

THE INTERNATIONAL PROTECTION OF THE INDEPENDENCE
OF THE JUDICIARY

ADDRESS

DELIVERED BY

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AT A CONFERENCE CONVENED BY

THE INTERNATIONAL COMMISSION OF JURISTS

IN CARACAS, VENEZUELA

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THE PROGRAM OF THE CONFERENCE ANNOUNCES THE TOPIC OF THIS ADDRESS AS FOLLOWS: "THE U.N. BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY AND THE MONTREAL PRINCIPLES". THE MATTER THEREFORE PRESENTS A TWOFOLD ASPECT, BUT THE ONE AND THE OTHER MERGE INTO A SINGLE QUESTION WHICH IS THAT OF THE PROTECTION OF THE INDEPENDENCE OF THE JUDICIARY AT THE LEVEL OF THE UNITED NATIONS. THE MATTER HAS INDEED BEEN UNDER ACTIVE CONSIDERATION IN THE U.N. SINCE THE BEGINNING OF THIS DECADE. YET SOME PEOPLE FEEL THAT THIS IS AN EXERCISE IN FUTILITY, INASMUCH AS THE INDEPENDENCE OF THE JUDICIARY, WHICH IS AN ESSENTIAL FEATURE OF A SOUND ADMINISTRATION OF JUSTICE, MUST DRIVE ITS ROOTS DEEPLY INTO THE NATIONAL SOIL WHERE ALL EFFORTS SHOULD BE PRIMARILY, IF NOT SOLELY, DIRECTED.

THERE IS ADMITTEDLY A CERTAIN DEGREE OF TRUTH IN SUCH A POSITION. ESSENTIALLY, JUSTICE IS ADMINISTERED AT A NATIONAL, OR REGIONAL, OR LOCAL LEVEL AND IT IS AT THOSE LEVELS THAT ITS INDEPENDENCE MUST BE ORGANIZED, MUST BE SEEN AND MUST BE RESPECTED.

INDEED THAT INDEPENDENCE WAS VIOLATED IN CHILE IN JUNE 1981 WHEN FOUR EMINENT LAWYERS WERE EXPELLED FROM THE COUNTRY AFTER HAVING OFFERED TO DEFEND ELEVEN UNION LEADERS BEFORE THE COURTS.

THAT INDEPENDENCE WAS VIOLATED IN COLUMBIA IN 1985 WHEN, IN THE COURSE OF A BATTLE BETWEEN THE GUERILLA AND THE ARMY FOR THE CONTROL OF THE COURT HOUSE IN BOGOTA, AT LEAST 95 PERSONS, INCLUDING 17 JUDGES, WERE KILLED.

THAT INDEPENDENCE WAS VIOLATED IN MALAYSIA IN 1987 WHEN THE LAW WAS AMENDED SO AS TO DENY ANY RIGHT OF JUDICIAL REVIEW TO PERSONS ARRESTED BY VIRTUE OF THE INTERNAL SECURITY ACT.

THAT INDEPENDENCE WAS VIOLATED LAST YEAR IN FIDJI UNDER A SIMILAR ACT WHICH PROVIDES FOR A PERIOD OF ADMINISTRATIVE DETENTION OF UP TO TWO YEARS UNDER THE MINISTERIAL FIAT, WITHOUT ANY RIGHT OF JUDICIAL REVIEW.

THAT INDEPENDENCE WAS VIOLATED LAST YEAR ALSO IN KENYA WHERE THE PRESIDENT HAS BEEN AUTHORIZED, BY A CONSTITUTIONAL AMENDMENT, TO REMOVE JUDGES AT HIS OWN DISCRETION.

BUT I DO NOT WANT TO APPEAR TO BE CLOSING MY EYES TO THE SITUATION IN MY OWN COUNTRY. WE BOAST IN CANADA OF A LONG TRADITION OF RESPECT FOR THE JUDICIAL PROCESS AND IT IS PROBABLY TRUE THAT WE ENJOY ONE OF THE MOST INDEPENDENT SYSTEMS...

... OF JUSTICE IN THE WORLD. INSTANCES OF OUTSIDE INTERFERENCE WITH THE LEGAL PROCESS ARE, TO SAY THE LEAST, EXTREMELY SCARCE. YET AT TIMES JUDICIAL INDEPENDENCE HAS BEEN PUT IN JEOPARDY AT THE HANDS OF SOME ILL-ADVISED POLITICAL AUTHORITIES. LET ME QUOTE THREE EXAMPLES PICKED FROM THE PRESENT DECADE.

THE FIRST EXAMPLE OCCURRED IN THE PROVINCE OF QUÉBEC. A WELL-KNOWN LADY, WHO HAD ACTED FOR FIVE YEARS AS DEPUTY-SPEAKER OF THE NATIONAL ASSEMBLY, WAS APPOINTED IN 1982 AS A MEMBER OF THE QUÉBEC MUNICIPAL COMMISSION. THIS IS A QUASI-JUDICIAL BODY WHOSE MEMBERS ARE APPOINTED, ACCORDING TO THE STATUTE, FOR A FIXED TERM OF TEN YEARS. HOWEVER IN THIS PARTICULAR CASE THE APPOINTING INSTRUMENT ALLUDED CRYPTICALLY TO «ANNEXED CONDITIONS». THIS PHRASE REFERRED ACTUALLY TO A DOCUMENT IN WHICH THE LADY IN QUESTION RESIGNED HER POSITION IN ADVANCE AT THE END OF A PERIOD OF FIVE YEARS AND THE GOVERNMENT RESERVED THE RIGHT TO RENEW AT WILL HER APPOINTMENT. SHORTLY BEFORE THE END OF THE 5-YEAR PERIOD, THE GOVERNMENT PUT THE LADY ON NOTICE THAT HER MANDATE WOULD NOT BE RENEWED. SHE APPLIED TO THE SUPERIOR COURT WHICH HAD NO DIFFICULTY IN FINDING THAT THE ALLEGED AGREEMENT VIOLATED A LAW OF PUBLIC ORDER: NO ONE COULD, EITHER BY DECREE OR BY CONTRACT, REDUCE OR VARY THE TENURE OF A JUDGE AS DETERMINED BY LAW. TO DECIDE OTHERWISE WOULD AMOUNT TO A TOLERATION OF A ...

... DISTINCT ATTACK ON JUDICIAL INDEPENDENCE. THE QUÉBEC GOVERNMENT DID NOT DARE CHALLENGE THE JUDGMENT BEFORE THE COURT OF APPEAL.

THE SECOND EXAMPLE OCCURRED SOME FOUR OR FIVE YEARS AGO, IN THE COURSE OF A POLITICAL SQUABBLE BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE PROVINCE OF SASKATCHEWAN. HERE ONE MUST BEAR IN MIND A PROVISION WHICH IS SPECIFIC TO THE CONSTITUTION OF CANADA: THE COURTS ARE SET UP BY THE PROVINCIAL AUTHORITIES, BUT THE JUDGES WHO PRESIDE OVER THE COURTS OF SUPERIOR JURISDICTION ARE APPOINTED BY THE FEDERAL, OR CENTRAL, AUTHORITY.

IN 1982 CANADA HAD A LIBERAL GOVERNMENT, BUT SASKATCHEWAN ELECTED A PROGRESSIVE-CONSERVATIVE PROVINCIAL GOVERNMENT. SHORTLY THEREAFTER A DISPUTE AROSE BETWEEN THE TWO GOVERNMENTS CONCERNING THE EXERCISE OF THE FEDERAL POWER OF APPOINTMENT OF JUDGES TO THE SASKATCHEWAN COURTS. THIS WAS STRICTLY A POLITICAL ISSUE, BUT IT VERY SHORTLY CARRIED WITH IT A THREAT TO THE INDEPENDENCE OF JUSTICE. INDEED THE COURTS BECAME A TOOL IN THE HANDS OF THE PARTIES. THE PROVINCIAL GOVERNMENT STARTED TO REDUCE THE NUMBER OF JUDGES BY A PROCEDURE WHICH, IN THEORY, COULD LEAD TO THE TOTAL EXTINCTION...

... OF THE COURTS. IN PRACTICE IT GAVE RISE TO SERIOUS ADMINISTRATIVE DIFFICULTIES. THE OBVIOUS PURPOSE OF THE POLICY WAS TO FORCE THE FEDERAL GOVERNMENT TO PUT JUDICIAL APPOINTMENTS ON THE BARGAINING TABLE.

HOWEVER IN SEPTEMBER 1984 THE CENTRAL LIBERAL GOVERNMENT WAS REPLACED BY A PROGRESSIVE-CONSERVATIVE GOVERNMENT WHICH SOON ANNOUNCED THAT IT WOULD «SEEK THE VIEWS OF THE PROVINCES IN ALL AREAS OF MUTUAL CONCERN.» SOME TIME LATER THE DISPUTE WAS SETTLED, BUT THE WHOLE EPISODE HAD PUT IN STARK RELIEF THE FRAGILITY OF THE INDEPENDENCE OF JUSTICE. IT HAD SHOWN VIVIDLY HOW SOME POLITICIANS WILL NOT HESITATE TO USE COURTS AS A PAWN IN THEIR POWER GAMES.

THE THIRD AND LAST EXAMPLE TOOK PLACE IN MY PROVINCE OF ORIGIN, QUÉBEC, NO MORE THAN HALF A YEAR AGO. FOR QUITE SOME TIME THERE HAD BEEN DISCUSSIONS AIMING AT THE UNIFICATION OF THREE COURTS COMING WITHIN PROVINCIAL JURISDICTION, NAMELY: THE PROVINCIAL COURT, THE COURT OF SESSIONS OF THE PEACE AND THE YOUTH COURT. THE INITIATIVE APPEARED ADVANTAGEOUS AND IT WAS FINALLY BROUGHT TO FRUITION UNDER THE PRESENT GOVERNMENT: THE RELEVANT LAW, WHICH WAS ASSENTED TO ON 17 JUNE, 1988 CONSOLIDATED THE THREE COURTS INTO ONE UNDER...

... THE NAME OF THE COURT OF QUÉBEC. UNFORTUNATELY, THE REALIZATION WAS MARRED AT THE LEVEL OF THE CHIEF JUDGES, THEIR DEPUTIES AND ASSOCIATES. IN SPITE OF THE ADVERSE SUBMISSIONS OF THE BAR, S. 154 OF THE ACT WAS PASSED, PROVIDING THAT <THE TERMS OF OFFICE OF (THE VARIOUS CHIEF JUDGES) SHALL END ON THE DAY OF THE ENTRY INTO FORCE OF THE ACT>. THUS THE LEGISLATURE DECIDED UNILATERALLY TO OUST THE CHIEF JUDGES IN THE COURSE OF THEIR MANDATE AND GAVE TO THE EXECUTIVE THE POWER TO APPOINT REPLACEMENTS. IN ACTUAL FACT, ONE OF THE THREE CHIEF JUDGES WAS RE-APPOINTED AS THE CHIEF JUDGE OF THE NEW COURT BUT, OF THE OTHER TWO, ONE WHO HAD BEEN ILL FOR SOME TIME WAS NOT RE-APPOINTED WHILST THE THIRD ONE WAS PURELY AND SIMPLY THROWN OUT OF OFFICE.

THIS IS AN EXTREMELY DANGEROUS PRECEDENT. UNDER THE GUISE OF A REORGANIZATION OF THE JUDICIAL SYSTEM, BOTH THE EXECUTIVE AND THE LEGISLATIVE BRANCHES OF GOVERNMENT HAVE ASSUMED THE RIGHT TO INTERFERE WITH THE INDEPENDENT ADMINISTRATION OF THE COURTS, TO DISMISS CHIEF JUDGES LEGALLY IN OFFICE AND TO APPOINT NEW JUDICIAL OFFICERS IN THEIR STEAD. THE PROCEDURE PROVIDED FOR BY LAW FOR THE REMOVAL OF JUDGES FOR CAUSE HAS BEEN SIDESTEPED. IN MY PERSONAL VIEW, THE CONSTITUTIONAL PROVISIONS DESIGNED TO UNDERPIN THE INDEPENDENCE OF JUSTICE IN CANADA HAVE BEEN FLOUTED. WHO CAN NOW BE ASSURED THAT, FOLLOWING AN EVENTUAL CHANGE OF GOVERNMENT, THE NEW LEGISLATURE WOULD NOT INTERVENE AGAIN TO DISMISS THE RECENTLY-APPOINTED CHIEF MAGISTRATES AND APPOINT NEW ONES MORE TO ITS LIKING?

SO WE SEE THAT NOBODY IS IMMUNE FROM THE DANGER OF EROSION OF JUSTICE; AND, BE IT IN ONE PART OF THE WORLD OR ANOTHER, IN ONE FORM OR ANOTHER, SOME ATTEMPT AGAINST JUDICIAL INDEPENDENCE IS NEARLY ALWAYS RAISING ITS UGLY HEAD. SO, WORTHY AS IT OBVIOUSLY IS, THE BATTLE FOR THAT INDEPENDENCE AT THE NATIONAL LEVEL CAN NEVER BE TOTALLY WON, UNLESS THE EFFORT BE BOLSTERED BY A STRONG INTERNATIONAL SUPPORT. THE SEARCH FOR SUCH A SUPPORT IS, THEREFORE, NOT AN EXERCISE IN FUTILITY. INDEED IT IS BECAUSE SO MANY PEOPLE HAVE REACHED THAT CONCLUSION THAT THE EFFORT, AT THE LEVEL OF THE UNITED NATIONS, COULD ATTAIN IN RECENT YEARS SUCH TELLING PROPORTIONS.

THIS EFFORT HAS FOLLOWED TWO SEPARATE, YET CONVERGING STREAMS AND, IN ORDER PROPERLY TO ASSESS THE CURRENT SITUATION, IT IS NECESSARY TO SURVEY EACH OF THOSE STREAMS INDIVIDUALLY. I PROPOSE TO CALL THEM STREAM I, WHICH STARTED IN GENEVA, AND STREAM II WHICH, PROPERLY ENOUGH, STARTED HERE AND CONTINUED IN VIENNA. THOSE TWO STREAMS CORRESPOND, BUT IN REVERSE ORDER, TO THE TWO ASPECTS OF MY TOPIC WHICH ARE STRESSED ON THE PROGRAM OF THIS CONFERENCE.

STREAM I GOES BACK TO 1980. THE U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES HAD THEN ENTRUSTED DR. L.M. SINGHVI, PRESIDENT OF THE BAR OF THE SUPREME COURT OF INDIA, WITH A STUDY «ON THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWERS».

IN A PARALLEL FASHION, HOWEVER, MANY INTERNATIONAL ORGANIZATIONS WERE TACKLING THE DIFFICULT SUBJECT; BETWEEN 1980 AND 1983, NO LESS THAN NINE CONFERENCES WERE HELD IN OSLO, MALTA, GENEVA, SIRACUSA, LISBON, JERUSALEM, NEW DELHI, NOTO AND TOKYO. BUT THE MORE CONFERENCES THERE WERE — AND I HAD TAKEN PART IN THE MAJORITY OF THEM — THE MORE IT APPEARED THAT A COMMON FORUM MUST BE FOUND WHERE A WORLD CONSENSUS COULD BE REACHED. IN THE SPRING OF 1982 I FORMED THE PROJECT OF SETTING UP THAT FORUM. IT EVENTUALLY LED TO THE FIRST WORLD CONFERENCE ON THE INDEPENDENCE OF JUSTICE WHICH SAT IN MONTRÉAL IN THE FIRST WEEK OF JUNE, 1983. THERE WERE THEN IN ATTENDANCE REPRESENTATIVES OF 24 INTERNATIONAL ORGANIZATIONS BASED IN ALL PARTS OF THE WORLD; IN EUROPE, IN NORTH, CENTRAL AND SOUTH AMERICAS, IN THE MID-EAST, IN ASIA AND IN AFRICA. TO GIVE BUT ONE EXAMPLE OF THE INTEREST OF THE MEETING, IT WAS THE FIRST TIME IN THEIR HISTORY THAT THE JUDGES OF THE FOUR INTERNATIONAL COURTS SAT TOGETHER TO DISCUSS THE STATUS OF INTERNATIONAL JUDGES.

DURING FOUR DAYS, THE CONFERENCE CONSIDERED A DRAFT DECLARATION WHICH HAD BEEN PATTERNED AFTER THE U.N. MANDATE GIVEN TO DR. SINGHVI. IT CONSISTED OF FIVE CHAPTERS DEALING RESPECTIVELY WITH INTERNATIONAL JUDGES, NATIONAL JUDGES, LAWYERS, JURORS AND ASSESSORS. BY SOME SORT OF A MIRACLE, ALL...

... DIFFICULTIES COULD FIND A SOLUTION AND, WHEN I PUT THE MATTER TO THE FINAL AND CRITICAL VOTE, THE DRAFT AS AMENDED WAS APPROVED UNANIMOUSLY. THIS WAS QUITE A MOVING MOMENT: THE FULL AUDIENCE ROSE TO THEIR FEET, APPLAUDING AND CHEERING; THEY WERE REALIZING THAT, FOR THE FIRST TIME, ALL PARTS OF THE WORLD HAD AGREED ON A SET OF PRINCIPLES ACCEPTABLE TO ALL CIVILIZATIONS AND CONDUCIVE TO THE SOUND ESTABLISHMENT OF AN INDEPENDENT SYSTEM OF JUSTICE.

UNFORTUNATELY WE MUST LAMENT THE ABSENCE OF CHINA AND THE U.S.S.R. BOTH COUNTRIES HAD BEEN INVITED; THEY BOTH DECLINED BY LETTERS ADDRESSED TO ME WHICH ALLEGED, FOR CHINA THE HEAVY WORKLOAD, FOR THE U.S.S.R. THE PRE-PLANNED SCHEDULE AND THE IMMINENT ELECTIONS IN THE JUDICIARY. AT LEAST NEITHER COUNTRY CAN COMPLAIN THAT THEIR VIEWS WOULD NOT HAVE BEEN SOUGHT.

AT THE CLOSING DINNER I ENJOYED BOTH THE HONOUR AND THE PLEASURE OF DELIVERING INTO THE OWN HANDS OF DR. SINGHVI THE TEXT OF THE «UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE» WHICH, BARELY THREE HOURS EARLIER, HAD BEEN ADOPTED BY THE CONFERENCE. DR. SINGHVI UNDERTOOK TO TAKE THE MATTER TO THE UNITED NATIONS.

NOW MIGHT BE THE TIME TO DISCUSS THE MONTRÉAL DECLARATION. THIS HOWEVER WOULD GIVE BUT A TRUNCATED VIEW OF THE ACTUAL SITUATION. LIFE DID NOT STOP IN 1983. INDEED I WAS THEN ELECTED TO THE SUB-COMMISSION ON THE PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES. THUS CHANCE MADE ME A MEMBER OF THE VERY BODY TO WHICH DR. SINGHVI WAS EXPECTED TO REPORT.

HE DID INDEED REPORT FINALLY IN 1985. HE THEN PROPOSED THE ADOPTION OF A DECLARATION PATTERNED AFTER THAT OF MONTRÉAL, SAVE THAT HE COMPLETELY ELIMINATED THE FIRST CHAPTER ON INTERNATIONAL JUDGES. I PLEADED WITH HIM TO RESTORE THAT CHAPTER: IT WAS, TO MY KNOWLEDGE AT LEAST, THE ONLY AUTHORITATIVE STATEMENT OF ITS KIND AND IT HAD BEEN DRAFTED WITH THE HELP AND CONCURRENCE OF THE PRESIDENT AND TWO JUDGES OF THE INTERNATIONAL COURT OF JUSTICE AS WELL AS ONE JUDGE EACH OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COURT OF HUMAN RIGHTS AND THE INTER AMERICAN COURT OF HUMAN RIGHTS.

HOWEVER DR. SINGHVI STOOD HIS GROUND «BECAUSE», AS HE WROTE TO ME ON 30 JUNE 1985, «THE ESSENTIAL ELEMENTS ARE ALREADY A PART OF INTERNATIONAL LAW AND STATUTES AND IN ANY CASE THE PRINCIPLES AND STANDARDS APPLICABLE TO 'NATIONAL JUDGES' ARE APPLICABLE TO INTERNATIONAL JUDGES.»

IN MY HUMBLE VIEW, IT IS A PITY THAT THE PIONEERING WORK ACCOMPLISHED IN MONTRÉAL HAS THUS BEEN LOST. BUT LET US NOT SPEND TIME SHEDDING USELESS TEARS, ESPECIALLY SINCE DR. SINGHVI HAD RECOMMENDED, FOR JUDGES AT LARGE, THE ADOPTION OF NEARLY THE FULL AND INTEGRAL CHAPTER CARRIED IN MONTRÉAL WITH RESPECT TO NATIONAL JUDGES.

HOWEVER IN 1987 THE SECRETARY GENERAL OF THE U.N. WAS REQUESTED BY THE SUB-COMMISSION TO SEND DR. SINGHVI'S TEXT FOR COMMENTS TO ALL GOVERNMENTS. NINETEEN (19) COUNTRIES RESPONDED AND, AS A RESULT, DR. SINGHVI BROUGHT TO HIS DRAFT SEVERAL AMENDMENTS OF SUBSTANCE. OVERALL THE FINAL TEXT WHICH HE SUBMITTED TO THE SUB-COMMISSION LAST SUMMER DIFFERED FROM THE MONTRÉAL DECLARATION IN AT LEAST THREE MATERIAL ASPECTS:

1. THE POSITION OF CIVILIANS VIS-À-VIS MILITARY TRIBUNALS IN TIMES OF EMERGENCY IS WEAKENED;
2. THE IMMUNITY OF JUDGES FROM PROSECUTION IS RESTRICTED;
3. THE BAR AGAINST JUDGES TAKING AN ACTIVE PART IN POLITICAL ACTIVITIES IS DROPPED.

THE WATERING DOWN OF THOSE PROVISIONS IS EXTREMELY REGRETTABLE.

AS A MATTER OF FACT ALL THREE POINTS HAD BEEN SPECIFICALLY STRESSED IN THE RECOMMENDATIONS WHICH EMERGED FROM THE TWO SEMINARS HELD UNDER THE AUSPICES OF THIS COMMISSION IN LUSAKA, ZAMBIA IN NOVEMBER 1986 AND IN BANJUL, GAMBIA IN APRIL 1987.

HOWEVER THAT MAY BE, THE SINGHVI DRAFT HAS AN OVERALL VALUE WHICH SHOULD NOT BE UNDERESTIMATED. DURING THE COURSE OF THE DEBATE ON THE QUESTION IN THE SUB-COMMISSION LAST AUGUST 24TH, A COUPLE OF MEMBERS SUGGESTED AMENDMENTS, AN EQUAL NUMBER WANTED STILL TO DEFER FURTHER THE CONSIDERATION OF THE DRAFT, BUT A LARGE MAJORITY EXPRESSED THEIR SATISFACTION AS WELL AS THEIR DESIRE FOR CONCRETE AND IMMEDIATE ACTION. TOGETHER WITH THE OTHER CHAPTERS DEALING WITH LAWYERS, JURORS AND ASSESSORS, WHICH I AM NOT CALLED UPON TO EXAMINE, DR. SINGHVI'S SUGGESTIONS WITH RESPECT TO JUDGES WERE AGREED TO BY THE SUB-COMMISSION WHICH SENT THE DRAFT DECLARATION TO THE COMMISSION ON HUMAN RIGHTS ON 1ST SEPTEMBER 1988, FOR ITS CONSIDERATION NEXT MONTH.

SUCH WAS THE MEANDERING COURSE FOLLOWED BY STREAM I IN GENEVA.

STREAM II BEGAN HERE IN CARACAS, AT THE VITH U.N. CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS. THE CONGRESS CALLED ON THE VIENNA COMMITTEE ON CRIME PREVENTION AND CONTROL TO INCLUDE AMONG ITS PRIORITIES THE ELABORATION OF GUIDELINES RELATING TO THE INDEPENDENCE OF JUDGES.

THE VIENNA COMMITTEE IN TURN ASKED ME TO PREPARE A DRAFT OF SUCH GUIDELINES. THE MONTRÉAL CONFERENCE HAD BEEN HELD SHORTLY BEFORE. NO ONE WILL THEREFORE BE SURPRISED THAT MY DRAFT FOLLOWED VERY CLOSELY, WITH ONLY A FEW NECESSARY ADAPTATIONS, THE TEXT OF THE MONTRÉAL DECLARATION.

THIS DRAFT WAS DISCUSSED IN VIENNA (MARCH 1984) AND VARENNA (SEPTEMBER 1984), FINALLY TO APPEAR ON THE AGENDA OF THE VIIITH U.N. CONGRESS IN MILANO. ON 6TH SEPTEMBER 1985 THE CONGRESS ADOPTED THE «U.N. BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY». WITHOUT BEING ENCUMBERED BY THE DELAYS WHICH HAVE PLAGUED THE PROGRESS OF THE SINGHVI REPORT, THE BASIC PRINCIPLES WERE IMMEDIATELY ENDORSED BY THE U.N. GENERAL ASSEMBLY (29 NOVEMBER 1985) WHICH INVITED GOVERNMENTS «TO RESPECT THEM AND TO TAKE THEM INTO ACCOUNT WITHIN THE FRAMEWORK OF THEIR NATIONAL LEGISLATION AND PRACTICE».

THIS WOULD COMPLETE THE SURVEY OF THE COURSE FOLLOWED IN THE U.N. BY STREAM NO II, WERE IT NOT FOR THE FACT THAT THE DRAFTING OF PROCEDURES FOR THE IMPLEMENTATION OF THE BASIC PRINCIPLES WAS LATER UNDERTAKEN BY THE U.N. SOCIAL DEFENCE RESEARCH INSTITUTE (BASED IN ROME) JOINTLY WITH THE U.N. COMMITTEE ON CRIME PREVENTION AND CONTROL (BASED IN VIENNA), IN COOPERATION WITH THE INTERNATIONAL ASSOCIATION OF JUDGES (ALSO BASED IN ROME). THIS EFFORT RESULTED IN THE ADOPTION BY THE VIENNA COMMITTEE, ON 31 AUGUST 1988, OF «**PROCEDURES FOR THE EFFECTIVE IMPLEMENTATION OF THE BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY**». THIS TECHNICAL DOCUMENT, WHICH FILLS A FEW HOLES IN THE BASIC PRINCIPLES AND ESTABLISHES A QUINQUENNIAL REPORTING OBLIGATION ON THE PART OF MEMBER STATES, SHOULD APPEAR ON THE AGENDA OF THE ECONOMIC AND SOCIAL COUNCIL THIS COMING SPRING.

WE COULD THUS WITNESS, LAST FALL, A CURIOUS COINCIDENCE: BARELY 24 HOURS HAD ELAPSED BETWEEN THE ADOPTION OF THE PROCEDURES CONCERNING THE BASIC PRINCIPLES IN VIENNA AND THE INTERIM APPROVAL OF THE DECLARATION IN GENEVA.

IN THE END, WE THEREFORE SEE THAT THE U.N. HAVE BEEN SEIZED WITH TWO DIFFERENT INSTRUMENTS, FLOWING HOWEVER GENERALLY FROM THE SAME SOURCE. ONE - THE BASIC PRINCIPLES - THE GENERAL ASSEMBLY HAS ENDORSED IN 1985 AND THE ECONOMIC AND SOCIAL COUNCIL SHOULD COMPLETE 3 MONTHS FROM NOW. THE OTHER - THE DECLARATION PROPOSED BY DR. SINGHVI - SHOULD APPEAR ON THE AGENDA OF THE COMMISSION ON HUMAN RIGHTS IN GENEVA...

... NEXT MONTH AND SHOULD ALSO EVENTUALLY REACH THE GENERAL ASSEMBLY. IT MUST NOW BE DECIDED WHICH COURSE OF ACTION WOULD APPEAR THE MORE SUITABLE UNDER THOSE UNUSUAL CIRCUMSTANCES.

THE TWO DOCUMENTS ARE AIMING OF COURSE AT THE SAME TARGET: THE RECOGNITION AND PROTECTION OF JUDICIAL INDEPENDENCE. YET THEY DIFFER IN THEIR NATURE AND APPROACH.

THE BASIC PRINCIPLES - AND THIS SHOULD NOT BE TAKEN AS A DISPARAGING REMARK - ARE BUT WHAT THEY PROPOSE TO BE: A BASIC UTTERANCE OF THE VERY FOUNDATIONS OF THE INDEPENDENCE OF THE JUDICIARY. THEY FORM THE SKELETON OF THE LIVING BODY OF JUSTICE. AS DR. SINGHVI HAS HIMSELF COMMENTED IN HIS JULY 1988 REPORT TO THE SUB-COMMISSION: «IT MAY, HOWEVER, BE POINTED OUT THAT THE VARENNA GUIDELINES ARE FAR MORE COMPREHENSIVE WHEREAS THE PRINCIPLES ADOPTED AT THE MILAN CONGRESS ARE CONSIDERABLY ABRIDGED» (P. 5, PAR. 10)

YET THE BASIC PRINCIPLES DO GENERALLY COVER THE GROUND OF JUDICIAL INDEPENDENCE. TAKING THEIR VARIOUS HEADINGS, THEY DEAL WITH FREEDOM OF ASSOCIATION AND EXPRESSION, QUALIFICATIONS, SELECTION AND TRAINING, PROFESSIONAL SECRECY AND IMMUNITY, DISCIPLINE, SUSPENSION AND REMOVAL. TOGETHER WITH THE OPENING CHAPTER ON INDEPENDENCE OF THE JUDICIARY ITSELF, THE BASIC PRINCIPLES DO AT LEAST ESTABLISH A FOUNDATION...

...FOR JUDICIAL INDEPENDENCE AND ALL COUNTRIES SHOULD HEED THE ADMONITION CONTAINED IN PRINCIPLE NO. 1: "THE INDEPENDENCE OF THE JUDICIARY SHALL BE GUARANTEED BY THE STATE AND ENSHRINED IN THE CONSTITUTION OR THE LAW OF THE COUNTRY".

EVEN IF IT BE TRUE, AS STATED BY MR. AHMED KHALIFA, A MOST DISTINGUISHED MEMBER OF THE SUB-COMMISSION, DURING THE DEBATE LAST SUMMER, THAT THE BASIC PRINCIPLES APPLY "MORE TO MINIMAL JUSTICE THAN TO THE JUDICIARY SYSTEM AS A WHOLE", NEVERTHELESS THEY POSSESS THE IMMENSE ADVANTAGE OF BEING THE FIRST AND ONLY INTERNATIONAL INSTRUMENT ON THE SUBJECT TO HAVE BEEN ADOPTED BY GOVERNEMENTS AND APPROVED BY A UNANIMOUS VOTE IN THE U.N. GENERAL ASSEMBLY. AS WE HAVE ALREADY SEEN THE GENERAL ASSEMBLY HAS RECOMMENDED TO ALL GOVERNEMENTS TO RESPECT THOSE BASIC PRINCIPLES AND TO TAKE THEM INTO ACCOUNT WITHIN THE FRAMEWORK OF THEIR NATIONAL LEGISLATION AND PRACTICE. THIS EXPRESS ENDORSEMENT MAKES THE BASIC PRINCIPLES AN INVALUABLE TOOL IN THE NEVER-ENDING STRUGGLE FOR JUSTICE IN THE WORLD AND COMMENDS THEM TO OUR FAITHFUL SUPPORT.

I FEEL HOWEVER THAT I WOULD BE REMISS IN MY DUTY IF I DID NOT DRAW THE ATTENTION OF THIS CONFERENCE TO VARIOUS IMPROVEMENTS WHICH COULD BE BROUGHT TO THIS FIRST INSTRUMENT, THROUGH THE ADOPTION OF A DECLARATION ALONG THE LINES OF THE DRAFT WHICH HAS NOW REACHED THE U.N. HUMAN RIGHTS COMMISSION.

SOME MIGHT BE TEMPTED TO SUGGEST THAT, IN VIEW OF THE BASIC PRINCIPLES, A DECLARATION WOULD BE REDUNDANT; THAT WOULD BE QUITE A WRONG CONCLUSION. TRUE, BECAUSE OF THEIR VERY NATURE BOTH DOCUMENTS ARE DEALING WITH THE SAME SUBJECT MATTER: BUT THE DECLARATION IS AIMING AT A HIGHER, THOUGH STILL REASONABLY ATTAINABLE, LEVEL. INDEED THERE ARE NO LESS THAN 25 PROVISIONS IN THE DECLARATION WHICH ARE NOT FOUND IN THE BASIC PRINCIPLES. IT WOULD BE A TEDIOUS JOB TO GO THROUGH THEM ALL, BUT LET ME REFER, BY WAY OF ILLUSTRATION, TO THE HEADINGS OF THE MOST PROMINENT OF THOSE DESIRABLE PROVISIONS:

ART. 1: THE OBJECTIVES AND FUNCTIONS OF THE JUDICIARY

ART. 5: STATES OF EMERGENCY

ART. 6: CLOSING DOWN OF THE COURTS, ETC.

ART. 8: FREEDOM OF THOUGHT, OF SPEECH AND OF MOVEMENT FOR JUDGES;

ART. 9,10

AND 11: THE SELECTION OF JUDGES;

ART. 15: PROHIBITION OF TRANSFER OF JUDGES;

ART. 19: SECURITY OF JUDGES;

ART. 22

ART. 25: GROUNDS FOR DISQUALIFICATION;

ART. 32 AND 34: RESPONSIBILITY FOR COURT ADMINISTRATION AND BUDGET;

AND I COULD GO ON.

INDEED THERE IS BUT A SINGLE POINT ON WHICH THE BASIC PRINCIPLES HAVE PUT FORWARD A MORE GENEROUS VIEW OF JUDICIAL INDEPENDENCE THAN THE DRAFT DECLARATION: IT IS ON THE VEXED QUESTION OF THE IMMUNITY OF JUDGES.

NO DOUBT THE DRAFT DECLARATION WHICH IS NOW ON THE AGENDA OF THE HUMAN RIGHTS COMMISSION CAN STILL BE IMPROVED. BUT, JUDGING FROM THE SLOW PROGRESS MADE BY THIS DECLARATION SINCE THE MANDATE GIVEN TO DR. SINGHVI IN 1980, IT IS LIKELY TO TAKE SOME TIME BEFORE IT REACHES THE GENERAL ASSEMBLY AND WINS ITS APPROVAL. IN THE MEANTIME THE BASIC PRINCIPLES ARE THE BEACON BY WHICH ALL NATIONS SHOULD BE GUIDED. LET US PRESS FORWARD FOR THEIR WORLDWIDE DISSEMINATION AND RESPECT.

L'INDÉPENDANCE DE LA JUSTICE:

LA RÉALITÉ CANADIENNE

THE INDEPENDENCE OF JUSTICE:

THE CANADIAN REALITY

Conférence prononcée par

L'HONORABLE JULES DESCHÊNES
LL.D., s.r.c.

devant

L'INSTITUT CANADIEN
D'ADMINISTRATION DE LA JUSTICE

à Montréal

le 15 octobre 1987

Address delivered by

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before

THE CANADIAN INSTITUTE
FOR THE ADMINISTRATION OF JUSTICE

at Montréal

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b) administrative independence	
Conclusion	

Je sais que je parle à des convertis. Inutile dès lors de revenir sur les principes de l'indépendance individuelle du juge et de l'indépendance institutionnelle du tribunal: nous connaissons ces principes et nous sommes d'accord là-dessus. Le sujet que l'on m'a demandé de traiter implique plutôt une approche pragmatique: la réalité canadienne. C'est donc surtout à l'aspect concret de cette réalité que je voudrais m'arrêter aujourd'hui.

Une précaution oratoire s'impose. Je viens de mentionner le juge et le tribunal; mais l'objet de cette séance est beaucoup plus large: c'est l'indépendance de la justice. Il faut donc prendre en considération la justice comme institution et tous les acteurs qui s'y produisent: non seulement les juges, mais les avocats et notaires, les jurés, les assesseurs et, à la limite, même les témoins. C'est dans ce sens élargi qu'il faudra entendre mes propos; et s'il m'arrive de ne référer par endroits qu'à l'indépendance de la magistrature, il ne faudra pas y deviner une attaque de chauvinisme, mais se rappeler qu'en plusieurs circonstances c'est à ce seul aspect de l'indépendance de la justice qu'on a voulu s'attacher.

Dans la première partie de cet exposé, je m'arrêterai donc brièvement à un rappel historique des principaux développements qui ont marqué le progrès de l'idée de l'indépendance de la justice depuis le début des années '80. Dans une deuxième partie, nous en examinerons en quelque détail la transposition dans la réalité canadienne. Dans la troisième partie nous étudierons la direction que devrait prendre un effort concerté au Canada pour ancrer le concept de l'indépendance de la justice dans la réalité canadienne.

I

RAPPEL HISTORIQUE

At the turn of this decade, the need for a study of the principles underpinning the independence of justice and of their practical implementation had become quite acute. Take only the year 1981. In January 1981 in Malta, the Government suspended the operation of the courts in order to cut short a trial which challenged the validity of certain official actions.⁽¹⁾ Between February and...

...September 1981 in Guatemala at least thirteen judges, lawyers and law professors have been coldly murdered, usually in plain daylight in the capital city. The attackers have never been brought to justice, if indeed anymore justice there is in that unfortunate country.⁽²⁾

In April 1981 in Malaysia a bill was passed which classified civil organizations into three categories: political parties, political societies and friendship societies. The bill provides that the so-called political societies must register with the Registrar of Societies who has been given sweeping powers and it emphasizes that the Registrar's actions cannot be challenged in any court. The political life of the country is thus put under the control of a civil servant and, as the International Commission of Jurists has put it, "a fundamental liberty, the right to association, is subject to the decision of a member of the executive and is not reviewable by the Courts. This is a drastic inroad into the Rule of Law".⁽³⁾

In June 1981 in Chile proceedings were launched against the eleven leaders of the National Confederation of Labour (Coordinadora Nacional Sindical — CNS). When four prominent lawyers offered their services to defend the accused, they were promptly expelled from the country; and other people who rose to defend freedom of association were publicly threatened by the Minister of Labour "not to take any action of solidarity with the prisoners if they do not want to suffer the same fate as the lawyers who were banished" (4).

In July 1981 in Egypt a law comprising a single article was passed, dissolving the Council of the Bar and giving the Minister of Justice the power to appoint a new Council. (5)

In August 1981 in Iran, a young lawyer was condemned to death for having defended prisoners before Revolutionary Committees; he was shot before a firing squad (6). When the Teheran Procurator General was asked why journalists could not attend trials, he answered: "We don't have time to invite journalists. We work hastily day and night" (7).

In October 1981 in San Salvador two bombs exploded in the building of the Supreme Court; thirteen people were injured, including the President of the Court (8).

And the litany could continue.

It was in the same year, 1981, that a study in depth of the question of the independence of the judiciary was launched by the International Bar Association. The International Study Committee first met in Lisbon in May 1981. It had before it a draft of "Minimum Standards" prepared by Professor Shimon Shetreet, of the Hebrew University of Jerusalem. Obviously the work could not be completed in the relatively short time that we had at our disposition. The Committee met again in Jerusalem in March 1982 and in New Delhi in October 1982 when the International Bar Association gave its approval to "Minimum Standards of Judicial Independence".

Also in May 1981 a Committee of experts met in Siracusa, Italy under the aegis of the International Commission of Jurists and produced a set of draft principles on the independence of the judiciary.

A year later, in May 1982 another committee of experts met in Noto, Italy, again at the invitation of the International Commission of Jurists and produced, this time, draft principles on the independence of the legal profession. It was on that occasion that I had the privilege of making the personal acquaintance of our distinguished guest Dr. L.M. Singhvi, of New Delhi.

In July 1982 the Law Association for Asia and the Western Pacific — commonly known as LawAsia — met in Tokyo and agreed on "principles governing the independence of the judiciary in the LawAsia region".

But all those efforts remained isolated. There was lacking the catalyst which would channel all those energies towards their common goal and would bring them together for that purpose in a common forum. The Montreal Conference achieved that result for the first time in history in June 1983 and, with the unanimous approval of the representatives of no less than 24 international organizations interested in justice, it produced a draft "Universal Declaration on the Independence of Justice", in both French and English. I had the unique pleasure, during the closing...

...dinner tendered by the Government of Canada, of remitting the text of this Declaration into the own hands of Dr. Singhvi in his capacity of Rapporteur to the United Nations on the topic.

Then in November 1984 the International Association of Judges, in cooperation with the United Nations Social Defence Research Institute, published in Rome a declaration of fundamental principles under the title: "The rôle of the judge in contemporary society"⁽⁹⁾.

During the intervening period the United Nations themselves had been working on the matter at two levels. The topic had been taken by the Committee on Crime Prevention and Control, which sits in Vienna. The Committee asked me to prepare a draft of "Guidelines on the Independence of the Judiciary". As could be expected this draft went through extensive deliberations, to which however I was not a party. The resulting draft guidelines finally found their way to the agenda of the Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders which met in Milano, Italy from 26 August to 6 September 1985. The Congress adopted what it called "Basic Principles...

...on the Independence of the Judiciary". The basic principles were in turn approved by the General Assembly of the UN on 31 October 1985. They form therefore the first international instrument bearing on the specific aspect of the independence of justice which concerns the judiciary.

In parallel the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities had given a mandate to Dr. Singhvi in August 1980 to carry a study and report on "the independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers". Dr. Singhvi submitted his final report in 1985. Chance had it that I had been elected a member of the Sub-Commission in 1983. Unfortunately for reasons which are foreign to our interests today, Dr. Singhvi's report, which puts forward for adoption a Declaration patterned very closely after the Montréal Universal Declaration of 1983, could not be dealt with by the Sub-Commission in 1985. Due to the UN financial difficulties, the Sub-Commission's 1986 meeting was cancelled.

The matter was finally considered by the Sub-Commission in 1987 but, due to lack of time as well as to translation delays, no study in depth could be undertaken. On 4 September 1987 the Sub-Commission decided that the Draft Declaration recommended by Dr. Singhvi should be sent to all member-states for their comments and that it should be considered by the Sub-Commission on a priority basis at its August 1988 session.

Pendant que ces événements se déroulaient de 1981 à 1987 dans les forums internationaux, le Canada ne restait pas étranger au débat. Deux initiatives méritent en particulier d'être rappelées.

En août 1985 l'Association du Barreau canadien publiait le Rapport de son comité spécial sur l'indépendance de la magistrature au Canada ⁽¹⁰⁾. Ce comité était présidé, comme l'on sait, par Monsieur le Bâtonnier Louis-Philippe de Grandpré, O.C., LL.D., C.R.. Le Rapport du Comité contient une série de recommandations explicites auxquelles j'aurai l'occasion de revenir plus loin.

En février 1987 paraissait le Rapport de la Commission (triennale) de 1986 en vertu de la Loi sur les juges ⁽¹¹⁾. Ce Rapport contient lui aussi des considérations utiles sur le sujet de l'indépendance de la magistrature. Il n'est probablement pas sans intérêt de rappeler que l'un des membres de cette Commission triennale, Madame Jeannine M. Rousseau, a été nommée juge à la Cour supérieure du Québec le 29 juin 1987.

II

LA REALITE CANADIENNE

It is of course out of the question that we enter today into a detailed analysis of the situation of the independence of justice in Canada; a few figures will quickly show why. In 1981 when I was commissioned to study the sole aspect of the administration of the courts in Canada, with the precious collaboration of Professor Carl Baar, I devoted to the task eight full months. I took part in five group meetings in Canada and two conferences in the USA and abroad. I personally interviewed 187 persons of 8 different nationalities in 27 cities of 4 countries. ...

...No statistics are available with respect to the documentation which had to be digested. At the same time Professor Baar carried technical interviews with 17 resource people across the country, identified and collected some 312 federal and provincial statutes dealing with court administration and established detailed figures leading to an overall justice budget in Canada of over \$322.5 million for the fiscal year 1979-80. To these comments should be added Professor Baar's contribution to the drafting of the Report itself, to which we devoted, jointly and in two languages, at least two full months: contrary to all expectations, we came out of the exercise smiling!

I have given those figures with the only purpose of showing how futile it would be to think that we could embrace in its full breath our topic: the Canadian reality. I propose therefore to deal with a few cases in point, some illustrated in recent judgments, others forming part of current events. All have arisen during the 1980's. We will first visit some of our provinces and then move to the Canadian scene. Please keep in mind that we will always discuss those issues in light of the question of the independence of justice and that no personal criticism is ever intended.

a) **The Provincial scene**

i) **New Brunswick**

Two recent cases in New Brunswick have touched on our topic, but only incidentally and I will only mention them for memory.

Charters vs Harper⁽¹²⁾ was decided by Chief Justice Richard on 19 March 1987. It arose under rather unusual circumstances. Charters, a professional criminal, was charged with possession of narcotics, trafficking in narcotics and resisting arrest. He appeared before defendant Harper in his capacity as a judge of the Provincial Court of New Brunswick. Incidental proceedings lasted nine months. Charters appeared again before Judge Harper and the latter declined jurisdiction for reasons of alleged constitutional invalidity^(12a). Four months later Charters succeeded in his application to have the indictments quashed, on the ground that his right to be tried within a reasonable time had been denied or seriously infringed upon. Charters then turned around and sued judge Harper in damages. Chief Justice Richard had no difficulty in finding against the Plaintiff; he wrote pointedly (p. 15):

"The plaintiff's denial of his rights under the Charter and the subsequent quashery of the indictments preferred against him, have in fact benefited the plaintiff greatly. He has avoided being tried for two very serious offences. For him to have brought this action against the defendant is bewildering. Counsel for the plaintiff deserves no credit for having advised his client to proceed with such a frivolous action."

Relevant to our discussion to-day was the question of the right of the defendant judge to immunity but the Chief Justice found it unnecessary to deal with the issue.

In McEvoy vs The Attorney General for New Brunswick⁽¹³⁾ the Supreme Court of Canada, reversing a unanimous judgment of the Court of Appeal of New Brunswick, disallowed a conjoint plan of the Governments of Canada and of New Brunswick to establish a Unified Criminal Court whose judges would be provincially-appointed and which would exercise complete criminal jurisdiction. The scheme being thrown out, ...

...the federal appointing power was safeguarded and, to that extent, the independence of the judiciary. The Court even went so far as to hold that the B.N.A. Act did not authorize Parliament "to exclude members of the Bar from preferment for Superior Court appointments" (p.720).

ii) Nova Scotia

I had found in Nova Scotia in 1981 a situation unique in Canada. There existed a Family Court comprised of 12 judges. The Court came under the Department of social Services rather than Justice; it had no Chief Judge. The assignment of judges was done by the Deputy-Minister of Social Services who gave me the distinct impression that he considered himself the real manager of the Court. I came to learn that, in that province, the independence of the Family Court was hostage to financial considerations arising out of a federal-provincial agreement. I had to acknowledge that peculiar circumstance, but my recommendation number 32 was nevertheless to the effect that "the Family Court be provided with a chief Judge and that its 12 judges be fully integrated into the judiciary".

Now I was glad to learn lately that all of the 16 judges whom the Nova Scotia Family Court now comprises have become members of the Provincial Judges Association and that the Family Court itself has been endowed with a chief judge, currently his Honour Marshall Black, who has become the true manager of the Court. All of this means a real improvement, although one may question the wisdom of keeping the Family Court within the Department of social Services rather than recognizing it as a true Court within the justice system.

One may also question the advisability of secrecy in matters leading to the dismissal of a judge. For the first time this year a judge was dismissed from office in the Family Court of Nova Scotia. The dismissal took the form of an Order in Council of the Provincial Cabinet⁽¹⁴⁾ following a recommendation of the Judicial Council of Nova Scotia. The Judicial Council was created in 1980 and its enabling Act provides that "the proceedings of the Judicial Council shall not be public".⁽¹⁵⁾

As a result no reasons were given to explain the dismissal and the Report of the Judicial Council has been kept confidential. I have tried to gain access to it, but to no avail. On a question which touches on public interest: who should be entrusted with the administration of justice? whether one should be found unequal to the task? — the public is left to its own speculations and all kinds of conjectures are carried by the media.

It has been said that the Judge "used the Bible in Court to urge women(...) to be subservient to their husbands"⁽¹⁶⁾. The Judge is reported to have "complained to reporters that he did not receive a fair hearing from the Judicial Council"⁽¹⁷⁾. It is doubtful, at best, that those comments would have enhanced the prestige of the Nova Scotia Judicial Council and contributed to a better understanding of justice.

At the federal level no judge of a court of superior jurisdiction may be dismissed before a full public debate in Parliament and the concurrence of both Houses in the result. Why is not the same situation prevailing, in some provinces, with respect to their own-appointed judges? Or if the hearing must be held in camera, should not the full decision be rendered public when it leads to the dismissal of a judge?

Those are serious questions which do not arise only in Nova Scotia, as we will see in the next few minutes, and which are in need of an earnest consideration. Regrettably time does not allow that we go deeper into them here and now.

iii) Ontario

In late 1982 Ontario witnessed the beginning of the 2nd Valente case. Judge Sharpe had decided that, in light of the applicable legislation governing his remuneration and status, the public would not perceive him to be impartial. In the words of Chief Justice Howland, in the Court of Appeal, the question was whether "the Provincial Court (Criminal Division) as an institution, was (...) independent"⁽¹⁸⁾. After canvassing the issue with the utmost care, the Chief Justice and his four colleagues came to the conclusion that the Provincial Court (Criminal Division) of Ontario was indeed independent and the case of Valente was remitted to Judge Sharpe for appropriate consideration. It is interesting to note that the Provincial Court and the Family Court Judges Associations had both argued against the position taken by Judge Sharpe while the justices of the Peace Association of Metropolitan Toronto had supported him ⁽¹⁹⁾.

Valente took the matter to the Supreme Court of Canada⁽²⁰⁾. His appeal was dismissed. Mr. Justice Le Dain, speaking for the Court, made a scholarly review of the whole question of judicial independence. Central to his analysis was his prefacing statement that "the standard of judicial independence for purposes of s. 11(d) (of the Canadian Charter of Rights) cannot be a standard of uniform provisions" (p. 694). Mr. Justice Le Dain then proceeded to examine "the essential conditions to judicial independence" (ibid). He listed security of tenure, financial security and institutional independence and found that all those conditions were satisfied under the law applicable to Ontario Provincial Court Judges in 1982, saving some reservations which are not relevant to our topic.

iv) Québec

It is certainly not by design that a larger number of instances applicable to our topic find their origin in the Province of Québec. This may equally be due to my being domiciled here or to the particular temperament of us, Québécois. Be that as it may I now plan to refer to five different matters: two judicial in nature, one disciplinary, another administrative and the last one, squarely political.

Le premier exemple qui vient à l'idée est évidemment la poursuite logée par notre collègue l'Honorable Marc Beauregard, alors juge de la Cour supérieure et maintenant juge à la Cour d'appel du Québec. Il s'attaqua à une loi fédérale adoptée après sa nomination mais rétroagissant à une date antérieure à celle-ci, qui rendait en particulier sa pension de retraite contributoire et réduisait d'autant son traitement. Il plaida que le Parlement ne pouvait pas exiger une contribution d'un juge à sa pension, qu'il ne pouvait pas réduire le traitement d'un juge et que, de toute façon, la législation était invalide quant à lui parce que discriminatoire.

En première instance Monsieur le Juge Addy de la Cour fédérale rejeta le troisième argument, accueillit le deuxième et jugea inutile de considérer le premier. Il prononça donc une déclaration d'ultra vires en faveur du demandeur quant à sa contribution à sa pension de retraite (21).

A l'unanimité de ses trois membres, la Cour d'appel fédérale confirma le rejet de l'argument fondé sur la discrimination; de même les trois juges se trouvèrent en désaccord avec le motif retenu par le Juge Addy...

...à l'effet que le Parlement n'aurait pas eu le pouvoir de diminuer le traitement des juges. Mais la Cour d'appel se divisa ensuite deux à un lorsque vint le moment de se prononcer sur l'argument que le premier juge avait jugé inutile de considérer. Pour Monsieur le Juge Pratte, dissident, le Parlement a tout-à-fait le droit d'imposer aux juges une contribution à leur pension de retraite. Là--dessus toutefois le Juge en chef Thurlow et le Juge Heald tombèrent d'accord: le Parlement n'a pas ce pouvoir. Pour ce motif différent le Juge Beauregard obtint encore gain de cause ⁽²²⁾. L'euphorie de la victoire devait durer trois ans.

En septembre 1986 la Cour suprême du Canada accueillait l'appel de la Couronne ⁽²³⁾ par un jugement en partie unanime, en partie majoritaire. Les considérations de Monsieur le Juge en chef Dickson sur le concept de l'indépendance judiciaire recevaient l'accord de ses quatre collègues du banc. Le juge en chef reconnaît la validité de la conception moderne à deux volets de l'indépendance de la magistrature, savoir l'indépendance individuelle et l'indépendance collective ou institutionnelle. Il en énumère certains éléments constitutifs mais, ...

...comme il se devait dans l'affaire Beauregard, il s'arrête surtout à la question de la sécurité financière.

Le Juge en chef conclut ensuite, contrairement à la majorité en Cour d'appel fédérale, que l'obligation faite aux juges de contribuer à leur pension de retraite ne viole ni la constitution ni l'indépendance de la magistrature. Ici encore ses considérations emportent l'adhésion de tous ses collègues.

Toutefois l'unanimité cesse lorsqu'on touche à la question de discrimination. Le Juge Beauregard était déjà en fonction depuis cinq mois lors de l'adoption de la loi qui, rétroagissant de plus de dix mois et demi, lui devenait applicable. Tous les juges en Cour fédérale avaient rejeté la prétention du demandeur. En Cour suprême le Juge en chef et Messieurs les Juges Estey et Lamer furent du même avis. Le Juge en chef écrivit (p. 91):

"In light of the validity of the overall policy reflected in the 1975 amendments and the legality and fairness of Parliament's attempt to protect ...

...the settled expectations of incumbent judges, I cannot say that the choice of February 17, 1975 as the cut-off date was contrary to the Canadian Bill of Rights."

Mais Monsieur le Juge Beetz, auquel se joignit le Juge McIntyre, opina plutôt (p. 119):

"With the greatest of respect, I fail to see why the respondent's expectations were any less settled or legitimate than those of his fellow judges appointed before the date of first reading of the bill."

Le résultat net du litige se résume au rejet total de la poursuite du Juge Beauregard: tous les juges, anciens et nouveaux, sont tenus de contribuer dorénavant à leur pension de retraite; la diminution conséquente de leur traitement ne viole pas la constitution; la création par là de trois catégories de juges n'est pas non plus blâmable et, sur le tout, rien dans ce nouveau système de porte atteinte à l'indépendance de la magistrature.

La lecture des trois arrêts dans l'affaire Beauregard met toutefois en relief un objet de consolation sur lequel, cette fois-ci, l'unanimité s'est faite: c'est l'importance et le bien-fondé de la Déclaration universelle sur l'indépendance de la justice adoptée à Montréal en 1983.

La deuxième affaire qu'il convient de retenir est Cuerrier vs Bourbeau et le Procureur Général du Québec⁽²⁴⁾. Madame Cuerrier avait agi comme vice-présidente de l'Assemblée nationale du Québec de 1976 à 1981. Le 2 juin 1982 elle est nommée membre de la Commission municipale du Québec. La loi prévoyait à l'époque que les membres de la Commission étaient nommés pour dix ans. Toutefois le décret de nomination renvoyait à des "conditions annexées": il s'agissait d'un document dans lequel Madame Cuerrier renonçait d'avance à son poste à l'échéance de cinq ans et le gouvernement se réservait la faculté de la reconduire ou non. En décembre 1986 le Ministre des affaires municipales donnait avis à Madame Cuerrier que son mandat ne serait pas renouvelé à l'expiration des cinq ans. Sur requête pour jugement déclaratoire, Monsieur le Juge Claude Rioux, de la Cour supérieure, n'eut pas de difficulté à conclure que l'entente alléguée par le gouvernement était nulle parce qu'elle...

...violait une loi d'intérêt public. La Commission municipale constitue un tribunal administratif; le gouvernement ne peut pas, par décret ou par contrat, réduire la durée du mandat que fixe la loi. Les propos suivants de Monsieur le Juge Rioux méritent d'être médités (p. 9):

"On peut assimiler la situation de la requérante, qui est appelée à exercer des fonctions quasi-judiciaires à titre de membre de la Commission municipale, à celle des juges, qui sont inamovibles.

Il serait inimaginable qu'un juge s'entende avec le gouvernement pour limiter son mandat à quelques années seulement, à l'expiration desquelles le gouvernement pourrait, à son gré, renouveler son mandat: un pareil arrangement serait considéré radicalement nul parce qu'il porterait atteinte à l'indépendance judiciaire, une des pierres d'assise de la constitution et de notre société démocratique. Aucun acquiescement du juge ou du gouvernement, ni le passage du temps, ni le défaut d'en invoquer la nullité ne pourrait faire revivre un pareil arrangement."

On ne sera pas étonné d'apprendre que le Gouvernement du Québec n'a pas osé porter ce jugement en appel.

Let us now move from the strictly judicial field to the disciplinary process concerning judges and some incidental aspects of this process. You will no doubt allow me to refer to the judge concerned as judge X. The judge was sitting regularly in the criminal court in Montréal. In July 1984 eight defence lawyers laid jointly a complaint alleging lack of courtesy, impatience, partiality and denial of justice on eleven stated occasions. After ordering that the matter proceed in camera, the Inquiry Committee of the Québec Judicial Council listened to all the tape recordings and heard at great length the judge himself and the five witnesses, including another judge, whom he produced. The Committee came to the unanimous conclusion that all of the eleven charges had been substantiated and that judge X should be reprimanded by the Judicial Council. No appeal was taken by the judge concerned. It is however from this moment that the matter took an unexpected twist.

The Québec Courts of Justice Act ⁽²⁵⁾ provides that, should the Judicial Council or its Inquiry Committee decide that a complaint is not founded, notice of such decision must be given, among others, to the complainant ⁽²⁶⁾.

There exists however no similar provision in the event the complaint is sustained; notice must then go only to the Minister of Justice and, although the Act does not say so in so many words, to the judge concerned⁽²⁷⁾; but there is no duty for the Judicial Council to advise the complainant that the charge he had preferred has been retained.

In the case of judge X, the eight complainants were all members of the Association des avocats de la défense de Montréal (The Montreal Defence Lawyers Association), which had actually taken part in the hearing of the complaint before the Committee. The Association requested a copy of the decision from the Minister of Justice; for reasons better known to himself, the latter turned down the request. The Association then moved the Commission d'accès à l'information (The Commission has no English name) for an appropriate order. Here the matter took again another strange turn. Under section 29.1 of the relevant Act ⁽²⁸⁾ a body like...

...the Québec Judicial Council, i.e. "a public body performing quasi-judicial functions", to use the words of the Act, "may refuse to release information obtained in the performance of an adjudicative function." All those conditions were fulfilled yet, for reasons unknown, counsel for the Department of Justice waived that ground of refusal on the part of the Judicial Council. There remained open to him only the exception contained in section 53 of the Act which the Commission rightly concluded did not justify the Minister's refusal. An order therefore issued to the Minister of Justice to make available to the Defence Lawyers Association a copy of the report of the Inquiry Committee of the Québec Judicial Council.

Six weeks later, on 16 January 1987 a substantially detailed article appeared in the Montréal newspaper The Gazette. The paper said that it had obtained the Judicial Council's report "through an access-to-information request to the Québec Justice Department". It went on to quote extensively from the report, including names and verbatim extracts from the evidence and the Committee's conclusions.

Several questions respecting judicial independence are thus posed by this incident:

- a) the Courts of Justice Act empowers the Québec Judicial Council (and, as a logical consequence, its committees) to sit in camera ⁽²⁹⁾. In the case of judge X, the Inquiry Committee so ordered. Can this provision be superseded by an access-to-information order?
- b) is it a logical interpretation of the Courts of Justice Act that a complainant be not entitled to obtain copy of a decision which has declared his complaint well-founded?
- c) in the affirmative, should not the Act be corrected?
- d) what degree of publicity, if any, should be attached to a decision blaming the conduct of a judge in Court?
- e) is it consonant with the independence of justice that a decision of a Judicial Council become the subject of litigation between third-parties before an administrative body?

- f) is it consonant with the independence of justice that, in such litigation, the position of a Judicial Council be argued, and possibly weakened, by counsel for the Department of justice without the Judicial Council's presence or approval?

Those are troublesome questions which should not be left unanswered indefinitely especially when, from province to province, the laws are contradictory to each other. For instance in British Columbia, contrary to Québec, the inquiry into the conduct of a judge must be conducted in public ⁽³⁰⁾ rather than in camera. In Ontario, again contrary to Québec, the report of the Judicial Council, far from being kept confidential, must be laid before the Legislative Assembly ⁽³¹⁾.

Nous arrivons ainsi au quatrième cas que je désire citer au Québec et où la question de l'indépendance de la justice se soulève au niveau administratif. Il s'agit encore de l'exercice indépendant de la fonction judiciaire par ceux qui en sont chargés; mais il s'agit d'abord et surtout de l'indépendance institutionnelle des tribunaux....

... La question se soulève alors au point de convergence entre l'activité autonome des tribunaux et la fonction administrative du pouvoir exécutif. Dans le système que nous connaissons — et qui ne devrait pas nécessairement perdurer — les tribunaux ne possèdent aucune autonomie administrative et ils sont, sous cet aspect, à la merci du pouvoir exécutif. Cette situation, peut-être tolérable dans d'autres conditions autrefois, a créé au cours des quinze ou vingt dernières années un malaise croissant qui a débouché, en 1986, sur une crise majeure. Elle s'est manifestée dans le domaine de la fourniture des ressources humaines nécessaires à l'exercice des fonctions des juges de la Cour supérieure du Québec.

Depuis plusieurs années l'Exécutif visait à réduire le personnel auxiliaire des juges: secrétaires et huissiers-audienciers. D'innombrables réunions et des discussions interminables consommaient des énergies qui auraient pu être employées plus utilement ailleurs. En 1981 le problème débordait sur la scène publique et devait mettre aux prises les trois pouvoirs. N'était l'importance des principes en jeu, l'épisode présenterait toutes les caractéristiques d'un opéra-bouffe, compte tenu de l'étroitesse de...

...l'incident et de l'ampleur des moyens mis en oeuvre dans une tentative pour assurer la suprématie des pouvoirs publics sur les tribunaux.

Le 4 septembre 1981 un juge de la Cour supérieure siège dans l'une des salles d'audience du Palais de justice de Montréal. L'administration ne met pas de huissier-audiencier à sa disposition permanente. Le juge somme de comparaître devant lui le directeur régional des greffes. Après un débat où ce fonctionnaire allègue des directives contraires du Conseil du trésor, le juge rend une ordonnance lui enjoignant de mettre un huissier-audiencier à sa disposition, sous peine d'outrage au tribunal⁽³²⁾.

Le Gouvernement du Québec porte l'affaire en appel: il subit un second échec⁽³³⁾. La Cour d'appel confirme la thèse de l'indépendance du pouvoir judiciaire. Monsieur le Juge Jacques écrit significativement (p. 517):

"Les décisions de l'exécutif qui touchent le personnel de soutien du pouvoir judiciaire ne peuvent être prises unilatéralement. Elles doivent l'être en coopération avec ce pouvoir, sans quoi il deviendrait subordonné."

C'était le 15 septembre 1982. Le gouvernement ne se tient pas pour battu: il met en branle le processus législatif et, en décembre 1982, il obtient de l'Assemblée nationale l'insertion dans la Loi des tribunaux judiciaires de l'article 5.1 (34):

"5.1 Malgré toute autre disposition législative, le protonotaire ou le greffier d'un tribunal n'est tenu de fournir, lors d'une audience, afin de remplir les fonctions d'huissier-audiencier, que les huissiers-audienciers dont il dispose."

Une trêve malaisée s'installa jusqu'au 18 avril 1986 lorsque le Sous-ministre de la justice avisa le Juge en chef de la Cour supérieure "qu'en raison des compressions budgétaires décrétées par le gouvernement, il devait réduire les postes d'huissier-audiencier et de secrétaire mis à la disposition des juges de la Cour supérieure" et ce, dès le 5 mai 1986. Cette fois-ci la marmite éclata. En sa qualité de Juge en chef de la Cour supérieure du Québec l'Honorable Alan B. Gold intenta contre le ...

...Ministre de la justice et Procureur général, l'Honorable Herbert Marx, une action en nullité accompagnée d'une demande d'injonction (34a). Par la force des choses et de par la nature de nos institutions, seul un juge de la Cour supérieure peut entendre ce litige: décider autrement équivaldrait à nier au demandeur l'exercice de tout recours. Le 2 mai 1986 l'Honorable André Forget, après audition des parties, émettait une ordonnance de sursis dans un jugement admirable par sa célérité, sa lucidité et sa logique. Après avoir disposé des objections concernant l'impartialité du tribunal et l'intérêt du demandeur, il étudie la question de l'indépendance judiciaire, il constate que le demandeur a établi un droit au moins apparent, il reconnaît l'urgence de la situation et le préjudice irréparable qui menace le tribunal et il conclut que le poids des inconvénients favorise le demandeur. Le juge ordonne en conséquence de surseoir à l'exécution des décisions annoncées par le Sous-ministre jusqu'à jugement sur la requête en injonction. Le gouvernement s'est immédiatement pourvu en appel. Depuis lors, soit depuis seize mois, le dossier de la Cour est vierge de toute autre entrée et les choses se sont installées dans le statu quo....

... Il est clair que le gouvernement n'est pas intéressé à presser l'affaire dans le forum judiciaire. On mesure néanmoins par là la résistance de l'Exécutif à partager avec les tribunaux le pouvoir de décision en matière administrative. Il n'y a là qu'un pas qui sépare l'administratif du politique: ce sera mon cinquième et dernier exemple au Québec.

Une lueur d'espoir est en effet apparue en septembre 1986. Dans les allocutions qu'il prononçait dans le cadre de la rentrée judiciaire à Montréal et à Québec les 3 et 5 septembre de l'année dernière, l'Honorable Herbert Marx, parlant "d'un tournant historique", annonçait un projet pilote par lequel les ressources humaines, matérielles et financières à la disposition de la Cour d'appel seraient remises entre les mains de celle-ci. Il entrevoyait également l'aménagement d'un projet semblable dans les autres juridictions. Comme le Ministre le dit d'ailleurs expressément, il s'agissait de la mise en place des recommandations pertinentes dans mon étude de 1981 sur l'administration judiciaire autonome des tribunaux.

Mais à la lecture des deux allocutions du Ministre, un curieux point d'interrogation apparaît: les deux allocutions sont généralement couchées dans les mêmes termes, jusqu'à ce qu'on arrive à la question des budgets. Cette question avait fait l'objet de recommandations précises et détaillées en 1981. Dans son allocution de Montréal, le Ministre s'exprime comme suit:

"Dans cette ligne de pensée, si la magistrature est d'accord, il me semble que rien n'empêche d'entrevoir un transfert, à cette dernière, des responsabilités actuellement exercées par le Ministère en termes de négociations ou de défense des budgets auprès des autorités compétentes. 'On n'est jamais si bien servi que par soi-même'".

Mais à Québec deux jours plus tard le Ministre se fait beaucoup plus restrictif:

"Dans cette ligne de pensée, rien n'empêche d'entrevoir des modalités de transfert de la présentation d'une partie du budget afférente aux services judiciaires ou du moins sa négociation."

Il est clair que ce paragraphe, dans le texte de Québec, va beaucoup moins loin que le paragraphe correspondant dans le texte de Montréal. Qu'il s'agisse d'une modification délibérée ne saurait faire de doute. L'intention derrière cette différence demeure toutefois mystérieuse.

Malheureusement les espoirs que la déclaration ministérielle avait suscités sont restés sans lendemain. Plus d'un an s'est écoulé sans qu'aucun développement concret ne survienne et la Cour d'appel n'est pas plus près de son autonomie administrative aujourd'hui qu'en 1986. Les discussions qui ont pris place dans l'intervalle entre la Cour d'appel et le Ministère sont à un point mort. Il ne m'appartient pas de distribuer des blâmes ni d'identifier des responsabilités. Nous ne pouvons que constater ensemble l'échec au moins momentané d'une initiative politique qui paraissait offrir le calumet de paix au pouvoir judiciaire.

Le 2 septembre dernier le Ministre de la justice du Québec réitérait ses "intentions de poursuivre le projet pilote de l'autonomie administrative à la Cour d'appel"⁽³⁵⁾. L'avenir seul témoignera du réalisme de ce souhait.

v) Saskatchewan

Out in the Prairies the question of the independence of justice suddenly surged to the forefront of actuality in the early 80's. This was a quite politically-charged issue; paradoxically it is on account of that very reason that we should not shirk the problem today. An opening word is however necessary about a relatively old statutory provision which was used in the premises, though it had no doubt been adopted for other purposes.

In 1958 the Queen's Bench Act had been amended; since then ss. 7(2) read as follows ((36):

"The Lieutenant Governor may at any time by proclamation increase or decrease the number of judges of the court and in the case of a decrease may provide for the decrease taking effect upon the occurrence of a vacancy in the court."

In 1978, under the N.D.P. (New Democratic Party) Government in Saskatchewan, a quite similar provision was inserted into the Court of Appeal Act. (37)

In April 1982 the Progressive Conservative Party won a landslide victory in Saskatchewan. Shortly thereafter a dispute arose in the open between the Liberal government in Ottawa and the Conservative government in Regina, concerning the exercise of the federal power of appointment of judges to the Saskatchewan Court of Appeal and Court of Queen's Bench. The provincial government was, in the words of the Attorney-General, "lamenting the federal practice of making judicial appointments in the absence of consultation with the province" (38). As can be seen, this was strictly a political issue, but it very shortly carried with it a threat to the independence of justice. Indeed the functioning of justice became hostage to the political wrangle and the courts, a tool in the hands of the parties.

The Saskatchewan Government, basing itself on the 1958 and 1978 statutes, passed five orders in council, the combined effect of which was to reduce the number of judges in the Court of Appeal from 7 to 4 and in the Court of Queen's Bench from 30 to 24. In theory, this could lead to the extinction of the courts. In practice, it could and did give rise to serious difficulties. The obvious purpose of the orders in council was to force the federal government to put judicial appointments on the bargaining table.

The Saskatoon Criminal Defence Lawyers Association took proceedings against the Attorney-General seeking the invalidation either of the relevant statutory provisions or of the orders in council. On 10 April 1984 Mr. Justice C.R. Wimmer, of the Court of Queen's Bench, declared that the orders in council concerning the Court of Appeal were valid, but that the orders in council respecting the Court of Queen's Bench were ultra vires the provincial government (39). The matter was taken to appeal; judgment was reserved on 21 September 1984. However three weeks earlier a new progressive conservative government had been elected in Ottawa. According to a release from the Department of justice on 16 November 1984, the new Minister of justice the Honourable John Crosbie stated that the Mulroney government policy was "to seek the views of the provinces in all areas of mutual concern" (40). Apparently some form of consultation took place and the provincial government rescinded the impugned orders in council.

It thus appears that the issue has become moot in Saskatchewan. However the Attorneys-General of Manitoba and British Columbia have also intimated at one time or another that they might resort to the same tactics. The issue is currently dormant.

This episode has put in stark relief the fragility of the independence of justice; it has shown vividly how politicians will not hesitate to use courts as a pawn in their power games.

vi) Colombie-Britannique

A somewhat reverse situation however may also occur: it did in British Columbia in 1981.

The big constitutional debate had reached a high point, in mid-November 1981 when the Ottawa Citizen, on the 10th, and the Globe & Mail on the 18th published, the former an interview, the latter an article by a distinguished member of the Supreme Court of British Columbia. Among other comments on the current constitutional issues, the judge labelled the decision of the First Ministers to "abandon" native rights as "mean-spirited and unbelievable"; he pleaded for "the restoration of Québec's veto" and he argued in favour of a particular amending formula.

The storm broke out. A senior member of the Judiciary lodged a complaint with the Canadian Judicial Council, alleging that "The harm which pronouncements of this kind in such circumstances is capable of creating to the independence of the judiciary, the administration of justice and the maintenance of the principle of separation of powers is, in my view, incalculable." Acting under its statutory powers, the Council decided to launch an inquiry and formed for this purpose a Committee of three of its members. The judge concerned submitted his views in writing, but decided not to appear personally before the Committee. On 30 April 1982 the Committee reported:

"We say again if a judge becomes so moved by conscience to speak out on a matter of great importance, on which there are opposing and conflicting political views, then he should not speak with the trappings and from the platform of a judge but rather resign and enter the arena where he, and not the judiciary, becomes not only the exponent of those views but also the target of those who oppose them.

(...)

...we view his conduct seriously, and are of the view that it would support a recommendation for removal from office."

Having reached that view, the Committee nevertheless did not make the recommendation. It reasoned as follows:

"As far as we are aware, this is the first time this issue has arisen for determination in Canada. It is certainly the first time the Council has been called on to deal with it. It is possible that Justice (...), and other judges too, have been under a misapprehension as to the nature of the constraints imposed upon judges. That should not be so in the future. We do not, however, think it would be fair to set standards ex post facto to support a recommendation for removal in this case."

This led the Committee to its two-fold conclusion:

"We conclude that the complaint non se bene gesserit (that he did not behave well) is well founded but, for the reasons stated, we do not make a recommendation that Justice (...) be removed from office."

The Report of the Committee had then to go to the full Council for a final decision. One could foresee that the Report might not enjoy an easy sailing. The lines of battle were drawn in the media; a number of respectable bodies started to intervene. It was pointed out to Council, on the basis of high authority, that "this means, if the report is adopted, that Justice (...) stands convicted by Council of the most serious possible judicial offence without an opportunity for exoneration in Parliament. He will be the first judge in history who has been placed in such an untenable position."

In a further brief of 21 May 1982 the judge concerned expressed the same thought. He added:

"But the question can now be resolved only by Parliament. It is too important to be left to judges. Certainly the Judicial Council has no mandate to deal with it; and under no circumstances should it be dealt with behind closed doors. The views of the bar, of scholars, of the Conference of Judges of Canada and, of course, the public, should be considered."

Such was the atmosphere when Council met to consider the matter of 31 May 1982. I did not however take part personally in the debate; through no fault of mine, I had been placed in a situation where I must withdraw. I had never met the judge in question. He, however, had taken me to task in his two briefs to Council: once in his first brief, three times in his second brief he had used my name, referred to one of my books or one of my lectures and made various comments at times laudatory, at times disparaging, on my conduct, apparently with a view to bolster his defence. There was a grave danger that I could not thereafter deal with the issue in the objective and dispassionate way that justice exacted. Under similar circumstances Mr. Justice Locke had withdrawn in the Duncan contempt of court case in the Supreme Court of Canada in 1957 (40a). I therefore left the meeting.

My colleagues of the Canadian Judicial Council took what the late Chief Justice Laskin called "a placating view". They stopped short of endorsing the opinion and the conclusion expressed by the Inquiry Committee. By a majority vote, the Council rather chose to express its views as follows:

"1) The Judicial Council is of the opinion that it was an indiscretion on the part of Mr. Justice (...) to express his views as to matters of a political nature, when such matters were in controversy.

2) While the Judicial council is of the opinion that Mr. Justice (...)'s) actions were indiscreet, they constitute no basis for a recommendation that he be removed from office.

3) The Judicial Council is of the opinion that members of the Judiciary should avoid taking part in controversial political discussions except only in respect of matters that directly affect the operation of the Courts."

The matter might well have died a natural death with this rapping of the fingers of the judge involved and the implicit warning to the Judiciary at large. But two months later the Chief Justice, who by law is also chairman...

...of the Canadian Judicial Council, chose to revive it in an address delivered at the annual dinner of the Canadian Bar Association in Toronto on 2 September 1982. He began by saying: "My mention of the (...) case is not to reopen an issue which is closed." But using the sternest language, the Chief Justice pursued:

"It was said that pursuit of the complaint against Justice (...) was an interference with his freedom of speech. Plain nonsense! A Judge has no freedom of speech to address political issues which have nothing to do with his judicial duties. His abstention from political involvement is one of the guarantees of his impartiality, his integrity, his independence.

(...)

Surely there must be one standard, and that is absolute abstention, except possibly where the role of a Court is itself brought into question. Otherwise, a Judge who feels so strongly on political issues that he must speak out is best advised to resign from the Bench. He cannot be allowed to speak from the shelter of a Judgeship."

After those public comments by the Chairman of the Canadian Judicial Council, the judge concerned was left no alternative: on 25 April 1983 he tendered his resignation, effective 27 August 1983.

This "cause célèbre" again raises troublesome questions: I will dare mention two.

First, we have seen a moment ago that the Canadian Judicial Council had not followed the direction shown by its Inquiry Committee; the Council qualified the conduct of the judge concerned not as misbehaviour under the Judges Act, but as a mere indiscretion constituting no basis for removal from office. With all due respect, was then the Chairman justified in publicly denouncing the conduct of the judge and putting him in default "to resign from the Bench"?

Second, the judge had argued in favour of the recognition of the rights of the Indigenous peoples of Canada and of Québec's right of veto: this, it was said authoritatively, was indiscreet but not misbehaving. Where then is the line of demarcation? when does a comment by a judge cease to...

...be proper and turn into an indiscretion? when does the indiscretion become misbehaviour leading to removal from office? and how does the independence of justice fit into this escalation of characterizations? — For the moment, suffice it that the questions are posed.

Much else could be said with respect to other provinces as well as to provincial judicial councils at large. But constraints of time are now bidding us to move to the federal scene.

b) THE FEDERAL SCENE

Here again we must choose. I propose to say a word about two institutions: the Canadian Judicial Council and the Supreme Court of Canada, followed by a post-scriptum dealing with the Citizenship Judges.

i) The Canadian Judicial Council

The Canadian Judicial Council in a sense stands apart from the traditional judicial system. It is not concerned with the judges' main function: decision-making. Yet it is composed of 36 persons who are the heads of all the Canadian courts whose members are appointed by the Federal Crown and these judges, in turn, are all subject to the authority of this Council. If the concept of judicial independence means anything, clearly it must shine at the level of the Canadian Judicial Council. Yet as I pointed out in my 1981 study, such is not the case.

Of the many angles under which the situation could be analysed, let us pick today a single one: the financing of the Canadian Judicial Council. Part II of the Judges' Act ⁽⁴¹⁾ which sets up the Council makes no mention of Council's administrative machinery or of its budget. Part III of the Act however places the Council really in the hands of the Commissioner for Federal Judicial Affairs ⁽⁴²⁾. In fiscal terms the Canadian Judicial Council forms only one item within one of the programs of the Commissioner who, in turn, is but one of several elements in the budget of the Department of Justice. As I wrote in 1981: "It is a situation of financial insignificance". This reflected on the Council's concerns and performance.

Take for instance the situation which developed during the nine years which followed the establishment of the Canadian Judicial Council: 1972 to 1981. The total Federal appropriations in favour of the Council amounted to \$1.7 million; the expenditures amounted to only \$1.1 million. Funds totalling \$618,000.00 were allowed to lapse during that period and were returned to the Consolidated Revenue Fund. This most unsatisfactory result was ...

...attributable to a combination of several factors; the main one was built into the system by the law itself. Parliament had not entrusted the Canadian Judicial Council with initiative and control over its finances; Council's activities were inhibited; interest in the matter was lacking. I remember that, during my first few years on Council, when we met only once a year, the budget was an unexisting topic and did not even appear on the agenda. When the question was first raised, it took quite an effort on the part of some members to obtain that a draft budget be supplied to us so that Council could have its say on its own business.

In 1981 I made a number of recommendations bearing on the financial and other aspects of the operations of the Canadian Judicial Council, with a view to enhancing its independence of action. Those recommendations were all approved by the Council in September 1982. Yet but for two or three of less importance, they have not been acted upon, the law has not been changed and Council's subordination has not been shaken. However in 1986 a working group "on the administrative independence of the Canadian Judicial Council" was established jointly by the Chief Justice of Canada and the...

...Deputy-Minister of Justice ⁽⁴³⁾. It is chaired by the Chief Justice of British Columbia, the Honourable Nathan C. Nemetz. The group has completed its task and its report has been ready since the middle of March 1987. The report has been withheld, however, pending — I am told — "more favourable circumstances".

ii) The Supreme Court of Canada

Nobody would ever think of questioning the full independence of the Supreme Court of Canada in its decisional process. Probably no better illustration of this statement could be found than the judgment of the Supreme Court in 1981 in the famous constitutional reference ⁽⁴⁴⁾. Nonetheless a shadow is cast on this picture when one turns to the internal working of the Court; I am referring especially to matters of budget and personnel.

In 1977 Parliament amended the Auditor General Act ⁽⁴⁵⁾. Parliament saw fit, and rightly so, to give the Auditor General the full autonomy which he needs in order to fulfill his duties unfettered by constraints in public service and financial legislation. At the very same session Parliament amended...

...the Supreme Court Act, but stopped half-way in the process and failed to accord to the Supreme Court of the land the same degree of independence it had granted to the Auditor General. The Registrar of the Court still performs part of his duties under the Minister of Justice of Canada; and dependence of the Court on the executive branch, eliminated in certain regards, remains very much a reality in others. Executive control over the staff is no mere theory; control over the budget is not theoretical either.

I recommended in 1981 that those restraints on the independence of the Supreme Court of Canada should be lifted and that the activities that are thus curtailed "should be placed under the sole responsibility of the Chief Justice"⁽⁴⁶⁾. This recommendation also is still crying for implementation; yet it was then and has been further supported by impressive authority.

In 1979 the Bureau of Management Consulting carried a survey of the organizational system of the Supreme Court and reported ⁽⁴⁷⁾:

"The present arrangement, based on the (1977) amendments to the Supreme Court Act, may not ensure an adequate level of independence. The possibility of further amendments, or other alternatives should not be overlooked.

It is recommended that:

The status of the Supreme Court as an independent organization be further reviewed for the purpose of making recommendations that would consolidate the independence of the judiciary." (48)

In 1985 the former Registrar of the Supreme Court, Mr. Bernard C. Hofley, Q.C. submitted a brief to the de Grandpré Committee of the Canadian Bar Association. The Committee summarized the contents of the brief as follows:

"The Registrar identified six problems with the new system. First, the Court is a department under the Financial Administration Act and therefore has no greater control over its funds than it ever did. Second, the Court is governed by the Public Service Employment Act and therefore has to give priority to job applicants from the public service. Third, there are problems with respect to classification of positions. Specifically, positions are compared to government agencies rather than to lower courts. Fourth, the Court is subject to audits by the Public Service Commission. Fifth, the building which houses the Court, and several other tenants, is controlled by the Department of Public Works. This creates problems with security. And sixth, the Registrar, who was supposed to exercise control over much of the Court's administration is an order-in-council appointment. His performance is re-assessed annually and while the Minister of justice has input into the assessment the chief Justice is not asked to participate."

The de Grandpré Committee itself recommended in August 1985:

"35. The immediate administrative independence of the Supreme Court of Canada be implemented, adapting as a model of the relationship between the Court and the federal government that of the Auditor General of Canada."

This recommendation was itself approved by the Canadian Bar Association at its 1986 mid-winter meeting.

Such is therefore another field where the situation should be improved and could easily be improved. The excuse of the difficulty of a constitutional amendment does not avail here.

iii) Juges de la citoyenneté

Finalement un post-scriptum relatif aux juges de la citoyenneté. Il s'agit-là d'une institution tout-à-fait spéciale qui emprunte à la terminologie judiciaire sans...

...en posséder tous les attributs. Il découle de là une importante source de confusion, surtout lorsqu'on s'interroge sur le degré d'indépendance des 36 juges de la citoyenneté vis-à-vis le pouvoir politique. Il serait présomptueux toutefois d'entreprendre une étude détaillée de la question vu qu'en janvier dernier le Secrétaire d'Etat, l'Honorable David Crombie, a ordonné une revue générale du système. Le Professeur Sharon L. Sutherland, de l'Université Carlton, a déposé son rapport que le Ministre a rendu public et je crois comprendre que des modifications à la Loi sur la citoyenneté ⁽⁴⁹⁾ sont actuellement à l'étude. Je ne résiste pas cependant à la tentation de citer deux courts passages du rapport du Dr. Sutherland. Elle constate d'abord (p. 9):

"The judges in short currently have no real independence or authority vis-a-vis the political level."

Et la première des 14 recommandations du rapport est la suivante (p. 30):

"The terminology of the activity should be changed to "commissioner" and "commission" and all other terms corrected to fit."

Je suggère qu'il s'agit là d'une question à laquelle le Conseil canadien de la magistrature pourrait utilement s'intéresser; mais il y a urgence, vu l'intention annoncée du gouvernement de légiférer d'ici la fin de l'année.

III

VERS L'INDEPENDANCE

Comme dans tous les débats canadiens qui se respectent (!) nous sommes, en fin de parcours, ramenés à une question constitutionnelle. Dans notre pays, ce n'est pas l'indépendance individuelle du juge qui fait problème: une profonde tradition l'assure et peu nombreux sont les incidents connus où elle aurait été battue en brèche⁽⁵⁰⁾. C'est plutôt l'indépendance institutionnelle de la justice, et plus particulièrement du pouvoir judiciaire, qui s'est longtemps appuyée sur une fondation insuffisante; la démonstration a été faite que cette insuffisance peut, à plus ou moins long terme, réfléchir sur l'exercice individuel de la fonction. Je voudrais donc conclure sur un double raccourci: l'un dans le domaine constitutionnel, l'autre dans le domaine administratif.

a) Indépendance constitutionnelle

For reasons which it is not easy to grasp, it has always been very difficult in our country to bring the political authorities to deal adequately with the necessity of a strong and independent judicial power. In his Public Inquiry Report of 23 October 1979 in British Columbia, Mr. Justice Seaton wrote (p. 7): "Independent Courts were, and still are, a frustration to those with executive powers." Yet history is full of eloquent constitutional pronouncements on the matter. Let me only draw on two traditional sources.

In 1787, in a constitutional document seven articles long, our neighbours to the South devoted the first article to the legislative power, the second to the executive power and the third to the judicial power.

In 1791, in the Constitution enacted by the French Assemblée Nationale, Title III was devoted to the Pouvoirs publics (Public Powers). Chapters I to IV in that title deal with the Legislative Power and the Executive Power; Chapter V is entitled Du Pouvoir Judiciaire (Of the Judicial Power).

In view of these precedents, it is astounding that the Fathers of the Canadian Confederation and, after them, the Parliament of Westminster proved so lacking in eloquence on the subject of the judicial power.

After spending four chapters and 87 sections dealing with the Executive Power and the Legislative Power, the B.N.A. Act balked at using the expression "Judicial Power — Pouvoir judiciaire". It blushingly crowned chapter VII with the title "Judicature" and covered the subject tersely in six pragmatic sections. This is a situation which must be corrected.

It was with that goal in mind that the first three recommendations of my 1981 Report were put forward. I am not quoting them because of a self-glorifying fatherly pride, but because of the official stamp which was later on put on them:

- "1. The Canadian constitution should proclaim, on the federal and provincial levels, the principle of the individual and collective independence of the judicial power.

2. The Canadian constitution should establish the Supreme Court of Canada as the General Court of Appeal for Canada.
3. The Canadian constitution should guarantee the supervisory power of the provincial courts of superior jurisdiction."

It is enlightening to follow the subsequent events in their chronological order.

The Canada Act 1982⁽⁵¹⁾ was proclaimed on 17 April 1982. It contained nothing on recommendations 1 and 3. As to recommendation 2, concerning the Supreme Court of Canada, it entrenched behind a requirement of unanimity the composition of the Court and behind a requirement of a special majority other matters concerning the Court in the constitution⁽⁵²⁾ but it fell short of giving the Court full constitutional recognition.

Shortly thereafter, on 14 September 1982, the Canadian Judicial Council unanimously endorsed the three 1981 recommendations. On 23 November 1982 the late...

...Chief Justice Bora Laskin, in his capacity as Chairman of the Council, sent them to all political authorities across the country and concluded his letter as follows:

"The three recommendations are quite clear and there can be no doubt of the necessary vindication that they provide of judicial independence."

I am not aware whether answers were received from all Attorneys General. I have seen those of the Minister of Justice of Canada, the Honourable Mark MacGuigan and of the Minister of Justice of Newfoundland, the Honourable Gerald R. Ottenheimer. For our purposes, may I refer only to the reply of Prime Minister Trudeau on 31 December 1982. In its relevant parts his letter reads as follows:

"I have noted the three recommendations of Chief Justice Deschênes, and I support the principles underlying them. As you are no doubt aware, the federal government has raised these subject matters during the course of the federal-provincial...

...constitutional discussions over the past few years. They have proven to be controversial.

(...)

Thank you for bringing the recommendations of the Council to my attention. I will keep them in mind in future constitutional discussions with provincial premiers."

There the matter rested for two and a half years. It was revived by Chief Justice Dickson in a letter of 25 June 1985 to the Minister of Justice of Canada, then the Honourable John Crosbie, with copy to all provincial Attorneys General. The Chief Justice ended his letter with the expression of an explicit wish:

"(The Canadian Judicial) Council would like to arrange a meeting at a mutually convenient time in the future with you and the provincial Attorneys-General to discuss the (Deschênes) Report and its recommendations."

The Minister reacted favourably and foresaw the possibility of a meeting in early 1986. Most unfortunately this unique opportunity was lost because of a conflicting agenda of the Judicial Council.

But another occasion came around last spring at the Meech Lake meeting and the subsequent First Ministers' Conference in Ottawa. This time the results were more gratifying. In the Accord which emerged, and which of course must now be ratified by the Federal and all provincial political bodies across the country, the following essential features were designed to be inscribed in the Constitution:

- i) the Supreme Court of Canada is established as the general Court of Appeal for Canada (s. 101A(1); our recommendation number 2 will thus be implemented;
- ii) a new method of appointment to the Supreme Court is established (s. 101C);
- iii) the Supreme Court's judges will henceforth enjoy the constitutional privileges of inamovibility until the age of 75 and of Parliamentary control over their salaries and other benefits (s. 101D);

- iv) any amendment to any of those provisions shall require unanimity of all political authorities (s. 41(g)).

Those are enormous gains for which, given the past reluctance over a hundred years and more, the Canadian political leaders of 1987 ought to be congratulated. The end of the road however has not yet been reached. Québec is the only province which, as of now, has ratified the Lake Meech Accord⁽⁵³⁾. Let us hope that the other political authorities will move forward in the same direction and that, more especially, possible disagreements on other aspects of the Accord will not detract from the agreement reached in the judicial field.

b) Indépendance administrative

Il faut toutefois revenir sur terre. Le règlement des problèmes dans les hautes sphères constitutionnelles laisse entier le problème plus terre-à-terre, mais également important, de l'autonomie administrative des tribunaux. J'irais même jusqu'à dire que l'indépendance théorique des tribunaux risque de rester lettre morte tant que l'on n'aura pas assuré leur indépendance pratique dans leur administration quotidienne. J'ai démontré en 1981 combien cette...

....indépendance pratique était loin d'être acquise dans les milieux judiciaires et d'être même admise dans les milieux gouvernementaux. La difficile expérience que vit la Cour d'appel du Québec en est un vivant exemple. Le retard du Conseil canadien de la magistrature à accéder à l'autonomie administrative en est un autre.

Peut-être faudrait-il que la Cour suprême du Canada — on y revient toujours — soit la première à secouer le joug.

J'ai fait l'exposé en 1981 des contraintes administratives et financières auxquelles la Cour était soumise malgré les modifications de 1977 à sa loi. Le comité de Grandpré a fait les mêmes constatations.

En 1981 j'avais recommandé que la législation soit modifiée "de façon à libérer la Cour suprême du Canada des contraintes administratives qui l'affectent encore en matières de budget et de personnel et à loger ces activités sous la seule autorité du Juge en chef."⁽⁵⁴⁾. Le Comité de Grandpré a formulé en 1985 une recommandation au même effet que j'ai citée tout-à-l'heure.

Espérons que, la fièvre constitutionnelle tombant, il restera encore des énergies pour s'attaquer au problème moins exaltant, mais tout aussi important, de l'indépendance administrative des tribunaux.

Cet exposé est bien partiel et imparfait; il est loin de toucher tous les aspects de l'immense question de l'indépendance de la justice. Il permettra néanmoins, je l'espère, de saisir un peu mieux les hauts et les bas de la "réalité canadienne".

(Voir notes sur les pages 69ss.)

NOTES

- (1) Dr. Shimon Shetreet, Judicial Independence, unpublished paper, Lisbon, May 11-15, 1981, page 5.
- (2) Centre pour l'indépendance des magistrats et des avocats, Bulletin, numéro 8, octobre 1981, pages 10 à 12.
- (3) The Review, number 27, page 11.
- (4) Ibid, page 24.
- (5) CIMA, Bulletin, numéro 8, p. 2.
- (6) The Review, (ibid) p. 7.
- (7) Ibid.
- (8) CIMA, Bulletin, numéro 8, p. 14.
- (9) Fratelli Palombi Editori, Roma, November 1984.
- (10) La Fondation du Barreau canadien, Ottawa, 1985.
- (11) Ministère des approvisionnements et services Canada, Ottawa, 27 février 1987.
- (12) Court of Queen's Bench of New Brunswick, number F/C/354/86.
- (12a) Quoted in part in R. v Charters, (1986) 70 N.B.R. (2d) 361.
- (13) (1983) 1 S.C.R. 704, decided 7 June 1983.
- (14) 15 January 1987.
- (15) 1976 S.N.S., c. 13, ss. 13C(2), added by 1980, 29 El. II, c. 60, s. 2, 5 June 1980.
- (16) The National, February 1987, under title: "Minister criticized for delay in dealing with judge".
- (17) Ibid.
- (18) R. vs Valente No 2, 2 C.C.C. (3d) 417, at page 422.
- (19) Ibid, p. 443.
- (20) Valente vs R., (1985) 2 R.C.S. 673.
- (21) Beauregard vs R., (1981) 2 C.F. 543.

- (22) (1984) 1 C.F. 1010.
- (23) R. vs Beauregard, (1986) 2 R.C.S. 56.
- (24) 200 05-000 345-871, 2 avril 1987, Honorable Claude Rioux.
- (25) 1977 L.R.Q. c. T-16 as amended by 1978 L.Q. c. 19, s. 33.
- (26) Ibid, s. 267 and 278.
- (27) Ibid, ss. 277 ff.
- (28) 1977 L.R.Q. c. 2.1, s. 29.1 as amended by 1985 L.Q. c. 30, s. 2.
- (29) s. 252.
- (30) 1979 R.S.B.C. c. 341, s. 16(4) as replaced by 1981 S.B.C. c. 26, s. 12 introducing a new s. 18.
- (31) 1984 S.O. c. 11, s. 60(4).
- (32) Shatilla vs Shatilla, C.S. Montréal, Pinard J., 4 septembre 1981.
- (33) 1982 C.A. 511.
- (34) 1982 L.Q. c. 58, art. 79.
- (34a) 500 05-003718-861: Gold v Le Procureur Général du Québec et al.
- (35) Notes pour une allocution du Ministre de la justice et Procureur général du Québec à l'occasion de la rentrée judiciaire, Montréal, 2 septembre 1987.
- (36) 1958 S.S., c. 70, s. 3; 1978 R.S.S., c. Q-1, s. 7.
- (37) 1978 R.S.S., c. C-42, s. 3; amended by 1978 S.S., Supplement, c. 10, s. 2.
- (38) Saskatoon Criminal Defence Lawyers Association, Elder and Maltby v. Saskatchewan and Lane, (1984) 3 W.W.R. 707, at 710.
- (39) Ibid.
- (40) Quoted in Canadian Annual Review of Politics and Public Affairs, 1984, University of Toronto Press 1987, p. 291-292.
- (40a) Re: Duncan, 1958 R.C.S. 41.

- (41) 1970 R.S.C. c. J-1.
 - (42) Ibid, s. 45(b) and (c).
 - (43) The working Group is composed of Chief Justice Nemetz, chairman, Chief Justice Richard (New Brunswick), Pierre Garceau (Commissioner for Federal Judicial Affairs), Martin Low (Justice), Jim McPherson (Office of Chief Justice of Canada), Jeannie Thomas (Executive Secretary, Canadian Judicial Council) and Fred Jordan (Justice).
 - (44) (1981) 1 S.C.R. 753.
 - (45) (1976-77) S.C. c. 34, proclaimed 1 August 1977: Canada Gazette, v. 111, p. 5101.
 - (46) Masters in their Own House, Ottawa, 1981, p. 75.
 - (47) Project no. 5-2451, May 1979.
 - (48) Quoted at p. 77 of Masters in their Own House.
 - (49) 1974-75-76 S.C. c. 108.
 - (50) Voir Maîtres chez eux, p. 11, note 7.
 - (51) 1982 U.K. c. 11.
 - (52) Ibid, ss. 41(d) and 42(1)(d).
 - (53) Resolution of the Assemblée nationale, 23 June 1987.
 - (54) Maîtres chez eux, 1981, p. 76, recommandation no 25.
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