

THE INDEPENDENCE OF LAWYERS

BY Professor Shimon Shetreet

ERRATA

The following are typing mistakes. Please excuse the author and his proofreader.

- P. 5 2nd Line: to society (instead for society);
- P. 6 Line 14: or too closely (instead on too closely);
- Line 19: Lawyers are under;
- Line 21: his client or give him
- P.6 Line 3 from bottom: or his pleading rights ;
- P.7 Line 4 : perform a responsive function (delete "in" after "perform");
- P.8 Line 5: privileges and immunities
- Line 6: But these checks
- Line 16: and edited by W.H. Hurlburt, Q.C.,
 contains surveys prepared.
- Line 17: and J.A.C. Kemp
- P.10 Line 2: long been established
- Line 15: he defends persons whose liberty is
 deprived (S. 3.18)
- P.11 Line 3: Should give equal weight to the
 duties of
- Line 7: principle of accountability

OCTOBER 17
2053

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Introduction

The topic of the independence of lawyers has been somewhat neglected in comparison to the research which has been devoted to the independence of the judiciary. Yet the independence of lawyers and the legal profession is of equal importance to the maintenance of the rule of law in society.

In recent years however, the subject has attracted attention, both at the national and international levels. On the national level one might mention the Quebec Report of the Study Committee on the Role, the Status, the Remuneration and the Career of Lawyers and Notaries in the Public Service¹ and the British Royal Commission on Legal Services². These and other reports have not focused on the independence of the lawyer, as did a number of international documents.

The independence of lawyers is provided for in Part III of the Universal Declaration of the Independence of Justice,³ adopted in Montreal on June 10, 1983, by the World Conference on the Independence of Justice conducted under the leadership of the Chief Justice at that time, Jules Deschenes. The independence of the legal profession is declared to constitute an essential guarantee for the independence of the judicial process and the promotion and protection of human rights.⁴ The Declaration

further provides that access to legal services provided by an independent lawyer is an important human right.⁵

The International Commission of Jurists which had addressed this issue in an international conference in New Delhi in 1959, established in the early 1980's the Center for the Independence of Judges and Lawyers.

The Sub-Commission on the Prevention of Discrimination and Protection of Minorities, of the Economic and Social Council of the United Nations, has also studied the question of the independence of lawyers in recent years.⁶

The aim of this paper is to examine the necessary prerequisites for the independence of the individual lawyer and the collective independence of the legal profession.

Theoretical Dimensions of Legal Independence

The independence of judges is referred to as "judicial independence". The independence of lawyers, which is likewise vital for the proper discharge of the duties of the lawyer, should be referred to as legal independence.

The maintenance of the rule of law requires that the independence of both the judges and the lawyers be secured. It follows that the concept of the independence of lawyers or legal independence should generally be structured along the lines of judicial independence, subject to the appropriate adjustments and modifications. The independence of lawyers is composed of a number of central aspects. The independence of the individual lawyer comprises substantive independence, personal independence, and internal independence. In addition to the independence of the individual

lawyer, the collective independence of the legal profession as an institution must be recognized.

Substantive independence of the lawyer is secured by a number of legal mechanisms and principles. The lawyer has to be free from any conflict of interests. This rule applies in situations of conflict of different forms: a conflict between his personal interests and those of his client, a conflict between the interests of two clients, or a conflict of interest between the client and an organisation which employs the lawyer or pays his fees.⁷ Substantive independence is also secured by legal immunity granted to lawyers in court-related activity: appearance in court and preparation for the trial. In the context of lawyers in the public service, such as prosecutors or legal advisors to government agencies, substantive independence means that in taking professional decisions they must be independent and not subordinate. This, in spite of the fact that personally they may be subject to administrative orders in relation to non-professional matters.⁸ As to professional matters they are only subject to professional hierarchy.

The second aspect of the lawyer's independence is his personal independence. The extreme model of this aspect, as recognized in Switzerland for example, is that those who are employed by non-lawyers cannot be members of the Bar⁹. The Swiss approach is quite unique, as in most systems personal independence does not extend this far. It normally requires personal independence in the sense that a practising attorney should preferably not be a single-client lawyer or run an office for a limited number of clients. This tends to adversely affect his independence.

An important aspect of personal independence relates to the

independence of the lawyer from the judges and the government. Lawyers who are too concerned with judges' favours or moods, or are overly anxious to please the government, cannot exercise their functions properly and effectively and cannot serve the best interests of their client.

There is a special interest in ensuring the personal independence of lawyers in the public service, and a number of models exist to protect their personal independence. For example, one such model, is to place them outside the normal administrative hierarchy of their governmental units and put them under the hierarchy of the Department of Justice and the Attorney General, which are expected to be more professionally-oriented in the exercise of their duties, and are expected to demonstrate greater concern for the independence of the law and the lawyer.¹⁰

In addition to substantive independence and personal independence, lawyers should also enjoy internal independence vis-à-vis their colleagues at the Bar. Discipline should be exercised by the legal profession subject to proper safeguards, both with regard to the procedure of discipline, and to the grounds for disciplinary action against the lawyer.

Thus far, we have outlined the aspects of professional independence of the individual lawyer. However, the independence of the legal profession cannot be complete without securing the collective independence of the Bar as an institution. Collective independence of the legal profession is assured by the establishment of self governing bar associations, recognised by law. Such associations must enjoy independent status uninhibited by governmental controls and restrictions.

The different forms of legal independence and their significance in the promotion of the social interest of maintaining the rule of law must not

cause us to lose sight of the delicate balance which must be maintained between independence and accountability; the lawyer and the legal profession must be accountable to society, and their independence must be qualified by proper mechanisms and standards to assure personal integrity, impartiality and a high quality of legal services. Legal independence must not shield incompetence, negligence, dishonesty and breach of ethical duties.

The striking of that delicate balance between independence and accountability calls for the resolution of difficult questions, such as the mechanisms of the discipline of aberrant lawyers, and the lines between immunity for conducting trials and liability for professional misjudgment, protection of client-lawyer privilege and the enforcement of the criminal law.

One aspect must be emphasised, which is that the mechanisms of accountability of lawyers must be operated effectively, with little delay. Also, the better models of accountability of lawyers provide for the participation of lay members of the public in the disciplinary process.

Significance of Legal Independence

The need to protect the lawyer's independence is vital because of the unique nature of his function. As Lord Macmillan once explained, lawyers must maintain a balance between many conflicting claims. A lawyer owes a general duty to the rule of law in society. As an advocate he owes a duty to his client, as an officer of the court he owes a duty to the court, to the State and to the other party, and finally, he owes a duty to himself.

In order to be able to maintain a proper balance between these various and somewhat conflicting claims of his office and effectively represent his client, a lawyer must be independent. He must enjoy personal independence and substantive independence, as outlined earlier.¹¹ A practising lawyer should be independent in a number of ways. He should be independent from powerful corporations and financial institutions; he should not be dependent or too closely associated economically with branch organizations which represent employers, industry or employees; at the same time, a practising lawyer should be independent from government in all its forms: the executive, public authorities of different nature and responsibility, and the judiciary.¹²

Furthermore, lawyers are under a duty to avoid a situation of interdependence between themselves and their clients. Thus, a lawyer cannot provide financing for his client or give him loans to pay for the legal services provided. Likewise it is generally expected from lawyers to avoid a situation of a single client law practice. The lawyer should feel free to offer advice which may displease the client, as excessive economic dependence on one client restricts and inhibits the lawyer's freedom.

Like a judge, the lawyer exercises his function in a situation of dispute, a conflict between parties. The dispute may be constitutional, administrative or criminal, or where the individual is in confrontation with the government. The dispute may be a civil dispute between an ordinary citizen and a large corporation. In these conflict situations, a practising lawyer must be able to bring a claim, or conduct a defence without being at risk of jeopardizing his business interest, or worse, putting at risk his

bar license or pleading rights, should he present arguments which displease the government. The harassment of lawyers who are engaged in defence of human rights is unfortunately a widespread practice in some countries.¹³

The significance of the independence of lawyers has increased with the further development in the expectations from lawyers. Today a lawyer is not only expected to perform a responsive function; but also to exercise a supervisory function. As one senior lawyer put it, he is not expected to limit himself to "a yes or no or green light - red light function", but also to a "how to do it design function".¹⁴ Other lawyers spoke of the duty of the lawyer to offer "a meaningful preventive law alternative", and have pointed out the change on the function of the lawyer "from a role of response to a role of continuing surveillance and monitoring."¹⁵

The independence of the individual lawyer is enhanced by a strong and independent legal profession. The collective independence of the lawyers' organizations, an autonomous Law Society, Bar Association or Bar Council, established by law and protected from undue governmental control, are vital for the maintenance of an independent legal profession.

Contemporary Problems of the Legal Profession

The maintenance of legal independence - the independence of the lawyer and the legal profession - is a dynamic and a continuing campaign. This campaign is within the larger campaign of the maintenance of the quality of legal services provided by lawyers. The protection of independence calls for safeguards, privileges and immunities. These in turn result in abuses which must be checked. But these checks must be exercised so as not to

cause undue interference with the independence of the non-aberrant lawyers, who are the majority. This complicated circle of conflicting needs and principles requires both careful judgment and a firm resoluteness. These lines of analysis illustrate the complicated nature of the problems of the legal profession.

The continuing campaign of maintaining lawyers accountable can be illustrated by a sample survey of actions filed against lawyers. Such a survey is offered by a Canadian report published by the Federation of Law Societies, entitled "The Legal Profession and Quality of Service".¹⁶ The typical aberrations by solicitors extend to a wide range of areas.¹⁷ In real estate transactions, lawyers allowed insufficient mortgage security or failed in the investigation and certifying of titles. In the conduct of actions lawyers missed deadlines or limitation periods. The survey also reports the representation of conflicting personal interests, and gives account of straightforward cases of negligence, such as allowing the wife of a proposed beneficiary of a will to witness the execution of the will.

The Independence of Lawyers in Public Service

In order to perform their duties properly, employed lawyers, both in private business and public service, must enjoy professional independence. The independence of lawyers in public service is not always perceived with the clarity it requires. There is greater understanding of the need for assuring substantive independence of lawyers who are charged with the function of making prosecutorial decisions in the system of criminal justice. It is generally accepted that such decisions must be made without external pressures and subject only to professional considerations to the

exclusion of political input or non-relevant administrative guidance or instructions.

In some countries special care is taken to divorce the prosecutorial decision-makers from the political level. This is the rationale behind the office of the Director of Public Prosecutions in England, and behind the long established tradition that the Attorney-General in England, although a Minister of the Government and a Member of Parliament, is independent of the Government in the exercise of his prosecutorial functions. If this tradition is violated it will be viewed with the greatest seriousness, and may cause, as it did in 1924, the fall of the government of the day.

In Israel the separation between the political level and the prosecution process is achieved by an institutional set-up which vests the responsibility for criminal prosecution in the hands of a senior appointed public officer, a State Attorney, and his superior, who is termed the Legal Adviser to the Government, but who is normally referred to in English as the Attorney General. They are independent and not subject to the Minister of Justice or the Cabinet in the exercise of prosecutorial powers.

The General Security Services case, known as the Shin Bet Affair (1986), illustrated how important it is for the office of the Attorney General to be independent. The Attorney General at the time, Professor Yitzhak Zamir, preferred to leave office rather than to heed to pressure not to investigate the matter. The rule of law must prevail, even when it involves the security services.

This understanding of excluding political and external pressures is not as clear with respect to other aspects of the administration of justice, such as civil law or administrative law. The Report of the Quebec Study

Committee on the Role of the Status of Lawyers in Public Service addressed this issue and recommended the clarification of this proposition by a proper legislative amendment.¹⁸

It is in times of crisis that the independence of the lawyer is put to the test, particularly lawyers holding public office. An example is the Saturday night massacre in the United States during the Watergate Affair where the Attorney General refused to fire the Special Prosecutor.

There is no doubt that the social interest of protecting the professional independence of the lawyer in public service applies to all fields of law. Their independence must be further enhanced by proper conditions of work, secured terms of office and adequate remuneration.

International Perspectives

The independence of the individual lawyer and that of the legal profession has long been a central prerequisite for the maintenance of the rule of law in a free society and for the adequate protection of human rights. In 1959 the International Commission of Jurists, in an International Conference held in New Delhi, emphasized that "It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs".¹⁹ A much more elaborate statement of the commitment to the principle of the independence of lawyers and the legal profession is contained in the Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983.²⁰

The Declaration provides²¹ that the independence of the legal profession "constitutes an essential guarantee for the promotion and protection of human rights." The Declaration also emphasizes the importance

of the independence of the lawyer in the discharge of his duties²² and the vital need to protect him from government threats when he defends those persons whose liberty is deprived.²³ There are many other aspects contained in the Declaration which are essential elements for the protection of the personal and substantive independence of the lawyer and the collective independence of the legal profession. These include the protection of the lawyer against any sanctions where he may be representing an unpopular client,²⁴ emphasis on the independence of lawyers vis à vis the court,²⁵ and provision for the principle of the immunity of lawyers for court-related statements made in good faith.²⁶

The Declaration guarantees freedom of movement for lawyers, and client-lawyer confidentiality,²⁷ and guarantees the right of the lawyer to participate in public debate on law and the administration of justice, to propose legal reform, and to form or join organisations and to participate fully in activities in all walks of life.²⁸

The protection that must be accorded to the Bar Association or similar institution, is dealt with at great length in the Declaration.²⁹

Some of these guarantees would seem obvious to those lawyers living in long-established stable democracies, but a quick look at events in other countries immediately show that these guarantees are violated in various forms and such violations are committed against lawyers for the mere exercise of their responsibilities as lawyers.

Reports published by international human rights organisations contain countless incidents of lawyers being harrassed, disbarred from practising, tortured and assassinated for acting as lawyers.³⁰ It is to eliminate such

practices that these principles are established, to promote the principle of the independence of lawyers on the international scene.

Conclusion

In conclusion I wish to stress the importance of meeting the continuous challenge of protecting the independence of the legal profession in all its aspects. At the same time one should give equal weight to the duties of the legal profession to society in general and to the clients who expect speedy, fairly-priced and high-quality service.

Finally, the independence of lawyers, must always be qualified by the principle of accountability. Lawyers must be accountable for failures and aberrations. The legal profession must be diligent in maintaining high standards of the profession so that the profession will continue to enjoy public confidence. Thus the profession will be able to perform the holy task of protecting human rights and maintaining the rule of law in society.

The Independence of Lawyers

Notes

1. 15 December 1986 (hereinafter, "Study Committee Report").
2. Appointed February 1976 and reported October 1979, Cmnd. 7648 (HMSO).
3. Appendix 1 (hereinafter, "Universal Declaration").
4. §3.02 Universal Declaration.
5. §3.04
6. Dr. L.M. Singhvi, "United Nations' Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers", in Shetreet and Deschenes (eds.), *Judicial Independence: The Contemporary Debate* (1985), at 489-491.
7. See further, Countryman, Finman and Schneyer, *The Lawyer in Modern Society* (2d. ed. 1976), at 111-114; G. Hazard, *Ethics in the Practice of Law* (1976), at 69-86.
8. N. Galston, "Professional Responsibility of the Lawyer in Government Service", in *Professional Responsibility of the Lawyer* (1977), at 93-113.
9. Dr. H.R. Steiner, "Professional Duties of Attorneys in Switzerland", 12 *International Legal Practitioner* 39, at 40 (June 1987).
10. See further, Study Committee Report, at 30-33, and 87-89.
11. *Supra*, at 2-4.
12. See further, Thomas H. Federspiel, "Independence of the Judiciary and the Legal Profession: A U.S. and Northern European Perspective", 12 *International Legal Practitioner* 47, at 48-49 (June 1987).
13. J. Shestack, "Legal Aid for Lawyers Who Represent Unpopular Clients and Causes," (unpublished paper dated 19.9.86).

14. Bayless Manning, "Corporate Legal Practice in the 1990's: Directions and Challenges", 37 The Business Lawyer 683, at 693 (1982).
15. Id., at 26.
16. W.H. Herburt, Q.C. (ed.), The Legal Profession and Quality of Service (1981).
17. Id., at 395 for survey prepared by Professor Lewis Klar and J.A.C. Kemps.
18. Supra n.1, at 74-76, 96-107.
19. Report of Committee IV International Congress of Jurists, New Delhi, 1959, Clause VII, Appendix II .
20. See further, the Hon. J. Deschenes, "The Montreal Declaration on the Independence of Justice - an Introduction", in Shetreet and Deschenes (eds.), supra, n.6, at 445-446. For the complete text of the Universal Declaration on the Independence of Justice, see Shetreet and Deschenes (eds.), id., at 447-461.
21. §3.02.
22. §3.11.
23. §3.18.
24. §3.13.
25. §3.14-3.15.
26. §3.17.
27. §3.19.
28. §3.20.
29. §3.25 - 3.29.
30. Supra, n.10.

Universal Declaration on the Independence of Justice, adopted in Montreal, June 1983.

III. Lawyers

Definitions

3.01 In this chapter:

- a) "lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters;
- b) "Bar association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

- 3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.
- 3.03 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
- 3.04 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

Legal Education and Entry into the Legal Profession

- 3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.
- 3.06 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer, and of human rights and fundamental freedoms recognized by national and international law.
- 3.07 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.
- 3.08 Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer, and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

Education of the Public Concerning the Law

- 3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant and available remedies.

Rights and Duties of Lawyers

- 3.10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and, where required, c) representing him before courts, tribunals or

administrative authorities.

- 3.11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.
- 3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.
- 3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.
- 3.14 No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.
- 3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.
- 3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.
- 3.17 Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.
- 3.18 The independence of lawyers, in dealing with persons deprived of their liberty, shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.
- 3.19 Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client relationship; b) the right to travel and to consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work; d) the right to accept or refuse a client or a brief.
- 3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to: a) take part in public discussion of matters concerning the law and the administration of justice, b) join or form freely local, national and international organizations, c) propose and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political,

social and cultural life of their country.

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

Legal Services for the Poor

3.22 It is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

- 3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

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

- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment.

The Bar Association

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

- 3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

Function of the Bar Association

3.27 The functions of a Bar Association in ensuring the independence of the legal profession shall be inter alia:

- a) to promote and uphold the cause of justice, without fear or favour;
- b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;
- c) to defend the role of lawyers in society and preserve the independence of the profession;
- d) to protect and defend the dignity and independence of the judiciary;
- e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;

- f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;
- g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
- h) to promote a high standard of legal education as a prerequisite for entry into the profession;
- i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
- j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
- k) to affiliate with, and participate in, the activities of international organizations of lawyers.

3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.

3.29 To enable the Bar Association to fulfill its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: i) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer. In such cases, the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that professional secrecy is safeguarded.

Disciplinary Proceedings

3.30 The Bar Association shall freely establish and enforce, in accordance with the law, a code of professional conduct of lawyers.

3.31 The Bar Association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar Association with a view to its initiating disciplinary proceedings.

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

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

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

APPENDIX II

Report of Committee IV International Congress of Jurists, New Delhi, 1959

The Judiciary and the Legal Profession Under the Rule of Law

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

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

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

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

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

Clause VI It must be recognised that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of judicial

business and that, subject to the limitations on delegations of legislative power which have been dealt with elsewhere, it may delegate part of this responsibility to the Executive. However, the exercise of such responsibility by the Legislative including any delegation to the Executive should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.

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

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

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

1. Wherever a man's life, liberty, property or reputation are at stake, he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;
2. Once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;
3. It is the duty of a lawyer, which he should be able to discharge, without fear of consequences, to press upon the Court any argument of law or of fact which he may think proper for the due presentation of the case by him.

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

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The Independence of Lawyers

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A paper to be presented at the National Seminar of
the Canadian Institute of the Administration of
Justice on "Justice: Independence and Accountability"
Montreal October 14 - 17, 1987

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Introduction

The topic of the independence of the lawyer and the notary has been neglected in comparison to the research which has been devoted to the independence of the judiciary. The International Commission of Jurists which had addressed this issue in an international conference in New Delhi in 1959, established in the early 1980's the Center for the independence of judges and lawyers.

Yet the independence of the lawyers and the legal profession is of equal importance to the maintenance of the rule of law in society.

In recent years however, the subject has attracted attention both at the national and international levels. On the national level one might mention the Quebec Report of the study Committee on the role, the status of Lawyers in Public Service (1986) and the British Royal Commission on Legal Services. These and other reports have not focussed on the independence of the lawyer, as did a number of international documents.

The independence of lawyers is provided for in Part III of the Universal Declaration of the Independence of Justice, adopted here in Montreal on June 10, 1983, by the World Conference on the Independence of Justice. The independence of the legal profession is declared to constitute an essential guarantee for the independence of the judicial process and the promotion and protection of human rights., The declaration further provides that access to legal services provided by an independent lawyer, is an important human right.

The International Commission of Jurists which had addressed this issue in an international conference in New Delhi in 1959, established in the early 1980's the Center for the independence of judges and lawyers.

The Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Economic and Social Council of the United Nations has also studied the question of the independence of lawyers in recent years.

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The aim of this paper is to examine the necessary prerequisites for the independence of the individual lawyers and the collective independence of the Legal Profession. The collective dimension of the independence of lawyers will be examined in the light of the various models of self government of the legal profession, existing in different parts of the world.

Theoretical Dimensions of Legal Independence

The independence of judges is referred to as "judicial independence". The independence of lawyers, which is likewise, vital for the proper discharge of the duties of the advocacy, should be referred to as legal independence.

The maintenance of the rule of law requires that the independence of both the judges and the lawyers be secured. It follows that the concept of independence of lawyers or legal independence should then generally be structured along the lines of judicial independence. The independence of lawyers is composed of a number of central aspects: the independence of the individual lawyer comprises of substantive independence, personal independence, and internal independence. In addition to the independence of the individual lawyer, the collective independence of the legal professions as an institution must be recognized.

Substantive independence of the lawyer is secured by a number of legal mechanisms and principles. The lawyer has to be free of conflict of interests. This rule applies in situations of conflict of different forms: a conflict between his personal interests and those of his client; a conflict between the interests of two clients; a conflict of interest between his client and an organisation which employs him or pays his fees. Substantive independence is also secured by legal immunity granted to lawyers in court related activity: appearance in court and preparation for the trial. In the context of lawyers public service such as prosecutors or legal advisors to the government agencies substantive independence means that in taking professional decisions they must be independent and not subordinate. This in spite of the fact that personally they may be subject to administrative orders in relation to non professional matters. As to professional matters they are only subject to professional hierarchy.

The second aspect of the lawyers' independence is his personal independence. The extreme model of this aspect as recognized in Switzerland for example, that those who are employed by non lawyers cannot be members of the Bar. The Swiss approach is quite unique, in most systems the personal independence does not go as far. It normally requires personal independence in the sense that a practising attorney should not be a single-client lawyer or run an office for a limited number of clients. This tends to adversely affect his independence. An important aspect of personal independence relates to the independence of the lawyer from the judges and the government. Lawyers who are too concerned with judges' favours or threats, or are overly anxious to please the government cannot exercise their functions properly and effectively and cannot serve the best interests of their client. There is a special interest in insuring the personal independence of lawyers in the public service. There are models to protect their personal independence for example by rendering them outside the normal administrative hierarchy of their governmental units and putting them under the hierarchy of the department of justice and the Attorney General who are expected to be more professionally oriented in the exercise of their duties, and are expected to demonstrate greater concern for the independence of the law and the lawyer.

In addition to substantive independence and personal independence lawyers should also enjoy internal independence vis-a-vis their colleagues at the Bar. Discipline should be exercised by the legal profession subject to proper safeguards both with regard to the procedure of discipline, and to the grounds for disciplinary action against the lawyer.

Thus far, we have outlined the aspects of professional independence of the individual lawyer. However, the independence of the legal profession cannot be complete without securing the collective independence of the Bar as an institution. Collective independence of the legal profession is assured by the establishment of self governing bar associations, recognised by law. Such associations must enjoy independent status uninhibited by governmental controls and restrictions.

The different forms of legal independence and their significance in the promotion of the social interest of maintaining the rule of law must not cause us to lose sight of the delicate balance which must be maintained

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between independence and accountability; the lawyer and the legal profession must be accountable for society; their independence must be qualified by proper mechanisms and standards to assure personal integrity, impartiality and a high quality of legal services. Legal independence must not shield incompetence, negligence, dishonesty and breach of ethical duties.

The striking of that delicate balance between independence and accountability calls for the resolution of difficult questions, such as the mechanisms of discipline of aberrant lawyers, and the lines between immunity for conducting trial and liability for professional misjudgment, protection of client-lawyer privilege and the enforcement of criminal law.

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Significance of Legal Independence

The need to protect the lawyer's independence is vital because of the unique nature of his function as Lord Macmillan once explained the lawyers must maintain a balance between many conflicting claims. A lawyer owes a duty in general to the rule of law in society. As an advocate he owes a duty to his client; as an officer of the court he owes a duty to the Court; he also has a duty to the State and the other party; finally he owes a duty to himself.

In order to be able to maintain this proper balance between these various and somewhat conflicting claims of his office and represent his client, a lawyer must be independent. He must enjoy personal independence and substantive independence as outlined earlier. A practicing lawyer should be independent in a number of ways. He should be independent from powerful corporations and financial institutions; he should not be dependent on too closely associated economically with branch organizations which represent employers, industry or employees; at the same time a practising lawyer should be independent from government in all its forms: the executive, public authorities of different nature and responsibility, and the judiciary.

Furthermore, lawyers under a duty to avoid a situation of interdependence between themselves and their clients, thus, a lawyer cannot provide financing for his diet or give his loans to pay for the legal services provided. Likewise it is generally expected from lawyers to avoid a situation of single client law practice. The lawyer should feel free to offer advice which may displease the client, and excessive economic dependence on one client restricts and inhibits the lawyer's freedom.

Like a judge, the lawyer exercises his function in a situation of a dispute, a conflict between parties. The dispute can be constitutional, administrative or criminal where the individual confronts the government. The dispute can be a civil dispute between an ordinary citizen and a large corporation. In those conflict situations, a practising lawyer must be able to prosecute a claim, or conduct a defence without being at risk of jeopardizing his business interest or worse, bar license on pleading rights, should he present arguments which displease the government. The harassment of lawyers who are engaged in defence of human rights is unfortunately a

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widespread practice in some countries.

The significance of the independence of lawyers has increased with the further development in the expectations from lawyers. Today a lawyer is not only expected to perform in a responsive function; but also to exercise a supervisory function. As one senior lawyer put it, he is not expected to limit himself to "a yes or no or green light - red light function", but also a "how to do it design function". (Bayless Manning, Corporate Legal Practice in 1990's: Directions and Challenges" (1982) 37 The Business Lawyer 683,693). Other lawyers spoke of the duty of the lawyer to offer "a meaningful preventive law alternative", and have pointed out the change on the function the lawyer "from a role of response to a role of continuing surveillance and monitoring" (id at 26).

The independence of the individual lawyer is enhanced by strong and independent legal profession. The collective independence of the lawyer's organizations. An autonomous law society; bar association or Bar Council, established by law and protected from undue governmental control, is vital to the maintenance of an independent legal profession.

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Contemporary Problems of the Legal Profession

The maintenance of legal independence - the independence of the lawyer and the legal profession is a dynamic and a continuing campaign. This campaign is within the larger campaign of the maintenance of the quality of legal services provided by lawyers. The protection of independence calls for safeguards, privileges and immunities. These in turn, result in abuses which must be checked. But more checks must be exercised so as not to cause undue interference with the independence of the non-aberrant lawyers, who are the majority. This complicated circle of conflicting needs and principles requires both careful judgement and a firm resoluteness. These lines of analysis illustrate the complicated nature of the problems of the legal profession.

The continuing campaign of maintaining lawyers accountable can be illustrated by a sample survey of actions filed against lawyers. Such a survey is offered by a Canadian report published in 1981 by the Federation of Law Societies. The Report entitled "The Legal Profession and Quality of Service" are edited by W.H. Hurbert, A.C., contain surveys prepaid by Professor Lewis Klar and Mr. J.A.C. Keys (see id p. 395). The typical aberrations by solicitors extend to a wide range of areas. In real estate transactions, lawyers allow insufficient mortgage security or failed in the investigation and certifying of titles. In the conduct of actions lawyers missed a deadline of limitation periods. The survey also reports the representation of conflicting personal interests.

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The Independence of Lawyers in Public Service

In order to perform their duties properly, employed lawyers both in private business and public service must enjoy professional independence. The independence of lawyers in public service is not always perceived with the clarity it requires. There is greater understanding to the need for assuring substantive independence of lawyers who are charged with the function of making prosecutorial decisions in the system of criminal justice. It is generally accepted that such decisions must be made without external pressures and subject only to professional considerations to the exclusion of political input or non-relevant administrative guidance or instructions. This understanding is not as clear with respect to other aspects of administration of justice such as civil law, or administrative law. The Report of the Quebec Study Committee on the Role of the Status of Lawyers in Public Service addressed this issue and recommended the clarification of this proposition by a proper legislative amendment.

There is no doubt that the social interest of protecting professional independence of the lawyer in public service applies to all fields of law; their independence must be further enhanced by proper conditions of work secured terms of office and adequate remuneration.

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International Perspectives

The independence of the individual lawyer and that of the legal profession has long been as a central aspect of the maintenance of the rule of law in a free society and for the adequate protection of human rights. In 1959 the International Commission of Jurists in an International Conference held in New Delhi emphasized that "it is essential, to the maintenance of the rule of law that there should be an organized legal profession free to manage its own affairs". A much more elaborate statement of the commitment to the principle of the independence of lawyers and the legal profession is contained in the Universal Declaration - on the Independence of Justice, adopted here in Montreal in June 1983.

The Declaration provides (§ 3.02) that the independence of the legal profession "constitutes an essential guarantee for the promotion and protection of human rights." The Declaration also emphasizes the importance of the independence of the lawyer in the discharge of his duties (§ 3.11) and the vital need to protect him from government threats when he depends on persons whose liberty is depressed (§ 3.18). There are many other aspects that the Declaration contains as essential elements for the protection of the personal and substantive independence, of the lawyer and the collective independence of the legal profession. Due to its significance, I have included the full text of the Declaration, the Part relating to the Lawyers.

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Conclusion

In conclusion I wish to stress the importance of meeting the continuous challenge of protecting the independence of the legal profession in all its aspects. At the same time one should not give equal weight to the duties of the legal profession to society in general and to the clients who expect speedy, fairly priced and high-quality service.

Finally, the independence of lawyers, must always be qualified by the principle of accountability. Lawyers must be accountable for failures and aberrations. The legal profession must be diligent in maintaining high standards of the profession so that the profession will continue to enjoy public confidence. Thus the profession will be able to perform the holy task of protecting human rights and maintaining the rule of law in society.

Appendix I

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Universal Declaration on the Independence of Justice, adopted in Montreal, June 1983.

III. Lawyers

Definitions

3.01 In this chapter:

- a) "lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters;
- b) "Bar association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

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

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

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

Legal Education and Entry into the Legal Profession

3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

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

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

3.08 Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer, and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil or political rights.

Education of the Public Concerning the Law

3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant and available remedies.

Rights and Duties of Lawyers

3.10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and, where required, c) representing him before courts, tribunals or

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administrative authorities.

- 3.11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his client and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.
- 3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.
- 3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.
- 3.14 No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.
- 3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.
- 3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.
- 3.17 Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.
- 3.18 The independence of lawyers, in dealing with persons deprived of their liberty, shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.
- 3.19 Lawyers shall have all such other facilities and privileges as are necessary to fulfill their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client relationship; b) the right to travel and to consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work; d) the right to accept or refuse a client or a brief.
- 3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly; and in particular they shall have the right to: a) take part in public discussion of matters concerning the law and the administration of justice, b) join or form freely local, national and international organizations, c) propose and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political,

social and cultural life of their country.

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

Legal Services for the Poor

3.22 It is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural, as well as civil and political, of individuals and groups.

3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.

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

- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
- recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with his professional conscience and judgment.

The Bar Association

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

3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

Function of the Bar Association

3.27 The functions of a Bar Association in ensuring the independence of the legal profession shall be inter alia:

- a) to promote and uphold the cause of justice, without fear or favour;
- b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;
- c) to defend the role of lawyers in society and preserve the independence of the profession;
- d) to protect and defend the dignity and independence of the judiciary;
- e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;

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- f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;
- g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
- h) to promote a high standard of legal education as a prerequisite for entry into the profession;
- i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
- j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
- k) to affiliate with, and participate in, the activities of international organizations of lawyers.

- 3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting the foreign lawyer to obtain the necessary right of audience.
- 3.29 To enable the Bar Association to fulfill its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: i) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer. In such cases, the Bar Association shall be entitled to be represented by its president or nominee, to follow the proceedings, and in particular to ensure that professional secrecy is safeguarded.

Disciplinary Proceedings

- 3.30 The Bar Association shall freely establish and enforce, in accordance with the law, a code of professional conduct of lawyers.
- 3.31 The Bar Association shall have exclusive competence to initiate and conduct disciplinary proceedings against lawyers on its own initiative or at the request of a litigant. Although no court or public authority shall itself take disciplinary proceedings against a lawyer, it may report a case to the Bar Association with a view to its initiating disciplinary proceedings.
- 3.32 Disciplinary proceedings shall be conducted in the first instance by a disciplinary committee established by the Bar Association.
- 3.33 An appeal shall lie from a decision of the disciplinary committee to an appropriate appellate body.
- 3.34 Disciplinary proceedings shall be conducted with full observance of the requirements of fair and proper procedure, in the light of the principles expressed in this declaration.

APPENDIX

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Report of Committee IV International Congress of Jurists, New Delhi, 1958

The Judiciary and the Legal Profession Under the Rule of Law

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

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

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

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

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

Clause VI It must be recognised that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of judicial

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business and that, subject to the limitations on delegations of legislative power which have been dealt with elsewhere, it may delegate part of this responsibility to the Executive. However, the exercise of such responsibility by the Legislative including any delegation to the Executive should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.

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

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

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

1. Wherever a man's life, liberty, property or reputation are at stake, he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;
2. Once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;
3. It is the duty of a lawyer, which he should be able to discharge, without fear of consequences, to press upon the Court any argument of law or of fact which he may think proper for the due presentation of the case by him.

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