the proposition has never been tested.

There is complete judicial immunity from civil action in England. In 1963 it was laid down in Fray v. Blackburn d/ that no action will lie against a judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. It was observed in 1868 in Scott v. Stansfield that: e/ it is essential that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely without favour and without fear; this provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. The vintage judgement in Anderson v. Gornie f/ points to the conclusion that the judge of a superior court is not liable for anything done or said in the exercise of his judicial functions, however, malicious, corrupt or oppressive are the acts or words complained of, Section 2 (5) of the Crown Proceedings Act absolves the Crown from liability for the conduct of any person "while discharging or purporting to discharge any responsibilities of a judicial nature vested in him" or in the execution of judicial process, but immunity does not extend to the acts or words of a judge in his private capacity.

Inferior courts do not enjoy the same immunity, particularly for acts committed outside their jurisdiction. According to section 44 of the Justices of the Peace Act, 1979 a malicious act of a magistrate without reasonable and probable cause is actionable as a tort. An action may also lie against a magistrate in a matter in respect of which he does not have jurisdiction or in which he has exceeded his jurisdiction. g/ According to Wade and Phillips, it is doubtful whether the law yet provides an adequate framework of rules for compensating individuals out of public funds who suffer loss through defects

a/ (1972) 408 United States 606.

b/ Ibid., p. 627.

c/ Mauro Cappelletti, op. cit., p. 39.

d/ (1863) 3 B. & S. 576, by Crompton, J.

e/ (1868) L.R. 3 Ex. 220, 223 by Kelly, C.B.

f/ (1895) 1 Q. B. 668

g/ Reply of Lord Templeman to the questionnaire.

in the administration of justice. In 1974, the law of judicial immunity was considered by the Court of Appeal in Sirros v. Moore, when a Crown Court judge was held immune from liability for damages after he had by a wholly erroneous procedure ordered a Turkish citizen to be detained. The judgements sought to minimize the distinction between superior and inferior courts. The judges considered it an adequate remedy that the plaintiff had recovered his liberty by means of habeas corpus and did not discuss the issue of whether he deserved to be compensated for having suffered an unlawful detention. a/ Most countries with the common law tradition broadly follow the British approach to judicial immunity from civil liability. As the Cappelletti study b/ and the replies to the Special Rapporteur's questionnaire show the civil liability of a judge is restricted in many systems particularly in civil law systems to cases of fraud, extortion, malicious acts or to denial of justice (déni de justice), or to gross negligence. In Italy judges are not liable for damages for gross negligence although they are so liable in most other countries with civil law systems or traditions. There are however nearly insurmountable obstacles in translating the theoretical civil liability of a judge into a decree for a sum of money so that, as pointed out by Marcel Storme in the case of Belgium, c/ judges in effect enjoy complete immunity. In France d/ and the Federal Republic of Germany, e/ as also in Yugoslavia and other East European countries, a victim of a judicial wrong may sue the State for damages without suing the judge, although the State has a right to sue the judge for recovery of the damages (action récursoire in France or ruckgriffe in Germany) paid to the claimant.

This new procedure shields judicial independence to a certain extent and protects a judge from the harassment of litigation; at the same time it does not deprive an individual who has been wronged from seeking relief and reparation in damages. Since, however, the State reserves the right to recover from the judge concerned the damages paid by it to the claimant, it may be said that the sword of Damocles would continue to hang over the judge and if he is to defend and justify himself later he might as well do it as a party defendant at the stage of the suit for damages. A limited solution may be found by subjecting the judge's liability in the recovery proceedings by the State to certain exceptional grounds.

A comparative and analytical study of the subject shows that complete judicial immunity from civil liability is not accepted in many countries particularly those following civil law, that there is a growing sensitivity among citizens to complete judicial immunity even in common-law countries, and that the solution of State liability with or without the procedure of recovery of the damages by the State from the judge concerned is confined only to a few countries.

a/ E.C.S. Wade and G.G Phillips, op. cit., p. 322, See also Sirros v. Moore. (1975) Q.B. 118.

b/ Op. cit.

c/ Cappelletti, op. cit., p. 43

d/ Loi no. 72-626.

e/ Law of 26 June 1981.

The concept of the public accountability of the judiciary may appear to be somewhat vague and amorphous in countries where the judiciary is not elective or where the judiciary or its work is not openly and frequently exposed to public criticism.

In the United States of America and Union Soviet Socialist Republics, to give two well-known examples of elective judiciary, the public accountability of the judiciary is in a manner of speaking the living link between the judge and his judicial office. Judges and people's assessors in the Union Soviet Socialist Republics regularly report to their electorate which in the case of the judges of district courts comprises the citizens of the district. These reports of judges and people's assessors are discussed critically. The procedures of recall of judges (and people's assessors) in the Soviet Union and in seven states of the United States of America take the practice of public accountability one significant step beyond the election of judges and reporting by judges on their judicial work as in USSR. In Yugoslavia, judges may be re-elected or reappointed, and the judges may also be recalled or relieved of office during their tenure of office. a/

In many countries, the press and other mass media make the public accountability of the judiciary a strong disciplining factor. Sometimes, the publicity also poses a threat to the independence of the judiciary by tendentious, irresponsible and sensational publications. Rheinstein observed in 1947 that "of all the controls of judicial activity, that by public opinion is among the most effective". b/ In the United States of America the press is protected by the preferred right of freedom of speech enshrined in the First Amendment and insulated against the punitive displeasure of the judiciary in the form of contempt of court proceedings as in the United Kingdom.

185. In the Sunday Times case c/ the European Court of Human Rights found by a majority of 11 to 9 (on 26 April 1979) that the decision of the House of Lords on contempt of court in the thalidomide case, A.-G. v. Times Newspapers Ltd.

a/ "Judicial Staff", Yugoslav Survey, op. cit., pp. 86-88.

b/ Quoted by Cappelletti; op. cit., p. 29 fn. 121.

c/ Sunday Times v. United Kingdom (1979) 2EHRR245; Series A; No. 30 (European Court of Human Rights, Strasbourg) 1979.

constituted a breach of article 10 (freedom of expression), in that the ban on publication went further than was necessary in a democratic society for maintaining the authority of the judiciary. a/

Apart from the questions relating to sub-judice rules and the law of contempt of court, the operational impact of public accountability is sometimes more salutary than the appraisal of judges by lawyers or by their colleagues or by academics because the mass media audience is much larger and public odium is intolerably embarrassing for a judge. By the same token, the dangers of public criticism by journalists based on half-truths buttressed by lack of professional understanding of what the judges do, are not inconsiderable. The question ultimately is of the quality, motive, style and the substance of the criticism. On the one hand, there is the danger of trial by the press and justice by proxy, if the sub-judice rule is allowed to be broken indiscriminately. On the other hand, there is fundamental public interest in the freedom of speech and expression. And the two must be balanced in the same way as the principles of judicial independence and accountability. Lord Denning put the broad principle pithily when he observed: "[...] the Press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board [...]. But the watchdog may sometimes break loose and has to be punished for misbehaviour." b/

5 Offences against the administration of justice and attempts to interfere with the judges in their judicial functions are punishable in most legal systems, but the law of contempt of court and its elaborate rules are a particular contribution of the common law. c/ As Lord Simon said in A.G. v. Times Newspapers Ltd. d/ the law of contempt seeks to vindicate the public interest in due

a/ The House of Lords judgement (1974) A.C. 273 had reversed the decision of the Court of Appeal (1973) 1 All E.R. 815 (C.A.). The House of Lords held that the thalidomide actions were not dormant, that it was a contempt to publish an article prejudging the merits of an issue before the court where this created a real risk that fair trial of the action would be prejudiced; and that it was a contempt to use improper pressure to induce a litigant to settle a case on terms to which he did not wish to agree, or to hold a litigant up to public obloquy for exercising his rights in the courts. This decision was based on the view that newspapers and television must not seek to prejudice a civil court's decision by seeking to persuade the public that one side in litigation is right and the other wrong. The Phillimore Committee doubted whether the prejudgement test was satisfactory and proposed a new statutory test of contempt, namely, "whether the publication complained of creates a risk that the course of justice will be seriously impeded or prejudiced".

b/ Denning, Road to Justice, 1955, p. 78.

c/ See generally Oswald, Contempt of Court; Arlidge and Eady, the Law of Contempt, 1982; Fox, The History of Contempt of Court (1927); Halsbury's Statutes of England, Third Edition; Borrie and Lowe's Law of Contempt by Nigel Lowe (1983).

d/ Supra, p. 315.

administration of justice. As pointed out in Johnson v. Grant: a/ : "[...] The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. It is not the dignity of the Court which is offended - a petty and misleading view of the issues involved; it is the fundamental supremacy of the law which is challenged." The application of the law of contempt differs from one country to another. In India, the Supreme Court once chastised a leading Marxist politician and the chief minister of a state for his ideological condemnation of the judiciary and upheld his conviction for contempt of court. b/ On the other hand, the Courts in India have also taken the view that public expression of views on matters of great national importance did not fall within the mischief of the contempt of Court. In the well known case of Nebraska Press Association v. Stuart, Chief Justice Burger said that a pre-trial publicity - even pervasive adverse publicity - does not inevitably lead to an unfair trial, a view which would find relatively few subscribers in many other countries which have adopted the common law rules of the contempt of court. The Phillimore Committee in the United Kingdom recognized the dangers of trial by newspapers or television but recommended the replacement of the "prejudgement" test by the test of "serious risk of prejudice". In 1982, the Canadian Law Reform Commission in its final report accepted the need to protect the fairness of particular trials from serious interference even at the expense of freedom of speech but not so as to muzzle the press unduly. c/

The Contempt of Courts Act, 1981 was enacted in the United Kingdom inter alia, to harmonize the law of England and Wales with the majority judgement of the European Human Rights Court in the Sunday Times case. d/ It has been said that what the Act does is "to maintain the basic stance of the ultimate supremacy of the due administration of justice over freedom of speech but to shift the balance a little in favour of the latter". e/ It may also be pointed out that apart from the majority decision on the particular facts of the Sunday Times case, the European Court did unanimously agree that one of the purposes of the contempt law is to maintain the authority and impartiality of the judiciary, and held it to be legitimate in principle. That is the limit of the law of contempt, so that it remains essentially a shield and does not become an instrument of suppression of freedom of speech and public accountability. The same principle applies to holding the court in camera, which is justified only if it advances the cause of justice but not if it is employed merely to evade public accountability. Courts are sometimes invited to hold certain proceedings in camera and to preserve the anonymity of parties but this ought not to be done to avoid public accountability. Equally relevant is the procedure of public pronouncement and publication of the judgements of courts so that they are there for any one to examine and comment upon. Individual opinions of judges, dissenting or concurring, also serve the purpose of public accountability of the judiciary and perhaps a sense of accountability to posterity, but in civil law countries dissenting opinions of

a/ 1923 SC 789 (at p.790) cited with approval in A.G. v. Leveiler Magazine Ltd. (1979) A.C. 440 at 459.

b/ In Re E.M.S. Namboodiripad (Namboodiripad v. Nambiar) (1970) 2 SCC 325.

c/ See Report No. 17 (1982) p. 28. This was clearly underlined in the Working Paper No. 20 of the Canadian Law Reform Commission (1977).

d/ See Borrie and Lowe's Law of Contempt, op. cit., p. 85

e/ Ibid., p. 85.

judges in the minority or concurring but separate opinions are never made known and are not even recorded in some cases. In collegial adjudication (which is the pattern in courts of first instance also in civil law countries), individual judicial responsibility cannot be ascertained. The system has its advantage in presenting a united judicial front to the public and to the authorities and in discouraging the angularities and the prolixity of individual judges but there is also a net loss to the community which is deprived of the wisdom of one or more judges who might prove to be more prophetic and far-sighted than those in the majority. Once again, it is a matter of the custom and usage of a legal system and no uniform procedure or universal model can be ordained.

A happy and harmonious mix of judicial independence and accountability in a framework of principles and standards creates congenial and favourable conditions and enables the judiciary to perceive and perform its role in the fulfilment of its objectives and in the discharge of its functions. Such a framework of principles touches only broadly on what judges do and how best they can perform their judicial functions. It lays down reasonable and flexible standards without mandating any models. To that broad framework of principles and standards, each country has to relate in terms of its own experiences, problems and solutions and should endeavour to achieve and excel existing standards in its own way without allowing the basic principles to be compromised.

It has to be borne in mind that impartiality is not a technical conception. It is a state of mind. a/ Impartiality must also have a human face. Judges no doubt form a part of a given system, but they should nevertheless be "as free, impartial and independent as the lot of humanity will admit". b/ Independence is a condition precedent for impartiality.

To sum up the framework of principles which emerge from the study in an outline form: judges individually shall be free to decide matters before them and within their jurisdiction impartially without any interference; the judiciary as an institution should be independent of the Executive and the Legislative. Its jurisdiction should not be tampered with. Judges should have the freedom of thought, speech, expression, assembly, association and movement to fulfil the promise of independence inherent in their office and function. Methods of judicial selection should preclude judicial appointment based on improper motives. Candidates chosen for judicial office should be individuals of integrity and ability. There should be no discrimination in the selection of judges but due consideration should be given to ensure a fair reflection by the judiciary of the society. The judiciary itself should be involved in making selections for judicial appointment. The posting, promotion and transfer of judges should be based on internal autonomy, objective assessment, and consent of the judge. There should be security of tenure. The executive must ensure the security and physical protection of judges and their family. Judges should not be permitted to be sued or prosecuted except by an authorization of an appropriate judicial authority.

a/ Hughes, C.J. in United States v. Wood (1936) 299 United States 123 (p.14)
b/ Constitution of Massachusetts adopted in 1780.

Judges should be bound by professional secrecy and should not be required to testify. A judge should be disqualified for accepting any incompatible office or employment or in cases of any conflict of interest. A judge may be accountable in disciplinary or other proceedings before an appropriate forum and his actions should be considered on the basis of established standards of judicial conduct and there should be a fair opportunity to the judge concerned to defend himself. A judge should not be subject to removal except on proved grounds of incapacity or misbehaviour rendering him unfit to continue in office. The main responsibility for court administration including supervision and disciplinary control of administrative personnel and support staff shall vest in the judiciary. It should be a priority of the highest order for the State to provide adequate resources for the administration of justice. In states of exception, derogations should not be made from the basic minimum principles of the independence of the judiciary. The courts must ensure the observance of fair trial safeguards.

The basic principles outlined can be translated into a living reality only if there is public understanding of, and support for, the role of judges in modern society. The functions of the judiciary and the part it plays in securing justice and public order needs to be understood by the ultimate masters of all Governments, the people, as well as the authorities and individuals who operate the system. Human rights education and legal literacy are the foundations on which the edifice of judicial independence can be securely built in the modern world. In order to project a proper image and to discharge its responsibilities adequately, the judiciary must put and keep its house in order. There has to be a ceaseless striving for integrity, excellence and efficiency. The judiciary must ensure that there are no malpractices, misconduct or misbehaviour in the administration of justice, no undue delays or denial of justice, no paralysis of judicial will to dispense justice without fear or favour and no abdication of jurisdiction because of fear or favour. In the contemporary ^{threshold} perspective of the twenty-first / threshold century, the rule of law and human rights constitute the core commitment of the judiciary.

To make this alliance effective and meaningful there is need for training judges, prosecutors, lawyers and law enforcement officials in the field of human rights and for strengthening legal institutions, particularly in third world countries. This has been emphasized time and again by non-governmental organizations ^{a/} in different fora of the United Nations. This developmental initiative, if imaginatively implemented with the assistance of non-governmental organizations would go a long way in creating an enduring indigenous infrastructure in every country. A world-wide sense of professional solidarity among judges and lawyers would help to provide mutual assistance and would assist in building up a community committed to the basic values of the independence of the judiciary. In the ultimate analysis, the defences of the independence of justice must be built up in the public mind, in the minds of those who operate systems and subsystems of power in the society, and above all in the minds of judges, jurors, assessors and lawyers themselves, and this is particularly so in the changing and challenging age in which we live.

^{a/} See, e.g. Synopsis of material received from non-governmental organizations in consultative status (The Administration of Justice and the Human Rights of Detainees) E/CN.4/Sub.2/1984/13, 5 June 1984, para. 61.

VIII Independence of Members of Tribunals, Jurors, Assessors
and Arbitrators

Jurors and assessors participate in the process of judging and therefore their independence is necessarily a part of the independence of justice. An assessor who is chosen for his or her technical competence is like an independent expert witness. His role is advisory in some jurisdictions, in others, an assessor participates as a judge with a limited status or as a full member of a court. In the Soviet justice system, an assessor has the right to dissent, and his or her individual minority opinion may prevail on appeal* The jury system was introduced in many countries as a part of the process of democratisation. The oath of jurors testifies to their obligation to be impartial and independent. In the United States of America, the Sixth Amendment guarantees speedy public trial by an impartial jury, and this constitutional provision has been interpreted to mean that a selection should be from a cross-section of the community, without systematic and intentional exclusion of economic, racial, political and geographical groups or of women. Reform movements and measures relating to jury system in the countries in which it is used demonstrate the emphasis on the goal of impartiality and independence.

Arbitrators and members of tribunals perform essential judicial functions. Though they may not be judges stricto sensu, it is necessary that they are fully socialized into the ethos of independence and impartiality. Some of them possess specialised technical expertise; others may be civil servants or lawyers or retired judges. Some of the tribunals and boards are courts in a fullfledged functional sense. Many of them enjoy vast powers. If they are not independent and impartial in any system or if they are not perceived to be independent and impartial by the public because they do not ^{enjoy} security of tenure and other forms of protection for their independence, a grave jeopardy to individual rights may occur. Administrative and quasi-judicial tribunals have a great potential for performing important adjudicating tasks

* V. Zaichuk, "An Individual" Opinion, Izvestia May 22, 1975, p. 5.

but it is necessary to impart a modicum of judicialisation to them to a ^{the} reasonable extent consistent with the functions they perform and ^{with} the impact of their powers and functions.

In a recent case, a Constitution Bench of Supreme Court of India had occasion to judicially review Administrative Tribunals Act, 1985 enacted in pursuance of the newly inserted Article 323A of the Constitution of India. (S.P. Sampath Kumar vs. Union of India (1987) 1 Supreme Court Cases 124). The Court held that the Act would not be rendered unconstitutional if certain amendments were carried out. The amendments thus mandated, though indirectly (under the pain of declaration of invalidity) were to the effect that the Chairman of the Tribunal shall be a sitting or a former Chief Justice or a senior judge of a High Court of proven ability, that in the appointment of Vice-Chairman there shall be no particular weightage to the Services and no "valae - discounting" of judicial members, and that the appointment of Chairman, Vice-Chairman and Administrative Members shall be made by the Government only after consultation with the Chief Justice of India. The Court also ruled that "such consultation must be meaningful and effective and ordinarily the recommendation of the Chief Justice of India must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to the Chief Justice of India and his response must be invited to such reasons"; alternatively, "a high powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India may be set up for such selection." The Court also directed the Government to set up a permanent bench, and if that is not feasible having regard to the volume of work, then at least a circuit bench, of the Administrative Tribunal wherever there is a seat of the High Court. The Court held that these amendments were necessary to insulate the administrative tribunals, which was akin to judiciary, from all forms of interference from the from the coordinate branches of Government. In this case, the Court also reiterated that the independence of the judiciary was a basic feature of the Constitution (and by that token, unamendable and unbridgeable). This may well be described by some as government by judges but in India the judgement was generally well received and has not been subjected to much criticism.

IX. The Independence of Practising and Academic Lawyers

The legal profession has an ancient pedigree a/. It is quite possible that in the dim and distant past, as law took the place of brute force, sanguinary duels and wagers by battle were replaced by adjudication in courts and lawyers replaced representative pugilists. Among ancient Hindus, a person well versed in law offered gratuitous legal aid as a matter of simple justice or because of some social connection or kinship but there was no professional class of legal practitioners b/. Amongst the ancient Athenians there was no distinct professional class of men whose particular office it was to speak on behalf of parties in a court of justice; there was no clear differentiation between the function of the agent for litigation and that of the advocate c/. Advocacy was an art, the eloquent performance of orators and the persuasiveness of the Patroni Causarum, but not yet an organized profession. Niebuhr d/ tells us that the origin of the counsel-client relationship goes back to the paternal protection of patroni for protégés. The term Advocatus came to be used for a pleader after the time of Cicero. Its connotation meant "a friend who, by his presence at a trial, gave countenance and support to the accused" e/. Exigencies of legal representation led to the practice of appointing an agent or attorney, called cognitor or procurator f/. In course of time the agents for litigation became attorneys. The Islamic legal tradition gave pride of place to jurists and juris-consults whom the Islamic judges consulted often and regarded highly, but representation by professional attorneys was not explicitly recognized g/.

a/ See generally Roscoe Pound, The Lawyer from Antiquity to Modern Times (1953).

b/ See Singhvi, "The Legal Profession and its Social Responsibilities", The Indian Advocate (1971). See R. Jois, Constitutional and Legal History of India (1984), Vol. I. There are references to the function of lawyers in many ancient texts including smritis.

c/ See Bonner, Lawyers and Litigants in Ancient Greece (1972).

d/ History of Rome, I, pp. 277-279, referred to by many writers. See William Forsyth, Hortensius (An Historical Essay on the Office and Duties of an Advocate), London, John Murray, Third edition, p. 1879.

e/ Ibid.

f/ Roscoe Pound, Jurisprudence, Vol. V, Part 8 (The System of Law), 1959, p. 693.

g/ See however, Osman Abd-el-Malek al-Saleh, "The Right of the Individual and Personal Security in Islam" in The Islamic Criminal Justice System edited by M. Chérif Bassiouni, 1982, pp.50-90, and p.83.

For an understanding of the contemporary situation in terms of the traditions of the legal profession from the middle ages to the modern times, a reference may be made to the historical evolution in England.

In England, as in France and other countries legal representation evolved slowly. In ancient times, appointment of an attorney was allowed only on special grounds and by formal authorization in court or by special writ 8/. By the time of Edward I, in the thirteenth century, however, there were already two types of lawyers, attorneys and pleaders. The distinction between the two types was sharply drawn. As late as the fifteenth century, attorneys might be members of the Inns of Court, but sometime in the sixteenth century, their links with the Inns of Court were snapped and they were without an organization, without much of a professional tradition and without any effective discipline. In the fifteenth century another clan of persons, called solicitors, began to appear in Chancery.


In 1825, the Incorporated Law Society was founded: in 1831, it was given a charter; and by the end of the century it had become recognized as the authority for "the education, admission and regulation of solicitors and the repression of professional malpractice". The term "solicitor" superseded the term "attorney" in England. The other branch of the legal profession in England consisting of barristers has a long and uninterrupted lineage. There were four Inns of Court and some 10 Inns of Chancery. The Inns had benchers and students who taught and studied law.

8/ Glanville, De legibus et consuetudinibus regni Angliae (1187 - 1189) Book II, chaps. 1-2 (Beames' translation, 1900) pp. 223-2 pp. 223-226. Cited by Roscoe Pound, Jurisprudence, Vol. V, Part VIII, 'The System of Law', 1959, p. 685.

The Inns have retained their character as institutions of professional legal education and qualification and function as homogeneous professional bodies with an important role in inculcating a strong sense of professional ethics and a sense of public responsibility. Both judges and barristers belong to the Inns. Judges are elevated only from among senior barristers of recognized standing at the Bar. The history of judicial independence in England is also the history of the independence of the legal profession, which has been the cradle of British legal culture. It is in the Inns of lawyers that the most crucial battles of ideas were fought; institutional equations for the impartiality and independence of the justice system and the liberty of the British people were worked out, the dignity and the freedom of the legal profession were established, and the ethics and etiquette of the legal profession were established, and the ethics and etiquette of the legal profession became a living tradition. It may be that the composition and the culture of the legal profession have at times reflected class or colour bias, but a certain responsive sense of public accountability and principled professionalism make it possible for the essentially conservative community of lawyers to move with the times. It is noteworthy that the British legal profession, its ideas of judicial impartiality and independence and its commitment to the freedom and independence of the legal profession have exercised a strong and lasting

influence throughout the world, more particularly in what were at one time British dominions and colonies.

Among the colonies of Great Britain, America began by forbidding and expelling lawyers from litigation. It was soon discovered that "the work that ought to have been in the hands of trained, responsible members of a profession got of necessity in the hands of minor officers of the courts, sharpers and pettifoggers" ^{a/}. In New York and Maryland in the seventeenth century, sheriffs, constables, clerks and justices of the peace were flourishing as practising attorneys in their own courts and legislation had to be enacted to prohibit them from doing so ^{b/}. The confusion persisted even as late as 1759 when John Adams found the practise of law in the "grasping hands of deputy sheriffs, pettifoggers and even constables" ^{c/}. During that period, however, there were, at the higher stratum of the legal profession, many educated and well trained lawyers. According to Warren, 115 americans were admitted to the Inns of Court in England from 1760 up to the Revolution ^{d/}. Eight institutions of learning, where prospective lawyers could receive liberal education, had been established before the Revolution. The Revolution, however, engulfed the legal profession in a serious setback.

The decline of the professional idea and ethos led to a virtual collapse of standards and requirements as to education and professional training of lawyers particularly after the Civil War in the United States. In 1860, only nine of the then 39 jurisdictions prescribed a definite period of preparation for admission to the Bar. Preliminary general education was no longer required. New Hampshire, Maine, Wisconsin and Indiana abolished all educational requirements. Apprentices read law in the offices of practitioners who seldom exerted themselves to teach or supervise their professional work. There was opposition to an educated, adequately trained bar and an independent, experienced, permanent judiciary. The history of legal and social institutions in the United States shows that the resurgence and renovation of legal professionalism imbued with the spirit of the time and inspired by the ideal of public service during a 

^{a/} Ibid., p. 688.

^{b/} Riley, "The Development of the Legal Profession in Maryland" (1899); quoted by Pound, ibid.

^{c/} Works of John Adams, 2, (edition published in 1856), p. 58 and p. 271, referred to by Pound, op.cit., 688.

^{d/} Warren, History of the American Bar (1911), p. 194 ff.

little over the last one hundred years have brought a decisive change in the quality of legal education, the calibre of the legal profession, the prestige of lawyers and law teachers and their social impact, the use of law for social engineering and as a vehicle of human rights. The leading law schools and the Bar Associations have over the years played a momentous role in bringing about a sea change in the role perception and the role performance of the legal profession. American lawyers and judges occupy a pre-eminent position in the American society. The American Bar today is large, well-knit, affluent and influential. It is aware of its social responsibilities, and has the will and the resources to move in the direction of realizing its objectives. Its institutional image today is that of a pillar of liberty and mainstay of society's striving for justice. Younger generations of lawyers have spear-headed a movement for equal justice, particularly to alleviate the situations engendered by discrimination and poverty. Particularly notable in the context of the present study is the American Bar Association's Committee on International Human Rights, its Sub-Committee on the Independence of Lawyers in Foreign Countries, and its Network of Concerned Correspondents, illustrating the sense of solidarity and concern in the American legal profession for human rights generally and for lawyers in other countries in particular.

Most of the constitutions of States do not make express provisions for the independence of the legal profession as they do in respect of judges, or even jurors and assessors. That is perhaps because the legal profession does not generally constitute an organ of State power and its independence is assumed to be in existence independently of the organ of State powers or because its autonomy is secured by legislation, social and professional traditions and conventions, and by the very nature of the work lawyers do. Indeed, it is their work and tradition which together define the nature and scope of their independence, because their independence, as that of judges, jurors and assessors, is a prerequisite in their work. It is premised on the service they render, and because that service is best rendered in traditions of freedom, independence is its most fundamental aspect.

A lawyer cannot perform and fulfill his representational or advisory role under any external threat, restriction, pressure, influence, inducement, intimidation or interference from any quarter, direct or indirect, or if there is a conflict of interest. He cannot be quite impartial or independent

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of his client, but professional ethics do expect of him a certain degree of objectivity, freedom and independence, even in the relationship between him and his client. A lawyer represents his client and his interest but in advising his client, he also represents the law. A lawyer is entitled to advise his client what he can do and what he cannot do, and is not bound to follow his client's peremptory behest to stop telling him what he cannot lawfully do and to tell him how he can do what he wants to do. Nor is it a part of the lawyer's duty to so identify himself with the interests or desires of his client as to conspire in committing a crime or a civil wrong.

37. The independence of lawyers is a right of the individuals and institutions seeking remedies because it is a functional guarantee of the rights of individuals and institutions in need of lawyers to represent them or to advise them. It is evident that a lawyer who is subjected to undue pressure or inducements of any kind from any quarter cannot properly and satisfactorily discharge his professional duties for and on behalf of his client. If he succumbs to any such pressure, he forfeits the right to represent or advise his client. Such pressure or inducement may come from the opponents of his client or of the class or group or race to which his client belongs. Pressures of public opinion in unpopular causes are equally perilous. Discrimination is often a social malaise manifested in an attitude of mind. If a lawyer suffers from prejudice or is influenced by the prejudice of others, he cannot be depended upon to do his duty. There would then be no access to justice for such groups or classes who are victims of prejudice. Even in ordinary litigation, a lawyer should be able to command the implicit and complete confidence of his client. The trust and confidence of the litigant (or anyone seeking legal advice) in his lawyer springs from the lawyer's competence, diligence, reputation, freedom, courage and the observance of the highest professional standards by him. If a lawyer is identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be, the professional freedom of the lawyer is impaired. Unfortunately this is a widespread phenomenon and therefore lawyers are held to public obloquy and social ostracism and are even subjected to loss of professional work, loss of personal liberty and loss of life because they are professionally connected with a case or a kind of case or because they are courageous and have integrity. It is well known that lawyers are also rewarded by gifts of high public offices for professional services rendered to political parties. That, however, is understandable and excusable, but when a lawyer is made to suffer or is threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or cause, the stage is set for the intimidation of the legal profession and violation of its independence.

Throughout the world there is a striking similarity in respect of three fundamental aspects: (a) the concept of law as a profession, (b) the broad identification of a function of advising clients and representing them

professionally, (c) the autonomous organizations of lawyers as a professional class. Each one of these aspects is vital to the status of the community of legal practitioners and to their independence. Their role as scholars and publicists, which also calls for a special measure of erudition, objectivity and independence, is also generally recognized and had its beginning in ancient times.

Given the complexities of modern society, whatever the stage of economic development in a country, lawyers have become indispensable. Citizens, groups and the State require legal advice at every step to anticipate and avoid problems and to arrange and order their affairs; they require lawyers to represent them. Lawyers have expert knowledge and special skills. What is fundamental, they have a sense of social responsibility, professional ethics, and a degree of independence necessary to the performance of their functions. In modern society there cannot be a satisfactory or systematic organization of the economic and social activities in a community or in the world (which is itself a community today), and there cannot be an acceptable system of adjudication and settlement of disputes without law or lawyers. Nor can fundamental freedoms and basic human rights be adequately protected and effectively advanced without the active involvement of the legal profession. To perform these tasks, a lawyer must be free and independent individually and the legal profession should be free and autonomous, as an organized profession. The lawyer and the legal profession must be aware of the ideals they serve and the manner in which they must serve those ideals in the fulfilment of their obligations.

A lawyer has obligations to his client as well as to the society. His obligations to the society include his obligation to his profession as well as to his fellow human beings. It is in this context that the legal profession may be defined as a group of men and women pursuing a "learned art as a common calling in the spirit of public service - no less a public service because incidentally it may be a means of livelihood" ^{12/}. There is a great deal more than traditional dignity and convivial fellowship in the idea of a profession. There is intellectual and moral striving which is characteristic of the legal profession. There is the spirit of public service, the quest for justice and fair play, and the commitment to certain values which have earned them the appellation of a noble profession. The independence of the legal profession is vital not for the sake of lawyers but because they serve the fundamental cause of the rights of human beings and those of the society.

^{a/} Roscoe Pound, Jurisprudence, Vol.5 Part (The System of Law, 1959, p.676).

The development and character of the legal profession is linked to the evolution and outlook of the legal order within the framework of which it operates. A lawyer serves that legal order, helps to extend its frontiers and attempts to reform and humanize it. A lawyer is, in this sense, not only a mechanic but also an engineer and an architect.

33. The profession and its own role perception bears testimony to its sense of tradition and its awareness of social purpose and accountability. Role perception by the profession is an assurance that the goals and ideals of the profession are not relegated to oblivion, that the acknowledged expectations which form that role perception constitute a kind of social contract and an earnest of role performance. The profession's own understanding of its role leads to rules and conventions of ethics and etiquette, some of them written and many of them unwritten. These rules and conventions are sensitive to social pressure, needs and demands, and are subject to change from within and sometimes by legislative or judicial intervention. They help in the constant process of the socialization of the profession. The ideals of the legal profession are in a fundamental sense universal without being uniform. Their universality provides the basis of shared values and common principles applicable to the legal profession on a world-wide basis. These ideals cannot be achieved unless the independence of the legal profession as an intrinsic institutional and functional condition is guaranteed a.

34. Fundamental to the role of the lawyer and the principle of the independence of lawyers is the lawyer's professional education and training. It is through legal education and professional training that lawyers are educated in the discipline of law as a science and as an art and are prepared for their professional duties. Professional competence is imparted to them as students in universities, as apprentices preparing for their legal careers and as young lawyers imbibing knowledge of law and techniques of advocacy from their seniors. It is during this formative stage of their lives that their value system is shaped and they acquire their sense of professional ethics, their awareness of the social responsibilities of the legal profession, and their concern for human rights and fundamental freedoms. In their capacity as teachers, researchers and critics, the independence and objectivity of academic lawyers is crucial.

a See B. Barber, "Some Problems in the Sociology of the Professions", 1963. (see Daedalus Vol. 92 No. 4, 672. Durkheim came to the conclusion that an occupational activity can be efficaciously regulated only by a group intimate enough with it to know its functioning, feel all its needs, and able to follow all their variations. See J. S. Gandhi, Lawyers and Touts, 1982.

An illustrative reference to the Inns of Court in England would serve to underline the importance of professional legal education. For centuries they have functioned as nurseries of the legal profession: They admit members to the Bar, provide for their education and set the pace of professional conduct and etiquette. There is an atmosphere of cohesive homogeneity. An inn is a university, a club and a guild rolled into one, united by shared and continuing tradition and ritual but at the same time alive to modern needs. Judges, senior and junior barristers and students reading for the Bar all belong to the Inns which are meant to provide legal instruction in a professional setting. Younger members imbibe the values of the profession and its traditions as a part of their professional education and culture. To an outsider and a critic, an Inn may appear to be a highly inbred and exclusive institution, perpetuating a class structure and preserving the status quo. They are no doubt essentially conservative institutions and are not quick to respond to sudden winds of change. On the other hand they have shown a considerable capacity to cope with the changing times without discarding tradition. The Law Society which is the professional body of solicitors plays a similar educational, informative and disciplinary role. The Inn and the Law Society and the universities inculcate in the students the philosophy and outlook of sturdy professional independence.

In most countries of the world there is a clearcut shift from professional apprenticeship to universities for imparting legal education. In many countries, a first university degree followed by another university degree in law is necessary for admission to the Bar. In a study first published in 1922, Max Weber correlated the system of apprenticeship and the pragmatic responsiveness of the common law and contrasted it with the more intellectual and formalistic treatment of the law arising from university education in Europe. From the point of view of the independence of the legal profession, it is necessary to transmit the ethos of the profession and the basic value of its independence both through university education and professional training, both as a part of intellectual equipment and as a matter of pragmatic approach. The objectives of legal education and training throughout the world should be to equip the student with (a) technical professional competence and liberal and contextual understanding of law, its evolution and its role; and (b) an awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms, and a sense of social responsibility and concern for those who are disadvantaged or neglected. In this context, and in order to emphasize the new dimension of the second (not secondary objective), Lord Wilberforce spoke in Manila a few years ago of the need for a new breed of lawyers sensitive to the social obligations of the legal profession and Mr. Justice P. N. Bhagwati has advocated the idea of "barefoot" neighbourhood lawyers in the third world countries to highlight the new challenges to which the legal profession must respond a.

a / See Kishore N. Govind (Fiji). "Do we Need "Barefoot" Lawyers?" Papers-Proceedings of the Commonwealth Law Conference (Hong Kong), 1983, pp.57-62.

It has to be appreciated that different countries follow different systems of legal education, different kinds of curricula and different durations of study. Diverse pedagogic methods and techniques are employed in different legal systems. It is, also, generally accepted that a lawyer's education does not end when he finishes his legal studies in the university for entry into the profession. In many countries, the legal profession holds its own examination and requires the observance of certain formalities for admission to the Bar. In England, there is now a new emphasis on university education in law, but admission to the profession is exclusively a professional preserve of the Bar Council and the Law Society for barristers and solicitors respectively.

In the Republic of Korea, admission to the Bar is through a very difficult examination after the completion of legal education in the university. In Japan a person has to complete the course of a legal apprentice after his legal education to be qualified to be a practising attorney a/. Intensive practice courses are also given by the bodies of the Bar in different countries. The main idea is to ensure professional competence, but what is needed equally is that human rights content of legal education and the emphasis on the independence of the Bar as a professional institution should be substantially augmented. Access to legal education and law careers is obviously an important determinant of the role which law and the legal profession play in society. If there is indirect discrimination or systematic exclusion in the matter of legal education or entry into the legal profession, it is bound to have certain repercussions on the way the legal profession would function. There may not be overt discrimination and yet it is quite possible that for one reason or the other a segment of the population is excluded from legal education or the legal profession. From the point of view of avoiding the detrimental consequences of class bias and affiliation and of ensuring the independence of the legal profession, access to legal education should be open, equal, uniform and without any discrimination. In some jurisdictions, it is constitutionally permissible and socially desirable to resort to a moderate measure of affirmative action to secure wider accessibility and to correct imbalances. Wider accessibility is likely to bring an enlargement of perceptions and a more representative responsiveness which democratizes and socialises the legal profession and prevents it from becoming exclusive and elitist. Such wider accessibility may often diminish the conventional social homogeneity and lower the quality and standards of the profession. It would call for a strategy to ensure that members of educationally backward or socially deprived sections of the community have full opportunities to come up to the level of others before they actually enter the profession or soon thereafter so that standards of the profession as a whole do not

a/ See Law No. 205 of 1949.

suffer a serious setback and qualitative disparities are not created. It may be noted that for a long time, discrimination was practised in the matter of entry to the legal profession not only on the basis of race, colour and social origin but also on the basis of sex. Earlier in this century, women were not permitted to become lawyers in many countries. In recent years there has been an increasing number of women lawyers in most countries of the world. Their entry in the legal profession enables the profession to perform its role more adequately and with a fuller awareness of the women's viewpoint which in its own way contributes to objectivity and independence.

The numerical strength of the legal profession is important because it helps to strengthen its influence and enables it to discharge its duties to the society adequately. There is no set formula for determining the ideal strength of the legal profession in a given country. No proportion or percentage in relation with the total population can be indicated as reasonably necessary. Certain societies are more law-minded or litigious than others. Forms of wealth and property and their distribution and patterns of litigious disputes may also indicate the extent to which lawyers are required and the areas in which they specialize. The need for lawyers also depends on the existence of an efficacious remedial framework, how much it costs to go to a lawyer and to institute legal proceedings, how long it takes for the disposal of the case, how credible and satisfactory is the process of adjudication in every society. The problem of costs and the problem of the law's delays assume grave proportions. The legal profession has a social obligation to ensure that the law's delays are reduced to the minimum and that legal services are available at a fair price, although in most jurisdictions, it is neither necessary nor practicable to impose a rigid or uniform scale of fees so long as the system does not make legal services a rich man's preserve. An adequate number of lawyers and the freedom of choice to the public may generally be the most acceptable method. Demand and supply cannot be determined with precision but it is generally of interest to see whether there is a shortage or surfeit of lawyers. While the numerical strength of the profession also has its impact on the society, it has also the likely consequence of bringing down the standards of the legal profession. Large numbers varying in quality would have the inevitable effect of providing poor sub-standard legal services. A small number, although of very high quality would lead to a scarcity of legal services and a measure of elitism. The profession must balance both quality and quantity.

3. Jurisdictions with a very small number of lawyers face a problem with regard to legal literature, reporting systems and the quality of intellectual discourse. It is difficult to build up a sense of community when the number of lawyers is very small. There are also countries which have no lawyers. Rwanda is an example in point.

If legal education and professional training are formative factors in preparing prospective lawyers for a true perception of their role, and of the basic importance of the principle of independence, the faithful performance of that role in advisory and representational capacities is the operational test. An avocat, abogado, advocate or attorney, by whatever term he may be designated, and whether he is a senior or junior member of the Bar, performs both advisory and representational functions. Most of them in most of the cases perform those functions for a consideration. The crucial questions, however, are whether those functions are being performed in a careful, competent and diligent manner, with dignity, honour and humanity and in consonance with norms of the ethics of the legal profession; whether the lawyer is performing those functions faithfully, fearlessly and with freedom and independence, without any hindrance, influence, interference, restriction, obstruction, inducement, pressure or intimidation from any quarter; whether the services of lawyers are available to everyone in society and there is more or less equal access to justice without discrimination; whether the legal profession as a whole is helping to uphold the rule of law, to promote and protect human rights and to strengthen truth and justice in the society. This simple four-way test provides the touchstones for evaluating the social role of the legal profession. To answer this four-way test to his own satisfaction and to the satisfaction of the legal community as well as the society as a whole each lawyer must be imbued with and inspired by the noble traditions of his profession and be conscious of the privileged and responsible position he occupies in the society. The basic framework of the rules of legal ethics is more or less the same in different legal systems.

Legal ethics provide the ground rules for lawyers as a class to participate in a civilized social exercise of resolving disputes and helping to adjudicate or of redressing grievances in accordance with law, equity and good conscience. The office of the lawyer generally is to seek justice according to law. He may help to interpret law in the light of the justice of the case. He represents a cause and a client but he also represents the law and its discipline and wisdom. He cannot perhaps be altogether impartial or independent vis-à-vis his client and the cause of his client, but to the extent that his allegiance is ultimately to law and he is also an officer of the court, his partisanship must be tempered and he must retain a measure of professional independence even in relation to his client and the cause of his client. The rights and duties and the conduct and motives of lawyers are premised on the functional requirements of a lawyer's work and should be such "as to merit the approval of all just men"^{21/}. The duties of a lawyer

^{21/} See generally American Bar Association, Opinions of the Committee on Professional Ethics with the Canons of Professional Ethics, 1967 Edition.

towards his client are to advise his client as to his legal rights and obligations; take legal action to protect his client and his interest, and represent his client before courts, tribunals or administrative authorities. A lawyer may, in keeping with the rationale of the law, appeal to the conscience of the judge or the jury and may persuade them to so apply the law as to do justice as he sees it. He may advise his client on the strength and weakness of his case. His professional ethics demands that he should advise fairly and candidly, and with a sense of responsibility, and that he should not foment litigation or help to fabricate evidence or assist his client in committing a fraud or contravening the law. He enjoys immunity in respect of confidential communications of his client for public policy reasons but not for enabling him to conspire or collude in the commission of a crime.

Confidentiality of lawyer-client communications is an important condition for the discharge of his duties by a lawyer in an independent, fair and credible manner. In most countries, communications between the lawyer and the client are regarded as privileged. When a lawyer is engaged to defend a client accused of crime, the lawyer is entitled to present every defence that the law permits by all fair and honourable means. If a lawyer defending his client were to disclose the information received by him from his client or if the State were to interrogate the lawyer with regard to what his client told him, or pry into a lawyer's papers to discover what an accused person might have told his lawyer or what document he might have handed over to him, the prosecution may not need to have witnesses and the lawyer would be reduced to the position of a prosecution witness. The privileged confidentiality of a communication does not, however, extend beyond the case in which a lawyer is engaged. If a crime is about to be committed by his client, the lawyer is free to inform the police. Indeed it may be his duty to do so. An attorney whose client has fled the jurisdiction of the court while out on bail, must reveal the whereabouts of his client, even if received in confidence from the client a/. Information that a client has violated the terms of his parole is not privileged b/. According to an informal unpublished opinion, the lawyer of a fugitive from justice may not properly advise him not to surrender because he believes that public hysteria would prevent his getting a fair trial c/.

a/ Ibid., p.20. Formal opinion of A.B.A. No. 155.

b/ Ibid., Formal opinion No. 156.

c/ Informal opinion No. 14, Ibid., p.21.

A lawyer is not permitted to solicit business because that would be inconsistent with the dignity of his profession. If in recent years, lawyers have been permitted to advertise in certain jurisdictions, it is mainly because it is construed to be in public interest. A lawyer has a right of prompt access to his client in custody because that is necessary for the rights of the accused to be respected, for a fair trial and for maintaining rules of law. A lawyer cannot accept employment which puts him in a subordinate position to any authority because that would impair his freedom of advocacy. An elaborate set of rules indicating incompatibilities and conflicts of interest with the practice of law are laid down in all the legal systems to protect a lawyer's integrity and independence which are fundamental to his role in the justice system. A lawyer cannot engage in trading and commercial activities and in most jurisdictions he cannot practice any other profession, because he must give his undivided allegiance to his profession. He is generally free to participate in the political, social or cultural life of the country because that does not compromise his independence and because his intellectual and moral equipment and his status as a free and independent person are highly valued.

The lawyer owes a duty to show proper respect towards the judiciary and to defend and uphold its dignity. In all the legal systems a lawyer may or may not be regarded as an officer of the court, but he is an important limb of the law and the independence of the judiciary is vital to the independence of the legal profession and vice versa. Judges, not being wholly free to defend themselves, are particularly entitled to receive the support of the Bar against unjust criticism and clamour a/. That, however, does not mean that a lawyer is in any way subordinate to the judge. He has the right, in an appropriate case, to object to the participation of a judge or to the conduct of a trial or hearing. He may ask for the transfer of a case from a particular judge or a jurisdiction. He may report any misbehaviour or interference by a judge in the legitimate and fearless discharge of his duties to his colleagues and the Bar association and the Bar association may, in an appropriate case, express its disapproval of the conduct of the judge.

3. In certain countries, the leader of the Bar conveys the feelings of the Bar to the judge. Members of the Bar sometimes refuse to appear in the court of a particular judge or adopt other methods to make their objection clearly known. A judge is not supposed to use his power to punish for contempt of court in cases where a lawyer has only endeavoured to do his duty. Indeed,

a/ Ibid., p.16.

in certain jurisdictions, a judge may himself be held in contempt of court if he were to misbehave with a lawyer or use abusive or intemperate language. Nor should the judge who is apprised of his own contempt by a lawyer initiate proceedings to impose sanctions against the lawyer. A lawyer must enjoy civil and criminal immunity for statements made in good faith in written pleadings or oral arguments or in his professional work before a court, tribunal or other legal or administrative authority. In certain countries the Bar plays a part in the selection of judges. In those countries, the Bar should give due importance to judicial fitness in the selection process because it has the expertise to evaluate prospective candidates or nominees a/. Lawyers must scrupulously refrain from exerting any personal influence on a judge and from interfering in the due administration of justice. Relations between judges and lawyers must not be open to "misconstruction of motive" and must not appear to mark a lawyer as particularly favoured. As an American canon puts it: "A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the judge's station, is the only proper foundation for cordial personal and official relations between Bench and the Bar" b/.

~~2~~. A lawyer's safety and security must be ensured by the society and neither the State, nor any other authority, nor any individual litigant should be allowed to take any revenge in any form upon the lawyer or members of his family. It is well known that lawyers have been deprived of their liberty and livelihood and were prisoners of conscience merely because they discharged their professional duties fearlessly and courageously. Many of them were subjected to torture and abduction. These extreme episodes constitute a form of organized intimidation and put fundamental freedoms and human rights in double jeopardy. Lesser forms of interference with the independence of the legal profession, though not so crude and violent, pernicious and objectionable. They range from inducements and bribery to nepotism, blackmail and other seemingly gentler forms of pressure. When these lesser forms of interference are employed by individuals or corporations or even the agencies of the State, and if the decay of morality has not sapped the vitality of the society and the legal profession, we find reliable defences in the conscience of the individual advocate, the ethics of the legal profession, the protests of the people and the disapproval of the international community.

a/ Ibid., p.17.

b/ Ibid., p.18.

The most important condition of the faithful performance of the role of the legal profession is the autonomy and independence of its organization. For an individual lawyer his professional organization is his sanctuary. The honour and integrity of the profession and those who belong to it are secured by its independence which in turn is safeguarded by its autonomous organization. An individual lawyer can do little to protect his independence in the discharge of his functions in relation to powerful institutions or individuals. An autonomous collective group provides an institutional armour and insulation for its members. It is also the best vehicle for fostering professional tradition, ethos, and solidarity. It forges bonds of common interests for its members and imparts to them a sense of mission. An autonomous professional organization becomes the repository of continuity and collective social accountability. It is important that the aims and activities of the autonomous professional organization of the Bar should be such as to reflect the entire range of the concerns of the Bar association. In most countries, the legal profession is organized either as a statutory body under the public law or it operates as a voluntary association. In many countries both statutory and voluntary bodies of the Bar function side by side. These bodies of the Bar, statutory and voluntary, have a pivotal role in inculcating among the lawyers a sense of professional ethics and social responsibility and a sense of professional solidarity and independence. Leading members of the Bar have a very important place in the organization of the Bar and in preserving its spirit of sturdy independence. Their eminence and success as lawyers is often a source of strength to the Bar. Equally important for the autonomy and independence of the Bar vis-à-vis all external authority is the internal freedom of intellectual discourse within the profession.

Different legal systems have evolved a set of structural arrangements under which the legal profession enjoys a substantial measure of autonomy. If the legal profession is to preserve its autonomy of internal organization and regulation, it is imperative for it to exercise its disciplinary jurisdiction adequately, effectively and so as to merit and meet with the approval of the community, without any permissive indulgence to its erring members. Jurisdiction to take disciplinary proceedings should be vested exclusively in a committee established by the Bar, with full observance of fair and proper procedure and with a provision for appeal. What is more important, however, is that every member of the legal profession should be imbued with the ethics of the profession. A member of a profession must at all times strive to uphold its honour and dignity, and when he embarks on a course of questionable conduct with a questionable motive, he disparages and damages the very sanctuary which nestles him. That is, by and large, the universally acknowledged norm of the legal profession in all the countries of the world, though applied with varying degrees of precision, frequency and rigour.

In most countries, there are disciplinary tribunals within the legal profession to which a lawyer is accountable in the first instance. The Bar

association also provides a mechanism for professional self-scrutiny, internal reform and concerted self-defence against any threat to the independence of lawyers from outside. The disciplinary jurisdiction of the Bar association does not give a lawyer immunity from civil or criminal liability. In some countries, complaints of professional malpractice and professional negligence involving large monetary claims against lawyers have assumed alarming proportions and have made insurance of lawyers to cover such claims a practical necessity. In most other countries, insurance for claims against lawyers is not in vogue, mainly because litigation of this nature is either unknown or a remote possibility. That does not however absolve the organized profession itself from exercising its disciplinary jurisdiction in an effective way. In many countries there are strident complaints from the consumers of the legal system that the disciplinary bodies of the legal profession take a soft and indulgent view of the lapse of the members of their professional fraternity. In England, for example, a demand has been made that a certain number of non-lawyers should serve on the disciplinary board. Similarly suggestions which have been made in several other countries from time to time provide a compromise solution reconciling the claims of lawyers' professional monopoly, independence and social accountability.

5. Access of the lawyer to the justice system on behalf of his client, the existence of an adequate framework of remedies and access of the common man to the lawyer are relevant in the general functioning of the legal profession and its independence. The profession cannot be independent if it is dependent mainly on the affluent segment of the society for its clientele and cannot serve large sections of the society, or if remedies are denied, curtailed or rendered nugatory or if his right to communicate with or advise or represent his client is taken away. Formally, every system recognizes the right of access of every person (particularly a person in custody) to his lawyer and vice versa. Most legal systems do provide a framework of remedies. When these remedies are abrogated or suspended, as for example, in states of exception, or if these remedies are denuded of their efficacy, an independent lawyer and an autonomous Bar can do little except to appeal to public opinion within the country and in the international community. The further question is whether the services of lawyers are available equally to everyone in the society. This is an important question which goes to the root of the integrity and the independence of the profession. More particularly so in the third world countries where indigence, ignorance and social disability often deprive many persons of their human rights and their basic remedies.

6. An Achilles heel of the legal system in many countries is their inadequate provision of legal services for the poor or for those with moderate means. It is universally accepted today that equal access to the system of justice is integral of equality in the administration of justice, but to implement this principle in a full measure involves enormous cost and

organization. For centuries, most legal systems regarded equal access through legal aid a matter of professional or social charity: legal systems remained content with formal equality of access, the doors of justice being theoretically open to the rich and the poor alike.

In the United States of America, in 1919, Reginald Heber Smith wrote his pioneering book, Justice and the Poor: A Study of the Present Denial of Justice to the Poor ^{a./}. When the same author wrote with John S. Bradway Growth of Legal Aid Work in the United States ^{b./} in 1936, the situation had changed considerably, but not sufficiently. In later years, the Supreme Court of the United States of America laid down in the well known Gideon case that legal aid was a mandatory condition of a fair trial in criminal cases. The Office of Economic Opportunity in the United States of America funded neighbourhood legal-aid offices and other legal-aid schemes on an extensive basis and an independent legal-aid corporation was entrusted with monitoring their operation. During the last three decades there has been a virtual worldwide legal aid revolution. The legal-aid scheme in the United Kingdom is funded by the Government and is administered by the Law Society. The Ontario Legal Aid Plan was based on the close co-operation of the profession but its administration was autonomous from the outset.

In India, during the years 1970-1975, following the National Legal Aid Conference, there were many reports ^{c./} and blueprints advocating legal-aid programmes with substantial State funding. The foremost question in all legal systems is how far and in what way would legal aid funds provided by the State affect the independence of the legal profession and how means and merit tests may be applied ^{d./}. In no country can full-fledged legal aid

^{a./} Published in 1919. (New York: Carnegie Foundation for the Advancement of Teaching).

^{b./} Published in 1936. (US Department of Labor, Bureau of Labor Statistics, Bulletin No. 607).

^{c./} See for instance "Processual Justice", 1973; see also Reports of Gujarat, Tamilnadu, Rajasthan, Madhya Pradesh Committees on Legal Aid. Also report of Review and Implementation Committee, headed by Mr. Justice P. N. Bhagwati.

^{d./} See L. M. Singhyi, Legal Aid for Equal Justice, 1985; see also, World Legal Aid Colloquium, 1975 Papers and Proceedings. Also Legal Aid in the Third World Countries (1975).

be provided exclusively by the legal profession. The task is enormous and the cost, whoever pays it, would be considerable. Lawyers, particularly in the third world countries, may be expected to offer volunteer service but only to a limited extent. The State has no doubt the primary responsibility for funding legal aid, but care has to be taken to ensure that the Government outlay of funds does not undermine the independence of the Bar. A viable organizational pattern should be devised to maintain the independence of the Bar and at the same time to effectuate public accountability in respect of funds and performance.

In many countries, Government funding of legal aid has created new sectors of litigation, but if an organization of the legal profession (e.g. the Law Society in England) or an autonomous legal civil authority established for the purpose is entrusted with the task, the independence of lawyers can be maintained more satisfactorily than if the Government administers legal aid directly and appears to distribute legal work as a form of patronage or largesse. On the other hand, the autonomous authority can be independent and publicly accountable. In some countries, the judiciary has been entrusted with the task of overseeing the dispensation of legal aid. It has the effect of making legal aid prestigious, but it also raises the problem of the involvement of the judiciary with litigation outside their judicial work and the eventuality of a predisposition thereto. The problem of providing legal services to persons of moderate means also compels attention throughout the world. Caught in the inflationary spiral and the high costs of litigation, they can neither afford to pay for litigation nor are they so indigent as to be eligible to receive legal aid gratis. Access to the justice system for them may be designed on the basis of existing models in several countries, either on the basis of legal expenses insurance or on the basis of a subsidised contributory scheme administered autonomously by the legal profession.

An important factor in ensuring the independence of the legal profession is its sense of solidarity. The profession is able to preserve its dignity, honour and independence if it remains united in its allegiance to its basic ideals. Sometimes when the independence of the legal profession is besieged within a country and internal protests prove to be of little avail, the solidarity of the international community in general and of the legal profession in other countries of the world can prove to be an important factor. The international solidarity of the world community and of the legal profession throughout the world is possible only when there are regular and continuous channels of communication, exchange and interaction, and availability of information about the independence of the legal profession and what happens to it from time to time in different countries. Information is half the battle.

The subject should occupy a place of importance in the United Nations system and international bodies in consultative status and Bar associations

should regularly report on violations of the principle of the independence of the legal profession. The fundamental prerequisites to the independence of lawyers are in four basic guarantees relating to the right to practise any profession, the right to freedom of expression, the right to freedom of association and the right to freedom of assembly. Without these four fundamental rights and without the right to fair trial safeguards, the legal profession cannot maintain its independence. If these rights are guaranteed, the independence of lawyers can be effectively preserved. The ultimate safeguard of the independence of lawyers lies in the legal system and in the society. On the other hand, in a society and a legal system in which the rule of law and human rights do not find the pride of place, lawyers are relegated to an inferior position and their independence, honour and dignity can be violated with impunity. Equally, an independent judiciary is an essential guarantee of an independent legal profession. The independence of the judiciary and the independence of lawyers are interdependent and complementary.

Difficulty of access to courts and lawyers, the high cost of litigation, procedural delays and a general mistrust of lawyers have often contributed to a bedevilled image of the legal profession. Even judges have not been spared for allegedly conniving with lawyers and both together are sometimes described as a continuing conspiracy to promote their own interests. The legal profession is self-assured to the point of complacency and relatively little is done by the profession to cultivate public relations and to project a better image of itself. Lawyers know that they are essential to any scheme of the administration of justice. They also feel that the criticism levelled at them is highly exaggerated or actuated by malice.

The reasons for the public tirade against lawyers are fairly evident, their traditions and ethos are not known to the public. The more successful lawyers do well for themselves and do not fail to excite jealousy. The language lawyers use is not easily intelligible. Unfortunately, their services also cost money, for lawyers must live. What is more, only one of the two parties to the dispute can win and therefore the other party may excusably want a scapegoat in his lawyer or the legal system. Few have the fairness to attribute their failure to the lack of merit in their case. Fewer still appreciate that the truth of the matter is not a simple or absolute category and there are often two sides in the claim of truth and justice. But there are also some other significant reasons for the unpopularity of lawyers over which the profession and the society must continually ponder. Delays and the high cost of litigation for those who cannot afford it cause exasperation, frustration and a rankling sense of wrong. If the best lawyers are available only to the affluent and if the poor and the socially disadvantaged are denied their due access to the doors of justice, there is bound to be an adverse reaction to the legal system and to lawyers.

If lawyers do not assist and do not appear to assist in reforming unjust laws and procedures and in ensuring equality in the administration of justice, they would tend to be seen as the protectors of the privileged and not as upholders of right and justice. "A practising attorney" says the Japanese Law (No. 205 of 1949), "is entrusted with a mission to protect fundamental human rights and to realize social justice". The mission should be seen to be fulfilled and the legal profession should strive to have a better image of itself in the public mind.

The legal profession today faces a congeries of problems the magnitude and complexity of which are unprecedented. There is an explosion of knowledge, technologies and litigious claims. Law reports and learned commentaries have become increasingly formidable in volume and subtle refinements. Legislation has been multiplied manifold. Contemporary internationalism and the transnational roots and ramifications of transactions compel a modern lawyer to look beyond the frontiers of his particular legal system and the municipal law of his country. Corporations and their business are far more complicated today than ever before. Fundamental conceptual changes are taking place in every branch of law. New demands and new strategies, unmet hopes and unfulfilled aspirations are all converging upon the modern lawyer, more particularly in third world countries, where new socio-economic orders are struggling to be born and legal systems need the care of the legal profession in a world of want and suffering and maldistribution.

On the one hand, law and lawyers are needed to fight on the front of poverty and privation; on the other hand, law must adjust itself to the inputs and offerings of modern technology to make the legal process more efficient, by freeing the lawyers of drudgery, by making more judge-time and lawyer-time available to the society and all this without making law and lawyers lose their human face. Contemporary legal education must cope with demands of sophisticated, specialized and computerized professionalism as well as the claims of social justice, social responsibilities and human rights and fundamental freedoms. The fruition of this hope depends in a large measure on the strengthening of the principle of the independence of the legal profession throughout the world and on the sensitive understanding and realization by the profession itself of its role in modern society for which independence should be guaranteed.

X. TYPOLOGIES OF DEVIANCE FROM THE NORMS OF IMPARTIALITY AND INDEPENDENCE

An attempt to study and monitor the deviance phenomena in relation to the principle of the independence of justice has great practical utility. It would help to classify and systematize the symptomatic manifestations. It would be of assistance in identifying and verifying the manner, modus operandi and magnitude of mischief. It would facilitate a measure of analogical anticipation. An ongoing annual reporting procedure would aid in the application of standards and choice of strategies to deal with the more serious and persistent aberrations relating to the administration of justice. The purpose of this study, however, is more general and conceptual; it is also to make a pathological cross-section examination of the phenomena by extracting the essence of the events of deviance.

The principle of the independence of justice is universally accepted but its violation is by no means a stray occurrence. Nor is it a matter of merely minor or marginal infractions or an occasional unwitting lapse. When a norm is reasonably well-understood and when it is repeatedly observed to be breached not in one country but in many, the malaise of deviance from the norm cannot be dismissed as something superficial, episodic and of no lasting consequence.

The deviance phenomena may be broadly catalogued by reference to what happens to the judges, assessors and lawyers, their working conditions, their status and functions and their sense of security and independence. The following types of deviance which often coincide and overlap and generally occur in concerted combination are common:

(a) Dismissal, which sometimes involves removal or dismissal of an individual judge for refusal to decide a particular case in a particular manner, and sometimes involves collective removals and dismissals of judges or the abolition of entire courts when they are perceived as obstructing the projects, ambitions or objectives of the executive power. Amendment of laws affecting the tenure of judges so as to permit their dismissal or removal at the discretion of the executive is a related menace to the independence of judges.

(b) Transfer is known to be used either to punish a judge or remove him from a jurisdiction where his independence is considered a problem by the executive. Examples of the latter include the transfer from a criminal to a civil court of a judge who displayed sympathy for an accused belonging to a racial minority, or transfer of a courageous civil libertarian from a court of general jurisdiction to a tax court.

(c) Appointment of judges for a limited term or on an acting or officiating basis, and confirmation of judges in permanent posts and tenures on political considerations.

(d) In countries where promotion or confirmation of judges proceeds by established rules or conventions rather than by exercise of executive discretion, abrogation of rules or conventions for promotion may be considered as a variant of the punitive use of transfers.

(e) Assassination and "disappearance" of judges, although less common than assassination and "disappearance" of lawyers, occurs with sufficient frequency and must be considered as a problem affecting the independence of the judiciary.

(f) Emergency measures occurring during states of exception which deprive the judiciary of its power to consider certain questions of constitutional law, to enforce its decisions or to try certain categories of cases and to curb and curtail the judicial function seriously impinge on the independence of judges. In some cases these aspects of their jurisdiction simply cease to exist, while in other cases they are transferred to military courts or other specially constituted courts whose partiality and whose lack of independence, juridical knowledge and experience is alarming. Sometimes these measures are taken without any formal promulgation of emergency.

(g) Adverse publicity, embarrassing accusations in public, and populist pressures to deflect the judiciary from its appointed role and to discredit it.

(h) Indirect and/or selective executive patronage.

(i) Inducement of extra judicial assignments or important judicial assignments in the gift of the executive.

(j) Systematic denial of adequate budgets and support staff, denial of autonomy in internal administration, and inadequate pay, pension and other benefits and perquisites in the context of other comparable positions.

(k) Appointment of judges without reference to their integrity and ability or on a discriminatory basis or by denial of equal access to certain sections of the people.

(l) Exclusion of the judiciary from the process of making judicial appointments and lack of consultation with the judiciary or studied inattention to judicial advice in matters concerning the judiciary.

(m) Promotion of judges on the basis of extraneous considerations and neglect of ability and integrity in matters of judicial promotions.

(n) Use of temporary, ad hoc, part-time tenures by the executive to subject the judiciary to a psychosis of fear.

(o) Promise or expectation of post-retirement employment by the Executive or by individuals, business firms and large corporations.

(p) Fear of vexatious, criminal, civil or disciplinary proceedings, particularly if the power to initiate or authorize such proceedings is not vested in the judiciary.

(q) Suspension or abrogation of the rights of the citizens, ouster of jurisdiction by reorganization of judicial functions, and vesting essentially judicial functions in non-judicial bodies.

(r) Denial of social status by according lower precedence and generally adopting a less than respectful and courteous attitude towards the judiciary.

(s) Intemperate and ill-informed attacks by influential members of the executive or the legislature or by other official persons against the judiciary in parliamentary and other official fora and in mass media; electoral invective and retribution; partisan attacks by political parties.

(t) Questionable life styles of judges which provide grist for the gossip mill bringing the judiciary into disrepute.

(u) Private disputes of judges or excessive zeal of judges in prosecuting their own cases.

(v) Lack of restraint in making public pronouncements or the failure to observe the obligation of reserve; or overbearing behaviour; rudeness in court or outside.

(w) Unwillingness of a judge to withdraw from a borderline case involving incompatibility or possible conflict of interest.

(x) Membership of judges in organizations or movements which may go beyond good taste or accepted public morals or which may be committed to questionable aims or involved in objectionable activities or their association with such organizations.

(y) Senility and other forms of incipient or advanced incapacity.

(z) Judicial misbehaviour in the form of corruption, bribery, gross and palpable denial of justice.

374. Assessors in many countries are like judges; elsewhere they are experts. Jurors and assessors perform judicial functions. The deviance phenomena in

respect of assessors and jurors arise in the first place because of the defects of the system. There is interference with the function, independence of the institution of assessors and jurors when they are chosen in a manner or by a system which is meant to operate in an unfair, unequal and discriminatory manner. Jury packing, exclusion of certain classes or groups of persons from jury service, handpicking jurors or expert assessors in order to obtain a particular kind of decision, and inducing or intimidating them, are some of the well known ways in which the principle of their independence is violated. In countries where such assessors or jurors are regarded as the ultimate safeguard of the citizen, the abolition of the jury system or the institution of assessors poses a serious threat. A threat to their independence often arises from within also either because there are contaminating elements among them or because a judge tries to impose his will upon them.

55. In the case of lawyers, the deviance phenomena also arise from external as well as internal factors as the following catalogue of overlapping types of situations and factors interfering with their independence show:

(a) Suspension or abolition of the Bar association or an official ban on the Bar association or curtailment of their functions.

(b) Denial of the right of freedom of association, assembly, thought, speech, expression and movement to lawyers and organizations of the legal profession.

(c) Punitive action against the leaders of the Bar and making examples of them in order to subdue the legal profession as a whole.

(d) Undermining the organization and leadership of the Bar from within and from outside, officially and otherwise.

(e) Disciplinary proceedings, disbarment, suspension from practice or prosecution of lawyers for acts within the proper scope of their professional duties, such as filing complaints about police mistreatment of a client, challenging the impartiality of a judge, challenging the legality of a law or administrative action, or defending the legality of a client's behaviour or statements.

(f) Threats, intimidation, disbarment, suspension from practice, contempt or breach of privilege proceedings, or prosecution of lawyers for statements made in legal proceedings or outside the context of a legal proceeding for criticising individuals or régimes or proposing changes in the administration of justice.

(g) Selective and motivated prosecution, including raids, searches, seizures and other kinds of harassment, application of administrative sanctions against lawyers known for their defence of civil liberties, political defendants or social groups such as peasants, trade unions, or racial or religious minorities and for offences purportedly and ostensibly unrelated to these activities.

(h) Detention without charge or trial. Although security authorities normally do not offer reasons for such detention, it is often the case that a number of lawyers are detained at the same time and the lawyers selected are known for their activities as defence attorneys or advocates and advisers to opposition groups or disadvantaged of the society. The effect, and presumably the purpose, of such detention is to punish and intimidate lawyers who have demonstrated their willingness to provide such services, and to subdue and suppress the Bar as a whole.

(i) Torture and physical liquidation or "disappearance" of lawyers has been a serious problem in recent years in certain countries. In some cases the reasons for assassination are not known, but in others death threats or subsequent communiqués confirm that legal activities on behalf of certain individuals or groups was the reason. In some countries this has led to the result that no political defendant is able to find an independent and experienced criminal lawyer willing to defend him. Systematic assassination or "disappearance" of lawyers must therefore be considered not only a violation of the individual's right to life and liberty, but also a threat to the independence of the profession and a threat to human rights and fundamental freedoms.

(j) Lawyers are expressly barred from practice for political reasons in a small number of countries. For example, in one country, membership in certain political or professional organizations is considered as proof that the applicant does not support the "basic constitutional order", while in another country lawyers may be barred from practice despite commendable and notable professional records because they have not demonstrated sufficient support for the current political leadership of the country.

(k) Political patronage and preferment by the State and hostile discrimination by the State on political grounds.

(l) Politicisation of the profession.

(m) Loss of professional identity.

(n) Decline in professional values and disregard of professional competence.

- (o) Division and dissension among the members of the profession; lack of unity and solidarity.
 - (p) Lack of adequate incomes.
 - (q) Insecurity in case of early death or disability or after retirement.
 - (r) Absence of legal education of an acceptable standard.
 - (s) Lack of professional training opportunities and lack of attention to training in professional ethics.
 - (t) Elitist class composition of the Bar; lack of access to legal education for all sections of society and the insensitivity of the leaders of the Bar to the problems of new entrants.
 - (u) Lack of public credibility of the profession.
 - (v) Sharp practices and unethical conduct on the part of lawyers.
 - (w) Weakness in the exercise of disciplinary jurisdiction by the profession itself.
 - (x) Lack of access to the legal system by the common man, and absence of effective legal systems.
 - (y) Absence of proper relationship with the judiciary; excessive or unwanted use of the contempt of court powers; subservience to the judiciary.
 - (z) Absence of fair trial procedures, ouster of jurisdictions or denial of the right of representation to lawyers.
376. One could multiply instances and categories of factors and situations. For the purpose of arriving at meaningful analytical typologies of deviance it is sufficient to identify the main situation. From the point of view of the source or the direction from which the threat to and assaults upon the independence of justice are unleashed, it is possible to identify the following main types:
- (a) interference by the executive in a variety of ways ranging from official amiability to animosity and from ordinary hospitality to sharp hostility. Official displeasure is known to have taken forbidding and brutal forms in certain countries;
 - (b) interference by powerful groups and interests in the society.

(c) interference by means of legislation dealing with judicial powers and functions or immunities or security of tenure etc., or by what has been described by Madam Nicole Questiaux in her report on states of exception as the ultimate degradation of the constitutional state;

(d) deviance because of lack of professional competence and non-observance of ethical and professional standards;

(e) interference by the press and the media, by disgruntled litigants and the dissatisfied public.

The problems do not admit of any simple single solution. The battle of independence has to be fought on many fronts, not once and for all, but every day. That battle must be fought first and foremost in the minds of men. Justice systems must command the confidence and approval of all just men. That is the talisman for the movement for securing the independence of justice. Justice after all is on trial every day. It is not a cloistered virtue. Nor is it a patrimony of a few. It is the birthright of mankind and a part of the ceaseless quest of human civilization.

The disease of deviance has to be treated by the natural cure of keeping the systems healthy and by expurgating arbitrary authoritarianism. The most intractable problem is the problem of the judiciary in states of exception and siege. Authoritarian régimes snipe at the judiciary and take pot shots by pressing populism or crude power into service. They start by discrediting the judiciary and end by curtailing its powers, functions and independence.

In the states of exception the strategy of onslaught on the independence of the judiciary is more frontal. Judicial tenures are abruptly ended. Judges are suddenly relieved of their offices by one device or the other. They may be asked to avow their allegiance afresh to the new régime on pain of dismissal. Judges and lawyers may be imprisoned, manacled, tortured, intimidated or be made to disappear or put to death. Courts may be abolished or their powers and functions emasculated. New courts or tribunals may be created not only to try wartime or emergency offences but also to assume jurisdiction in civil and criminal cases or monitor adjudication in them. Rights and remedies are thus obliterated and a climate of terror is created so as to enslave the judiciary and make it subservient. Universally accepted norms and principles of the independence of justice may help in these situations of all shades of severity, firstly to evaluate violations and secondly to bring to bear the weight of world opinion upon such régimes. In this connection the work of the Human Rights Committee, the Inter-American Committee on Human Rights, the Commission on Human Rights and the Sub-Commission for the Prevention of Discrimination and Protection of Minorities and the work of

non-governmental organizations in consultative status blazes a new trail. These bodies have imparted a new dimension, meaning and urgency to the principle of international accountability.

But deviance is not always open and turbulent. It comes creeping in many insidious and subtle ways. That is why it is necessary for the unwary citizen and the more perceptive observers and opinion-makers both within the professional orbit and outside it to be on guard. Public and professional vigilance particularly at the non-governmental level, strengthening of legal and democratic institutions, human rights, legal culture, and the solidarity of the international community are the most durable long-term safeguards.

Many centuries ago when King James intervened in person on behalf of one of the parties in a pending case (Bruce v. Hamilton), "the Lord of Newbottle (Newbattle) then also stood up and said to the King that it was said in the town to his slander and theirs that they durst not do justice but as the King commanded them; which he said should be seen to the contrary, for they would vote against him in the right in his own presence". The Lords then so voted, "whereat the King raged marvellously and is in great anger with the Lords of Session. The King swears he will have Mr. Robert Bruce's case reversed, which the President understanding, says he will pen in Latin, French and Greek to be sent to all the judges of the world to be approved, and that by his vote it shall never be reversed. And so say the whole session" ^{a/}. (emphasis added). There is in these assertions, not only the principle of independence and impartiality but also an incipient articulation of the universality of that principle and of the principle of international accountability for a gross violation. The unity of the judiciary on a matter of principle and the appeal of the Scottish judge to the international solidarity of the judiciary and to its collective conscience rings across the centuries and carries a message for fighting the chronic phenomena of deviance from the norms of the independence of justice.

^{a/} T. B. Smith, British Justice: The Scottish Contribution, Hamlay Lectures, 1961.

XI. Epilogue

My conclusions and suggestions are:

1. The United Nations should adopt and proclaim a Universal Declaration on the Independence of Justice along the lines of the revised text proposed by me and appended to my U.N. report in 1987.
2. A *World* Institute on the Independence of Justice should be established and Comparative Law projects on the subject should be set up. *There should be affiliated corresponding institutes in different regions.*
3. There is need for a representative world organization specially wedded to the cause of independence of justice. Such an organization would have a special role in promoting and protecting the independence of justice and in creating world-wide solidarity and may not only provide a clearing house of information and a specialized institute of education and research on the subject of independence of justice but also a rallying point for the principle of independence of justice as a flighting faith.
4. The subject of Independence of Justice should be taught to law students and prospective lawyers and curricula based on a comparative approach should be developed. Every bar association should take up a professional and public education project on ^{the} theme.
5. A package programme of technical assistance should be launched for the development of legal institutions, training of lawyers and judges and promotion of the concept of independence of justice some of the countries where facilities are inadequate: The UNESCO and U.N. University should also address themselves to these tasks. National, regional and international seminars and exchange programmes for lawyers, judges, draftsmen, law officers and members and staff of law reform commissions on a sustained basis with a composite approach inclusive of the twin objectives of the technical assistance plan would be highly beneficial in a variety of ways. I would suggest a Five-Year Integrated Plan for the Development of Legal Institutions and Promotion of Human Rights as a part of development process.

6. A world movement should be organized to build up the defences of the independence of justice in the public mind and in the minds of those who operate systems and sub-systems of power in the society, *including judges and lawyers.*

7. Five years after the Universal Declaration is adopted, there should be a review for the purpose of preparing an International Covenant or Convention. In the meanwhile the Human Rights Committee of the U.N., the Human Rights Commission should collect and monitor relevant information of gross and persistent patterns of the violations of the norms of the independence of justice.

The striving and the struggle for the independence of justice is a part of the perennial quest and the ongoing battle for fundamental freedoms and basic human rights. And, in the immortal words of Byron:^a

For Freedom's battle once begun,
Though baffled oft is ever won.

a. The Giaour, 1.123.