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# THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: STUDY ON THE INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY, JURORS AND ASSESSORS AND THE INDEPENDENCE OF LAWYERS

Final report by the Special Rapporteur, Mr. L.M. Singhvi */

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*/ This addendum contains Chapters V to VII inclusive.

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## V. THE CONCEPT OF IMPARTIALITY AND INDEPENDENCE

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

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

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

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

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

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

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

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

81. In the Conclusions of the International Congress of Jurists on the Role of Law in a Free Society 1/ it was noted that the independence of the judiciary "implies freedom from interference by the Executive or Legislative with the exercise of the judicial functions, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underline it." The duties of a juror and an assessor and those of a lawyer are quite different but their independence equally implies freedom from interference by the Executive or Legislative or even by the judiciary as well as by others in the fearless and conscientious discharge of their duties in the exercise of their functions. Each one of them has an allotted and accepted role and a body of rules and conventions to guide him. Jurors and assessors, like judges, are required to be impartial as well as independent. A lawyer, however, is not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases, and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference.

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

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

VI. IN DEFENCE OF THE CONCEPT OF IMPARTIALITY AND INDEPENDENCE

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

84. Studies of political justice 1/ and of law and politics in judicial appointments and the attitudes of judges 2/, critical surveys and classifications of judicial behaviour, and searching probes in the politics of the judiciary 3/ are invaluable and welcome aids to the principles of impartiality and independence of the judiciary. They establish that the independence of judiciary is not an absolute concept, that neither fanatical iconoclasm nor blind idolatry are appropriate, that the judiciary is a part of the established order and has often to render justice according to law, that judicial independence and impartiality is not a final finished product of standard specifications, that there is room for improvement in different directions, and that despite their limitations, the principles of impartiality and independence are axiomatic, essential and indispensable.

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

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

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

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

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

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

87. Political justice operates not only in crude, clear-cut ways but also in grey areas; but it is impermissible to look askance at every admixture of law and politics and to condemn such an admixture as nothing but political justice in the pejorative sense. After all, judges are creatures of the time and the society in which they live. The judiciary is not immune to a variety of influences. Dr. Robson said that "Public policy is nothing more or less than the expression of certain social sympathies and antagonisms of judges, certain ethical ideals which have taken definite form in particular decisions, and in that way become crystallized into stable doctrines" 4/. An English judge who has been accused of prejudice against trade unions denies the charge and says: "If you know your history you will know that in this field for 100 years law and politics have been mixed up together. Politics have influenced the law, and the law has influenced politics. Many of the cases that come before the courts are fraught with political consequences. The very decision of them becomes the subject of political controversy. The columnists comment on them. Pressure groups press for legislation to overrule them. All this is unavoidable. But none of it means that the judges themselves are political." 5/ The judge tells his readers: "If you should look into the cases in which I have taken part, you will see that sometimes the judgements have been in favour of trade unions; and sometimes against them. In every case I have decided in accordance with the law as I believe it to be." No judge can do better. However, what a judge believes to be the law, and how he comes to that belief are related to his training and legal culture, his personal, social and professional background, his unconscious and subterranean predilections, and his conscious commitment to be fair, objective, impartial and independent. To monitor these factors is to be concerned and vigilant about the principles of independence and impartiality in action rather than to disclaim the principles.

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

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4/ Robson, Justice and Administrative Law, p. 240 quoted by Slesher, op.cit., p. 133.

5/ The Rt. Hon. Lord Denning, The Closing Chapter, London, 1983, 158.

of the 80, 63 were appointed by their own party while in office; and 33 of them had been either Attorneys-General or Solicitors-General 6/. As Laski put it: "It is not necessary to suggest that there will be conscious unfairness; but it is, I submit, possible that such judges will, particularly in cases where the liberty of the subject is concerned, find themselves unconsciously biased through over-appreciation or executive difficulty ... Nothing is more disastrous than that any suspicion of the complete impartiality of the judges should be possible".

89. Griffith concedes that today being a member of a political party seems to be neither a qualification nor a disqualification for appointment. 7/ He, however, shows that in his country, four out of five full time professional judges are products of public schools and of Oxford or Cambridge 8/. He joins issue with Lord Justice Lawton who claimed generally in his Riddel Lecture, in 1975, that it was a common misconception that the judiciary were drawn from the moneyed classes and educated at leading public schools and at Oxford or Cambridge. Lord Justice Lawton claimed that judges were a microcosm of society 9/.

90. The controversy does not negate the value of judicial impartiality and independence. It leads us to conclude that it is desirable to make an effort to equalize opportunities of higher university and professional education and of recruitment to the Bar and the bench. Perhaps a certain element of subjective prejudice might always colour the process of adjudication for "judges are human with human prejudices". 10/ But a well-trained judiciary is expected to overcome those prejudices to the maximum extent possible and to provide an open and credible system which can provide more impartial and independent personnel and fairer and more equal procedures than any other institution. Griffith, however, adds another dimension to the issue of independence and impartiality. His thesis is that the principal function of the judiciary is "to support the institutions of government as established by law" 11/, that judges are concerned to preserve and to protect the existing order 12/, that "in both capitalist and communist societies, the judiciary has naturally served the prevailing political and economic forces 13/. The basic truth of Griffith's thesis is undeniable. Judicial institutions form a part of the whole system.

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

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

7/ Ibid., p. 24.

8/ Ibid., p. 215.

9/ Ibid., 214.

10/ Ibid., p. 215

11/ Ibid., p. 28.

12/ Ibid., p. 29.

13/ Ibid., p. 31.

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

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

93. No matter what judges do or fail to do, controversies on the question of "politicization" of the judiciary will always remain because the judiciary does not function in a vacuum. It is possible to increase professionalization of the judiciary and reduce its politicization by changing methods and sources of recruitment and by placing security of tenure and prospects of promotion beyond the reach of any patronage by the executive and the legislature. But the modern judiciary would still have to decide questions which are political in nature, have political consequences and which inevitably bring the judges within the range of political fire. As H.W.R. Wade pointed out "Today no apology is needed for talking openly about judicial policy. Twenty or 30 years ago judges questioned about administrative law were prone to say that their function was merely to give effect to the will of Parliament and that they were not concerned with policy. In reality they are up to their necks in policy as they have been all through history, and nothing could illustrate this more vividly in our own time than the vicissitudes of administrative law." 14/ When Lord Denning said in a speech in the House of Lords that if British judges were given power to overthrow Acts of Parliament, they would become politicized and referred to the somewhat forbidding examples of the constitutions of the United States of America and India in respect of conflicts which arise in those countries from time to time between the judges and the legislature.

94. Lord Hailsham replied to those who opposed powers of judicial review to invalidate Parliamentary legislation in words which are as telling as they are graphic: "They are under the curious illusion that the judges are not already in politics. Lord Diplock, as one of the authors of the Anisminic decision, practically abolished an Act of Parliament about the Foreign Compensation Commission. What about Gouriet? ... What about the Laker dispute? How about the Tameside education dispute? What about the decision in validating Mr. Roy Jenkins' policy on wireless licences? How about the various decisions of this House and the Court of Appeal on the Race Relations Act? And what about their recent decisions on the trade union legislation? ... If they (the judges) assume jurisdiction they are in politics; if they decline jurisdiction they are in politics. All they can hope to be is impartial ...." 15/

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14/ H.W.R. Wade, Constitutional Fundamentals (The Hamlyn Lectures), 1980, pp. 61-62.

15/ Ibid., pp. 76-77.

95. In greater or lesser measure, the tension between jurisdictio and gubernaculum, and the problem of politics of the judiciary is ubiquitous. Its size and complexion varies, but so long as the functions of the judiciary involve conflicting claims and interest and co-ordinate institutions of government, the problem will remain. We must tackle it as best as we can to achieve an optimum measure of impartiality and independence of the judicairy in a balanced constitutional framework.

96. Routes of statutory interpretation differ. Judicial techniques vary. The same words and their collocation may speak differently to different judges. Some judges may apply the literal rules of interpretation and may be strict constructionists. Others may be liberal and may be willing to leave gaps in the legislation to reach a practical or acceptable result. Some others may be more purposeful in their interpretation, and in looking for the intention of the Legislature and the spirit of the legislation and of the times, they may overcome obscurities and ambiguities in their own way. In the armoury of law, there are diverse aids to construction in every legal system.

97. The role of the judge varies. Certain systems go by precedents and stare decisis; others lean more heavily on the words of the statute. Yet others confide a great deal of power and discretion to the judges themselves. In many systems judges may strike down a parliamentary statute and in fact they do. There are many others in which such a power would be anathema. These differences underline different choices within the system and as between different systems. These differences do not necessarily make justice political in the pejorative sense. These differences only show that judges may approach the same matter differently, and that there is considerable play in the judicial joints.

98. On the other hand, a judge may find himself helpless in the face of the unambiguous mandate of the legal system or a particular body of laws. A judge in South Africa, howsoever liberal his views on race relations and equal rights may be, may well find himself a prisoner of the legal system which seeks to perpetuate apartheid and racial discrimination and which subjugates and suppresses the majority of the population. A judge who serves an unworthy and unjust system sits on the horns of a dilemma. Sir Henry Slesher's solution was helplessly individualistic: " ... in the last resort, there is nothing to prevent a good judge being called upon to interpret an evil law - in such case, if the legalistic unrighteousness become universal, his only escape lies in the resignation of his office" 16/.

99. The impartiality and the independence of the judiciary may soften the rigours of injustice occasionally but they cannot transform and rectify an altogether unjust social or legal system, the foundation of which is the denial of justice. We are concerned in this study with the principles of judicial impartiality and independence as working rules and not as a panacea for abnormal distortions such as apartheid, where a fundamental systemic change becomes necessary because the political injustice is institutionalized in the system, which has arrogantly obliterated the intrinsic impartiality, independence and humanity of the judges. It is safe to say that the working rules or the ground rules of

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16/ Slesher, op.cit., p. 149.

judicial impartiality and independence are substantially and invariably endangered by the use of the judicial forum for perpetuating political injustice or for political revenge for a premeditated or preordained result by a hand-picked judiciary and without the safeguards of law and fair trial by the raw use of State power.

100. Similarly, when judges or the judiciary become persecutors, prosecutors or perpetrators of partisan propaganda, their impartiality and independence are imperilled and the public confidence in the judicial process is shaken and subverted. In capitalist systems, powerful corporations, political patronage and power of money may pose a serious threat to the principle of independence. The danger of the eclipse of the independence of the judiciary is obviously most acute in countries where there is neither democracy, nor rule of law, nor social conscience and legal institutions lack strength and resilience. Personal and military dictatorships in one-party States find the independence of the judiciary intolerably irksome and inconvenient.

101. In theocratic countries, it may be theoretically possible to ensure the functional independence of the judiciary but particular care has to be taken at every step 17/ because centres of power are few and they tend to exert intolerant pressure on the judiciary to compel compliance with their views. If a system has no checks and balances within, if democracy and rule of law are not practised, if intolerance and fanaticism become the national creed, in such an environment, the independence of the judiciary and the legal profession cannot grow; it inevitably languishes and it soon becomes an endangered species.

102. In democratic societies, there is first a social philosophy to monitor legal institutions and to be monitored by the law of the land. There is freedom, dissent and consideration of legality. There is above all a measure of open-minded tolerance. Public debates and discussion, dissemination and projection help to preserve the independence of the judiciary. The press and the media as well as public opinion are important safeguards in the modern world where justice is denied by political power or political consideration. On the other hand, there is also danger of rank political injustice because of media build-up or popular passions worked up to a pitch by newspapers and the media. Political justice may pose a danger to the independence of the judiciary, if judges suffer from elitism, exclusivism or class bias and are influenced by their social origin. In countries where there are rich and poor, educated and illiterate, the judiciary has a great responsibility to protect the rights of the underprivileged irrespective of their own social origin, educational attainments and social status. A system of government and the economic system prevailing in the society do naturally influence the judicial mind, but it is necessary that the judges cultivate an attitude of objectivity and show a certain concern for the weaker sections of the society and their human rights, for compassion in a judge is not bias or partiality. Reflection of social pluralism in the

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17/ Telford Georges, Rule of Law in One Party States (Speeches).

composition of the judiciary may also help. But the most decisive single factor is the moral sensitivity and intellectual honesty of the judge, and his determination to overcome both affection and ill will.

103. In this connection, it is well to remember the old adage of abiding wisdom that justice should not only be done but it should also appear to have been done, for appearance, impression or belief is also part of social and legal reality. What is more, complacency about form and appearance of justice may also undermine the substance of justice besides impairing public confidence. Where law and politics intermix visibly, both the form and the substance of justice assume added significance.

## VII. INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

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

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

106. The principle of separation of powers has particular relevance to the principle of independence of the judiciary. It has had different historical antecedents and manifestations in different countries. The French Revolution proclaimed the ideal of strict separation of powers and compelled the Ordre judiciaire to refrain from encroaching upon or interfering with legislative and administrative action. 1/ The Americans adopted the doctrine in the form of checks and balances and raised it to the status of fundamental constitutional principle, making the judiciary the umpire of the constitutional process. The edifice of an extensive judicial review system has been built upon the foundation of separation of powers in the United States of America. 2/

107. Historically, separation of powers became necessary to the independence of the judiciary because that was the way the functional integrity of the judicial function could be maintained. In due course, the two concepts of separation of powers and independence of the judiciary became allies in the new constitutionalism of limitation of government by law 3/ and protection of civil and political rights. As Alexander Hamilton said long ago: "...the complete independence of the courts of justice is peculiarly essential in a limited constitution ... without this all the reservations of particular rights or privileges would amount to nothing." Chief Justice Marshall pressed the doctrine of separation of powers into service for laying the foundation for judicial review and claimed that it was the province and duty of the judicial department to say what the law is, particularly if law be in opposition to the Constitution. 4/

108. Strict separation of powers or extensive judicial review are not, however, an invariable inseparable condition of the principle of judicial independence. Separation of powers is found in many countries in sharply drawn demarcations of power in a classic Montesquieusque form; 5/ in many others it is found in a restricted form. In the latter there are mutual checks and balances. There is a separation of the executive, legislative and judicial powers, but the

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

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

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

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

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

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

109. Judicial and legal professionalism have contributed substantially to the principle of the independence of the judiciary. The complexity of law and the difficult task of interpreting, applying or declaring the law have created a distinctive educational curriculum and intellectual discipline. The judiciary as a class has come to acquire a distinctive professional ethos and culture, to which the entrants to the judiciary pledge their allegiance. The honour and the dignity of the judicial office and the sanctity of the judicial function reflected in the judicial oath become articles of faith for the members of judiciary. Professionalism sustains a sense of community and continuity and fosters a value system committed to integrity and excellence. Legal education plays an important part in the process of initiation. Selection of individuals on the basis of their competence, and integrity emphasizes the professional dimension. The appointment of a judge and his sense of belonging to the institution of judiciary united by a common professional creed completes the process of acculturation in the ethics of independence. Indeed lay judges and magistrates are also assimilated to the ethics of the professional judiciary. There are different methods of recruitment to the judiciary in different countries. Broadly speaking, there are four models of judicial appointments: (a) appointments by direct selection (inter alia, by means of competitive examinations) and promotions from the cadre of career judiciary; (b) appointments from the legal profession; (c) an admixture of (a) and (b); (d) elections. Each method has its strong points and shortcomings. A system of elections puts a premium on democratic and periodic accountability but suffers from insecurity and uncertainty of tenure. A judiciary constituted by public examinations tends to be cast in the mould of a civil service aloof from the community of lawyers and without the outlook of an independent profession. A judiciary drawn exclusively from the practising Bar tends to be more accountable to the Bar than any other segment of the society, although it does help to ensure their (judges') independence of mind. 6/ These different methods and models are mostly a product of history and habits of mind and cannot easily be replaced. The basic principle which meets with universal approval is that candidates chosen for judicial office shall be individuals of integrity, ability and sound legal training. In the case of lay judges and magistrates, however, legal qualifications are not required, although a course of instruction can be of

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

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

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

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

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

112. Among the non-conventional approaches both in respect of adjudication and representation, India provides another example of local village justice systems, the history of which goes back several thousand years ago to the Vedas. Similar institutions flourished in other ancient civilizations. Traditionally, they were manned by elders and by wise and learned members who functioned more as judges than as legislators. After the advent of independence, there has been a revival, though somewhat half-hearted, of the traditional institution of Nyaya Panchayat for the dispensation of justice and amicable resolution of disputes at the village level. In a limited way, the Nyaya Panchayats have proved their utility by reducing the level of litigation, diminishing the work of regular courts and inculcating an atmosphere of peace and harmony in the rural population. The principle of impartiality and independence of the lay judges of the Nyaya Panchayats are not statutorily recognized and protected, but these principles are also fully respected by transferring cases to regular courts whenever there arises any apprehension or complaint. By and large, Nyaya Panchayats succeeded in commanding the faith and confidence of the disputants and the lay judges who served as members of these bodies maintained their impartiality and integrity. A study showed that disputants in about 90 per cent of the cases in the district which was studied were satisfied with the adjudication of the Nyaya Panchayats and in more than 50 per cent of the remaining 10 per cent in which parties sought revision, the judgements of the Nyaya Panchayats were upheld. The criticism that the Nyaya Panchayats had become tools in the hands of rich and influential persons was not substantiated. 7/ Another study with which the author of this report was associated showed that the system of consensual people's justice in periodic assembly of the people living in a tribal area guided by a Gandhian social worker was quite effective in the settlement of disputes, thus avoiding a recourse to formal and time-consuming legal proceedings in regular courts. 8/ Grassroots justice through local and informal fora of adjudication and dispute resolution, particularly in the rural communities of the third world countries, for small local claims and disputes, both civil and criminal, have unique significance. They have the advantage of saving time and expense and avoiding the artifices of the formal legal system. These advantages should be viewed not with elitist condescension, but in a positive spirit and with respect for the basic goodness of the common people and their ability to

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

8/ From Takrar to Karar (From Dispute to Settlement). A Study by Dr. Upendra Bakshi.

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

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

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

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

116. The degree of judicial freedom of speech and expression and the extent of their freedom of assembly, association and movement are subject to reasonable restrictions which are conditioned by traditions, social and cultural attitudes and political organization. 9/ There is obviously a considerable gap in these matters between, for example, a country where judges do not exercise their voting rights and a country where judges contest popular elections for their judicial office. In many countries the freedom of association of the members of the judiciary does extend to active membership of political bodies and political activity except in so far as there may be incompatibility or a conflict of interest. In Switzerland, as in many other countries, membership of a political party is frequently a condition of continuing in office. During the formulation of the West German Judges' Law in the late 1950s, the Canadian model of non-voting judges was expressly rejected, and proposed prohibitions regarding political activity beyond voting and party membership were not adopted. In many

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

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

117. Judicial freedom of speech and expression is also subject to similar limitations. The overriding principle is that judges should always conduct themselves in such a manner as to preserve the dignity of their office and their individual as well as institutional impartiality and independence. What is becoming for a judge to say, whether it detracts from the dignity of judicial office or its independence are essentially matters of attitude and usage. In a recent decision, the Swiss Federal Court held, in 1982, that the judicial freedom of speech does not permit a judge to enter into political controversy in relation to concrete events (konkreten vorkommnissen). 10/ The West German Federal Constitutional Court rendered a decision in 1983 11/ holding that judicial freedom of speech is guaranteed only to the extent that its exercise is not incompatible with the obligation of restraint inherent in judicial office as understood by traditional principles. The West German decision resulted from the signing by a Lower Saxony Civil Court judge of a petition published in a newspaper in support of a teacher who had been dismissed for political activities and whose case for reinstatement was pending before a labour appeal court. The Swiss decision arose from the activities of a local elected Zurich judge who participated in the distribution of political tracts calling for the suspension of certain legal proceedings involving a large number of young people. These two instances help to highlight the limits upon judicial freedom of speech and expression in two situations in two European countries. It may be noted that continental judges have generally exercised greater individual political freedom than their common law counterparts, so that such limits will go farther in common law jurisdictions where the Shakespearean counsel is often more apposite: "Give every man thine ear, but few thy voice". Those few should be the brethren of the judges with whom of course there must be candid and honest communication and deliberation and the secrecy of those deliberations of the conference of judges must always be scrupulously preserved. Woodrow Wilson sketched in 1908 a vignette of judicial reticence and its rationale in words which represent the essential principle: "The most reticent men in Washington are the members of the Supreme Court of the United States. It would of course be a great breach on the part of any member of that Court to discuss any question involved in a pending case which the Court was considering or was about to consider; but his obligation of reticence goes much further than that. Almost any piece of public policy that

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10/ See Glenn, supra.

11/ Ibid.

touches the individual, though it be never directly, may sooner or later come before the Supreme Court. Every member of the Court, therefore, feels bound to keep his opinions upon such matters to himself". 12/

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

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

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

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

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12/ Woodrow Wilson, Constitutional Government in the United States, 1908, pp.122-123.

to subvert the fundamental laws", and though the House of Lords did not impeach him, he was removed from the Bench. Impeachment proceedings were initiated against the judges who held in the Ship Money Case that the King had power to levy indirect taxation in respect of ships without the consent of Parliament. On the other hand, the House of Lords summoned Chief Justice Holt to account for his decision in Rex v. Knollys, holding that the court had the right to determine the existence of a privilege claimed by the House of Lords. In the event, Chief Justice Holt denied the demand made upon him by the Lords and categorically stated that the Lords had no power to question him or the judicial decision of the court except in appeal. The House of Commons too questioned the courts and even attempted to win them to their viewpoint. In 1629, the House of Commons sought to persuade the Barons of the Exchequer to change their minds and it is interesting that the King protested at this attempt by the Commons to interfere with the judiciary, insisting that judges should not be so approached. Embattled by royal interference with the judicial process and by known judicial predisposition for the Crown, Parliament set out to remedy the balance of power and to provide institutional safeguards for the independence of the judiciary. It may be that Parliament was more anxious to limit and curtail royal powers than to ensure judicial independence. Be that as it may, parliamentary initiative and insistence on the principle that judges must be independent and impartial, and the moral sense of the community, reflected symbolically, for example, in Lord Coke's defiance of royal interference and the public disapproval of his dismissal, brought about the liberation of the judges from the compulsions of royal concubinage. An Act of Parliament established the judicial oath and provided that judges should swear that they shall not receive any fee or present from a party to a case before them except their salaries from the King. They were forbidden to give opinion or counsel when the King was a party and were placed under a statutory direction not to regard any letter or message from the King on any point pending before them. Later in the seventeenth century, Parliament in England began to achieve the security of judicial tenure. In January 1640, the Lords presented a petition to the King in June, the King agreed and informed the Parliament that "the judges hereafter shall hold their places, quam diu se bene gesserint. But in 1669 King Charles II again made the tenure of judges dependent on royal pleasure. So did James II. In 1673, the Commons debated a bill providing that judges should hold office during good behaviour but the bill was not enacted. In 1680, the Commons summoned judges who had been removed to inform themselves of the circumstances and motives of their removal. In 1691, "an Act for ascertaining the commissions and salaries of judges" was passed by both Houses, but it did not receive the royal assent. It was finally by the Act of Settlement (1700) that the constitutional status of an independent judiciary was established by providing that "judges' commissions be made quam diu se bene gesserint and their salaries be ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them." It is by this provision in the Act of Settlement of 1700 that a firm foundation was laid for the security of judicial tenure which was previously treated as a plaything by successive kings and parliaments in their contest for hegemony. In the following era, and more particularly in the modern age, the edifice of the independence of the judiciary was raised on that secure foundation.

122. Even after the Act of Settlement, the commissions of judges ceased on the death of the reigning king and their salaries were not properly ascertained and established. 13/ By an Act passed in the reign of Queen Anne it was provided

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13/ Shetreet, op.cit., p.10, quoting Lord Sankey, L.C., 90 House of Lords Debates 77 (23 November, 1933).

that the commissions of the judges would continue until six months after the death of the reigning sovereign unless the succeeding sovereign chose to terminate the commission of a judge before the expiry of that period of six months. 14/ King George III on his accession suggested that the commissions and salaries of judges be better safeguarded 15/ and it was in 1760 that it was provided that judges should continue to hold office during good behaviour and notwithstanding the demise of the monarch, and that their salaries should be a permanent charge upon the Civil List. Scandalous as it may appear today, "judicial salaries were supplemented by additional sources of income such as judicial fees, presents, profits arising out of the sale of offices, allowances for robes and loaves of sugar," 16/ until specific legislation was enacted and additional supplemental sources of income were eliminated in respect of judges. The present position is that "all the judges of the High Court and of the Court of Appeal, with the exception of the Lord Chancellor, shall hold their offices during good behaviour, subject to a power of removal by His Majesty on an address to His Majesty by both Houses of Parliament", judges' salaries are ascertained and established by law and judges cannot engage in any incompatible activity. Judges in the United Kingdom are today among the highest paid public officials and the salaries of the higher judiciary are adjusted according to the rise in cost of living along with the recipients of top salaries. The professional incomes of Queen's Counsel in the highest income brackets are still considerably higher than those of the judges, but judicial office carries not only high authority but great honour and prestige and is regarded as public service of a high order. Judges in the higher judiciary are recruited from the legal profession exclusively and the judiciary in the United Kingdom is therefore close to the profession. Judicial office is regarded as another phase in the career of members of the profession. High judicial office is not a matter of promotion for a career judiciary. Many in Britain regard that as an important source of support for the principle of independence. That may well be so today but there was a time not so long ago when appointments to judicial office were mixed with a visible measure of political motive. The appointments are now made more and more on the basis of professional merit and judicial ability. The Lord Chancellor who is himself a politician remains the key to the maintenance of the principle of independence in Great Britain. The Lord Chancellor has extensive powers in respect of judicial appointments and removals. The office remains a bundle of baffling perplexities. The Lord Chancellor is at once the head of the judiciary, Speaker of presiding officer of the House of Lords and a member of the Cabinet. The personality of the Lord Chancellor, his sense of independence and his style of functioning are vital to the independence of the judiciary in Great Britain.

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14/ It is noteworthy, as pointed out by historians and scholars that in 1714 and 1727, a number of judges failed to be reappointed on the accession of George I and George II and other judges were moved from office before the six months had expired.

15/ These words were recited in the preamble to the Act of 1760. See 28 Commons Journal 1094.

16/ Shetreet, op.cit., p.11.

123. It is an office older than Parliament and older than the Magna Carta. 17/ By the middle of the fourteenth century, the Lord Chancellor had become an important judicial officer but he had other functions too. Thomas More, 18/ a layman trained in the common law and the son of a judge of the King's Bench is generally regarded as the first of a new breed of lawyer-Chancellors. The woolsack on which the Lord Chancellors sat was often stuffed with political thorns. 19/ A Lord Chancellor noted that the office represented an antiquated and irrational accumulation of functions and successive holders of the office have declared that these functions were beyond the work of any one man. 20/ He suggested that the Lord Chancellor should no longer act as a judicial member of the House of Lords nor as its Speaker but should function only as a Minister of Justice. Another Lord Chancellor, Lord Birkenhead, however, argued that only a man respected by his professional colleagues could properly reconcile their interests and those of Government. He put his justification for the survival of the present structure of the office of Lord Chancellor, in opposition to the principle of separation of powers as follows: "In every democracy there arise from time to time occasions of jealousy and difficulty between the judiciary and the executive. Our present system, under which the head of the judiciary is also a prominent member of the executive Government, has its disadvantages. But it has this great advantage - that it provides a link between the two sets of institutions; if they are totally severed there will disappear with them any controlling or suggestive force exterior to the judges themselves, and it is difficult to believe that there is no necessity for the existence of such a personality, imbued on the one hand with legal ideas and habits of thought, and aware on the other of the problems which engage the attention of the executive Government. In the absence of such a person the judiciary and the executive are likely to drift asunder to the point of a violent separation, followed by a still more violent and disastrous collision." 21/ A former Lord Chancellor, Lord Elwyn-Jones, tells us in his autobiography 22/ that during the Second World War, the House of Lords began to meet at 2.30 p.m. instead of 4.30 p.m. and after this the Lord Chancellor was only able to preside occasionally over the judicial sittings of the House of Lords and his role as a judge was somewhat diminished. 23/ He emphasizes that one of the functions of the

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17/ Nicholas Underhill, The Lord Chancellor, 1978. See Foreword by the Rt. Hon. the Lord Elwyn-Jones, Lord High Chancellor of Great Britain. See also R.F.V. Heuston, Lives of the Lord Chancellors and Keepers of the Great Seal (8 volumes); Maurice Bond and David Beamish, The Lord Chancellor, (Information Office, 1977).

18/ See G.R. Elton, Studies in Tudor and Stuart Politics and Government; R.W. Chambers, Thomas More (1935).

19/ Nicholas Underhill, op. cit., p. XI.

20/ Ibid., p. 195.

21/ Ibid., pp. 196-197.

22/ Lord Elwyn-Jones, In My Time, 1983.

23/ Ibid., p. 266.

office of Lord Chancellor is to sustain the independence of the judiciary, because Great Britain has no written constitution and the responsibilities of the different areas of the Government are not defined. 24/ Lord Hailsham argues further that in the absence of a written constitution, the Lord Chancellor primarily discharges the function of ensuring separation of powers, "a task he can only fulfil if he sits somewhere near the apex of the constitutional pyramid, armed with a long barge pole to keep off marauding craft from any quarter". 25/ Nicholson Underhill, an author, remarks that the Lord Chancellor carries both professional and political weight: "only thus can he protect the rule of law and the independence of the judiciary from within the Cabinet and conversely keep the courts within their proper sphere". 26/ The Lord Chancellor is a cabinet minister and comes and goes with the party in power. He takes ceremonial precedence over the Prime Minister, though he is appointed by the Queen upon the advice of the Prime Minister. His office comes to an end when the Prime Minister so desires or so decides or when his party suffers electoral defeat at the polls. The appointment is based on political considerations, although the person selected is always of high standing and enjoys the confidence of the Bench and the Bar. 27/ If the political nature of his appointment, the precarious tenure of his office, and the far-reaching authority and control he enjoys and exercises over the judiciary have not impaired judicial independence in Great Britain, it is largely due to the British temperament and civic culture and the functional viability of British institutions. Its main merit is that it works satisfactorily without undermining judicial independence. Obviously, the office of the Lord Chancellor is a result of historical evolution through peculiar circumstances and does not represent an exportable model. It is unthinkable for any other country today in terms of modern constitutionalism and the doctrine of separations of powers to make a cabinet minister the head of the judiciary or vice versa. What deserves to be emphasized is that legal traditions and political culture and the intrinsic strength of judicial institutions can sometimes (though rarely), safeguard the independence of the judiciary even though the apparatus may not be theoretically and logically sound.

124. There are many countries in which the Minister of Justice is vested with extensive powers and his department participates in the inspection and merit and performance evaluation of the work of judges at different levels. Ministers of Justice also serve as important members of the councils of the judiciary in many countries. They have a crucial role in judicial appointments, removals, and in the initiation of disciplinary proceedings against judges and generally in developing proper relations between the judiciary and the executive. In some

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24/ Ibid.

25/ Underhill, op. cit., p. 197.

26/ Ibid., p. 201.

27/ G. Coldstream, Judicial Appointments in England (1957) 43 Am. Jud. Society, 41, p. 44 and Lord Goddard, Politics and the British Bench (1959) 43 Am. Judicature Society, 124, p. 128.

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

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

126. In Scotland, judges hold office- ad vitam aut culpam which makes them irremovable except on the ground of culpable conduct. In many countries there is a system of impeachment of judges. It has been suggested that theoretically it is possible for a judge to be dismissed or impeached not only for misconduct but for any other reason which might induce the legislature to pass the requisite address 28/ or to impeach the judge. Happily, this has not been so. The legislatures have generally shown due respect to the judiciary and a large measure of self-restraint. Other procedures for the removal of judges of the higher judiciary are also deferential to the principle of security of tenure, but judges of inferior rank at the lower rungs of the judiciary might be said to receive a lesser degree of protection in certain jurisdictions. They are dealt however with generally by the judiciary itself or by bodies composed predominantly of judges. The Ombudsman, the Complaints Tribunals, the Judicial Commission and similar other bodies in different countries which play an important part in such proceedings are trustworthy for judicial accountability and do not undermine the security of judicial tenures unreasonably.

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

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

appointed judges in the higher judiciary to compulsory retirement at the age of 75. Most written constitutions provide for a mandatory retirement age which varies from country to country and from one grade or rank to another within the same country. Thus in India, Supreme Court judges retire at 65, High Court judges at 62 and District judges and judges below that rank at 58. In England the age of retirement for magistrates is 70 years; for circuit judges 72 years; and for judges of the Supreme Court 75 years. A reasonable age of retirement providing for a reasonable span of service and an adequate pension are aspects of security of tenure in an extended sense.

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

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

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

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

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

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

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

134. Another problem which has a bearing on the principle of independence arises from the transfer of judges without their consent in certain jurisdictions. In many countries, the transfer of judges is a routine matter as a part of the career of judicial officers. Except where the transfer of judges is a part of a system of regular rotation, the transfer of a judge without his consent may be punitive in motive or effect, and such transfers have a tendency to interfere with judicial dignity and independence. In India where there were several rounds of constitutional litigation relating to the transfer of certain High Court judges, the Supreme Court has laid down that judges may be transferred without their consent as a part of a policy of national integration or for other valid and reasonable policy considerations but that any punitive transfer is impermissible. 29/ It follows that an individual judge should not withhold his consent to transfer unreasonably if the proposed transfer is not improperly motivated, in which case it should be open to the judge to challenge the transfer. There are certain assignments which require judicial skills and the reputation of judicial objectivity and independence. In many countries judges are called upon to inquire into matters of public importance. In principle, these assignments may not necessarily conflict with the concept of independence so long as they are made with the concurrence of the judiciary and the consent of the judge concerned, but

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

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

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

136. Advisory opinions are rendered by courts in many constitutional systems. It is one of the most important aspects of the jurisdiction of the International Court of Justice. 30/ Advisory jurisdiction has no doubt many uses, particularly in international affairs. It provides valuable and authoritative judicial guidance, at a critical juncture, defuses and resolves controversies before they become intractable, and helps to avoid confrontations between different organs of government. Advisory jurisdiction has the disadvantage of involving the judiciary in a legitimating function in controversial issues at a hypothetical stage prior to adjudication and thereby pre-empting the independent exercise of judical power at the proper stage of an actual dispute. If an advisory opinion is merely advisory, it can be ignored with impunity, undermining the dignity of the judiciary. If it has any binding effect, the judiciary itself is bound and estopped from determining the actual dispute judicially in a manner different from the opinion given in a hypothetical reference. If the judiciary is to avoid being used by the executive or the legislative, the courts should be able to decline jurisdiction in matters which are not of a judicial nature. In a leading case, the Supreme Court of India held with reference to its advisory jurisdiction under article 143 (1), that the Supreme Court was entitled to return the reference by pointing out the impediments in answering it. 31/

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

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

31/ In Re The Special Courts Bill, 1978 (Special Reference No. 1 of 1978), A.I.R. 1979 Supreme Court 478.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

148. That judges make law in the process of interpreting and applying the law is not a new discovery of our times. Jeremy Bentham used the term "Judicial Law" to emphasize the view that the judge, though nominally doing no more than declaring the existing law, may be said in truth to be making it. 32/ Long ago, Francis Bacon warned: "Judges ought to remember that their office is jus dicere, and not jus dare; to interpret law, and not to make law, or give law." Oliver Wendell Holmes put it succintly: "Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice." 33/

149. Activist judges use the prerogative of choice with a single-minded zeal and in a purposeful manner, but judges who may not be judicial activists, nevertheless, have to exercise their options between competing claims and contentions. Whether they like it or not, their vocation of judging necessarily involves them in a measure of law making. As Lord Radcliff described the predicament of a judge: "A judge might commend himself to the most rigid principle of adherence to precedent, might close his day's work every evening in the conviction that he had said nothing and decided nothing that was not in accordance with what his predecessors had said or decided before him: yet even so, their words, when he repeats them, mean something materially different in his mouth, just because twentieth century man has not the power to speak with the tone or accent of the man of the seventeenth or the eighteenth or the nineteenth century. The context is different; the range of reference is different; and, whatever his intention, the hallowed words of authority themselves are a fresh coinage newly minted in his speech. In that limited sense time uses us all as the instrument of innovation." 34/

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

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

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

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

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

151. Legislation is regarded as part of a democratic self-government based on the franchise and the consent of the people. The judiciary does not have the mandate of the people for legislation. The judiciary does not have at its disposal resources which are required for law making. They have no research apparatus of their own to probe social questions and consequences. They deal with issues and controversies at the micro level as between parties and not at the macro level. Lord Devlin put it bluntly when he said that judicial law making is unacceptable because it is undemocratic. He gave expression to that sense of democratic distrust of excessive judicial power in his Chorley Lecture: "It is a great temptation to cast the judiciary as an élite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably, however, long and winding the path, to the totalitarian State". 35/ It is true that a measure of law making and a value-protecting approach are both inevitable and legitimate but the real anxiety and apprehension is one of degree of creativity or activism. Judges cannot be excluded altogether from "making law" but they cannot tread on legislative toes or take in their own hands the reins of executive government. The Constitution may draw the line but if any organ, particularly, the judiciary, does not adhere to those lines of demarcation, it may imperil the institutional balance and harmony. In no country or system are those lines drawn with unquestionable clarity. Nor can any lines of demarcation in such matters be static.

152. As one distinguished jurist put it: "The law making role of the judiciary at any one time is a function of many variables". 36/ Those variables call for strict adherence to rules of conduct and social and professional accountability, lest the function of judicial law making, activism or creativity should be suspect in the public mind and exceed margins of tolerance. Judicial independence must for its own sake and for the sake of institutional credibility and functional balance, be tempered by judicial accountability and the ethics of judicial conduct.

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

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35/ Mauro Cappelletti, op.cit., p. 56

36/ Jaffe, English and American Judges as Lawmakers, p. 16.

154. The concept of independence does not mean absolutely rigid separation and the concept of accountability is not a euphemism for judicial subordination. Accountability implies a control system, a system of dos and don'ts of ethics and a system of checks and balances. In that perspective, the two concepts are not only consistent and compatible, but also complement, supplement and sustain each other and are inseparable. In the contemporary world, judicial accountability is particularly emphasized by the extraordinary growth and the ubiquitous reach of judicial power in modern societies as well as the democratic and rational insistence on functional justification of what any authority does. In operational harmony, judicial accountability and independence limit, rationalize, reinforce and legitimize each other, balancing power with responsibility. As one comparative scholar has put it: "there is a world-wide trend towards subjecting judges to scrutiny to improve judicial conduct and performance [...] to insure judicial accountability without reducing too far the political insulation of independence". 37/ The concept of judicial accountability is as old as the concept of judicial independence. It is not a new invention of our age. The democratic and functional thrust of our times has however made the demands and pressures for judicial accountability more pointed, forthright and frontal. If the principle of the independence of justice is to be effectively protected, preserved and extended, its alliance with accountability should be maintained and kept in good repair without allowing one to eclipse the other.

155. Every legal system embodies the principle of judicial accountability but its nature, extent, form and manner in different countries disclose overlapping patterns of diverse proportions and combinations. Broadly speaking there are the following main types of accountability often intertwined with each other: (a) moral accountability of the judge; (b) hierarchical accountability of the judge; (c) accountability to the intellectual constituency and the professional community of judges and lawyers; (d) disciplinary accountability of the judge; (e) civil liability accountability of the judge; (f) accountability of the State to pay damages with or without consequential recovery from the judge; (g) accountability in terms of criminal proceedings and penal sanctions; (h) accountability to the electing, co-opting, appointing or evaluating authority; (i) accountability in terms of removal provisions and procedures; (j) public accountability of the individual judge and of the judiciary as a class; (k) constitutional and political accountability; (i) in terms of the powers conferred upon the judiciary and duties cast upon it in the legal system; and (ii) in terms of answerability to another branch of the Government.

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

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

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

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

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

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

160. A judge cannot ordinarily hold any office which is incompatible with his judicial office and inconsistent with his judicial independence. The basic norm is that a judge cannot accept any position in any capacity unless it is clear that such functions are combined without compromising judicial independence. There are many countries, however, in which it is customary for a judge to accept an assignment outside the judiciary, but during that period the judge does not perform any judicial function. An extra-judicial assignment should not, however, become a form of executive patronage. In many of the states in India, it is customary for a judicial officer to serve for a specified period in the department of law and justice of the State Government. The services of the judicial officer are on loan to the Government by the higher judiciary. During the period the judge serves in the department of Law and Justice, he does not function as a member of the judiciary except to retain his right to return to his judicial post. There are some countries where traditionally judges do not even vote lest it should affect their impartiality and independence or impair the principle of separation of powers. Canada is an example in point where federal judges appointed by the Governor General cannot vote in federal elections. 38/ On the other hand, the Lord Chancellor in the United Kingdom is the head of the judiciary, the presiding officer of one of the two Houses of Parliament, and a cabinet minister. In many countries, Ministers of Justice play an important part in councils of judiciary as well as in appointments, removals and disciplinary control. In many jurisdictions where judges are elected or in one-party states judges are not quite aloof from politics or the political party which nominates and sponsors them. In multi-party systems, party labels are obviously not desirable or credible badges of identification for judges but in the constitutional

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

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

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

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

163. Appellate judges generally have the lower courts and the legal community in mind as reference groups to whom they feel a certain professional accountability. 39/ In many countries judicial work is subjected to a close

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

study by academic court watchers and commentators whose criticisms call the judges to account. It cannot, however, be said that judges in many countries feel that they are accountable to academic analysts and authors in any special way, even though judges and barristers in a country like England have occasionally remarked that writers in a highly prestigious law journal now constitute the final Court of Appeal. 40/ In the United States academic writings appears to have considerable impact on the judiciary. In many countries where the judiciary is recruited wholly or substantially from the legal profession and where there is professional and social proximity between the bench and the Bar, the legal profession is regarded as a final judge of the judges and their performance. The judiciary is thus accountable to the members of the legal profession and those of the legal community generally, who apply the critical apparatus of their learning and experience to what the judges do. In a sense, this accountability of the judiciary to the cogniscenti in the field of law and judicial administration is essentially accountability to the public who may scrutinize the work of the judiciary not merely from the narrow viewpoint of specialists but also from the point of view of the general public and the consumers of justice. Equally, a judge is accountable in a general sense to other fora of public information, debate, comment and communication, besides being primarily accountable in the forum of his own conscience.

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

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

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

to article II, Section 4 of the Constitution of the United States a federal judge may be impeached for "treason, bribery, or other high crimes and misdemeanors". The procedure consists of an impeachment by the House of Representatives followed by a trial by the Senate. In many other countries, the power of disciplinary sanctions including removal vests in composite bodies which have parliamentary and judicial, and in some cases, executive representation. In some cases disciplinary jurisdiction is entirely in the hands of the judiciary except for the members of the highest court. In Finland as in certain other countries, judges are under the supervision of superior courts and the Chancellor of Justice. A judge in Finland, may be brought to trial for misconduct in an ordinary court of law; inferior judges are prosecuted before one of the courts of appeal, appellate judges before the Supreme Court, and Justices of the Supreme Court before the Court of Impeachment. 41/ In Sweden, the 1809 Instrument of Government provided for Riksdagens Justitieombudsman (which may be referred to in an abbreviated form as JO) as a parliamentary watchdog to supervise the observance of laws and statutes. 42/ The JO receives complaints concerning the courts and examines the question whether the judge has been acting illegally, though the JO cannot revise the decision itself in any way. 43/ The JO only has the power to investigate and report and not the power to issue a direction or a mandate.

166. Unlike the Swedish prototype, the Danish Ombudsman has no power to deal with judicial administration. In Denmark complaints relating to the behaviour of judges may be made either to the president of the court concerned or with a Special Court of Complaints, through the Chief Public Prosecutor. The president of the court concerned may give an appropriate warning to the judge for neglect or carelessness as well as for improper or unseemly conduct. The jurisdiction of the Special Court extends to all professional judicial personnel and their official acts inside as well as outside the courtroom. The Special Court may criticize, disapprove or censure judicial behaviour, may impose fines on judges and may, in a rare case, remove a judge. It has also jurisdiction to reopen cases. It consists of five members when considering the reopening of cases. These five members include a judge from each of the three levels of courts, an academic jurist and a practising attorney. However, only the three judges sit when adjudicating complaints against judges, although it was reported that a proposal was mooted for a court composed exclusively of non-judges. 44/

167. In several American States, there are commissions on judicial performance and conduct. Among these, the work of California and New York Commissions has been studied by many scholars. In California 45/ the Constitution was amended in 1960

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

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

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

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

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

to establish the Commission on Judicial Qualifications (later renamed Commission on Judicial Performance). It is composed of five judges appointed by the State Supreme Court, two attorneys appointed by the State Bar, and two lay persons appointed by the Governor and confirmed by the majority vote of the State Senate. Its main function is to control the behaviour of judges and "to get rid of unfit judges". It seeks to improve the standards of judicial conduct, to exercise a corrective influence, to discipline and to remove judges who are not fit to hold judicial office. At the federal level in the United States, the idea of providing for any procedure for removal other than impeachment was vehemently opposed by some as a step towards "chilling judicial independence". 46/ On the other hand, there was a considerable body of opinion for a system of disciplinary control and less cumbersome removal (as compared to impeachment) of judges who were not fit to hold judicial office. 47/ There has been a demand to have such commissions composed of judges only.

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

169. Richteranklage in the Federal Republic of Germany empowers the Bundestag to initiate the procedure against a judge alleged to have violated the basic principles of the Constitution. The Federal Constitutional Court is vested with the authority to decide the accusation; a two-thirds majority is required to find a judge guilty of the charge of violating the "basic principles" of the Constitution. 48/

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

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

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

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

crime, but ill-adapted for the punishment of small transgressions". 49/ Apart from the problems of parliamentary removal procedure, there is a growing body of opinion in favour of an internal forum of judicial accountability. As compared to the parliamentary intervention, in cases of an extreme nature of rare occurrence, a judicial commission or a council of judiciary or a court of complaints is obviously simpler and more straightforward, it is also more efficacious, expeditious, discreet and accessible.

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

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

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

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49/ Ibid., p. 24, fn. 97.

174. According to Rheinstein, criminal liability for wilful abuse of judicial office is one of the oldest and most universally applied safeguards. 50/ He recalled that among Aztecs the acceptance of bribes by a judge was a capital crime and that Twelve Tables prescribed the death penalty for the corrupt judge. 51/ Penal sanctions were often imposed against judges in ancient and medieval times either because they committed grave wrongs and abused their judicial office or because they incurred the wrath of those in the contemporary powers structure. The displeasure of the executive power is obviously no longer a legitimate basis for penal sanctions, but an abuse of the judicial function continues to be subject to criminal liability. In most countries, judges do not enjoy absolute immunity from criminal prosecution. In Poland, Greece, Italy and India, for example, judges are subject to those provisions of the penal law which apply to public servants, such as bribery, corruption and wilful abuse of office. There is, however, in these and many other countries a special procedure of prior approval and authorization (called "sanction" in Indian law of criminal procedure) as a pre-condition for the prosecution of a public servant including a judge. In Poland, the authorization of the competent disciplinary council is required. 52/ In Yugoslavia 53/ and Czechoslovakia 54/, the prior approval of the assembly which elected the judge is necessary. According to Cappelletti, the procedure of authorization by an appropriate body in the Union of Soviet Socialist Republics is an important procedural limitation of judicial criminal liability. 55/ He points out that in France, article 681 of the Code of procédure pénale establishes a special procedure in case of crimes et délits commis dans l'exercice des fonctions, dont les magistrats ou les personnes assimilées sont susceptibles d'être inculpés, in particular, the court competent to adjudicate shall be designated by the Chambre Criminelle of the Cour de Cassation. In Israel, "(a) criminal prosecution against a judge cannot be filed except by the Attorney-General himself, and before a [...] court of general jurisdiction at the second instance [...] sitting in a panel of three judges". In Belgium, "if a magistrate commits a crime he will have the right to be judged by a superior court [...] the court of appeal."

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

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

52/ Ibid.

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

54/ Cappelletti, op. cit.

55/ Ibid., p. 36.

175. In the United States of America, the Supreme Court has ruled that the performance of judicial duties does not require or contemplate any immunity from criminal prosecution. In Gravel v. United States 56/, the Court dispelled certain lingering doubts about the question of judicial immunity from criminal liability by differentiating it from civil liability and by its dictum to the effect that "on the contrary, the judicially fashioned doctrine does not reach so far as to immunize conduct prescribed by an Act of Congress." 57/ Lord Denning had observed in a court of Appeal decision in 1975 that there are in England "perfectly adequate checks - such as the remedies of criminal law - capable of protecting individuals from the less that upright judge", 58/ but he also added that the proposition has never been tested.

176. There is complete judicial immunity from civil action in England. In 1963 it was laid down in Fray v. Blackburn 59/ that no action will lie against a judge of one of the Superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. It was observed in 1868 in Scott v. Stansfield that: 60/ it is essential that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law independently and freely without favour and without fear; this provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. The vintage judgement in Anderson v. Gornie 61/ points to the conclusion that the judge of a superior court is not liable for anything done or said in the exercise of his judicial functions, however, malicious, corrupt or oppressive are the acts or words complained of, Section 2 (5) of the Crown Proceedings Act absolves the Crown from liability for the conduct of any person "while discharging or purporting to discharge any responsibilities of a judicial nature vested in him" or in the execution of judicial process, but immunity does not extend to the acts or words of a judge in his private capacity.

177. Inferior courts do not enjoy the same immunity, particularly for acts committed outside their jurisdiction. According to section 44 of the Justices of the Peace Act, 1979 a malicious act of a magistrate without reasonable and probable cause is actionable as a tort. An action may also lie against a magistrate in a matter in respect of which he does not have jurisdiction or in which he has exceeded his jurisdiction. 62/ According to Wade and Phillips, it is doubtful whether the law yet provides an adequate framework of rules for compensating individuals out of public funds who suffer loss through defects

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56/ (1972) 408 United States 606.

57/ Ibid., p. 627.

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

59/ (1863) 3 B. & S. 576, by Crompton, J.

60/ (1868) L.R. 3 Ex. 220, 223 by Kelly, C.B.

61/ (1895) I Q. B. 668

62/ Reply of Lord Templeman to the questionnaire.

in the administration of justice. In 1974, the law of judicial immunity was considered by the Court of Appeal in Sirros v. Moore, when a Crown Court judge was held immune from liability for damages after he had by a wholly erroneous procedure ordered a Turkish citizen to be detained. The judgements sought to minimize the distinction between superior and inferior courts. The judges considered it an adequate remedy that the plaintiff had recovered his liberty by means of habeas corpus and did not discuss the issue of whether he deserved to be compensated for having suffered an unlawful detention. 63/ Most countries with the common law tradition broadly follow the British approach to judicial immunity from civil liability. As the Cappelletti study 64/ and the replies to the Special Rapporteur's questionnaire show the civil liability of a judge is restricted in many systems particularly in civil law systems to cases of fraud, extortion, malicious acts or to denial of justice (déni de justice), or to gross negligence. In Italy judges are not liable for damages for gross negligence although they are so liable in most other countries with civil law systems or traditions. There are however nearly insurmountable obstacles in translating the theoretical civil liability of a judge into a decree for a sum of money so that, as pointed out by Marcel Storme in the case of Belgium, 65/ judges in effect enjoy complete immunity. In France 66/ and the Federal Republic of Germany, 67/ as also in Yugoslavia and other East European countries, a victim of a judicial wrong may sue the State for damages without suing the judge, although the State has a right to sue the judge for recovery of the damages (action récoursoire in France or ruckgriffe in Germany) paid to the claimant.

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

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

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

64/ Op. cit.

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

66/ Loi no. 72-626.

67/ Law of 26 June 1981.

The Special Rapporteur has therefore come to the conclusion that the provision of unqualified and absolute judicial immunity cannot at present be enacted as a minimum international standard.

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

181. In the United States of America and Union Soviet Socialist Republics, to give two well-known examples of elective judiciary, the public accountability of the judiciary is in a manner of speaking the living link between the judge and his judicial office. Judges and people's assessors in the Union Soviet Socialist Republics regularly report to their electorate which in the case of the judges of district courts comprises the citizens of the district. These reports of judges and people's assessors are discussed critically. The procedures of recall of judges (and people's assessors) in the Soviet Union and in seven states of the United States of America take the practice of public accountability one significant step beyond the election of judges and reporting by judges on their judicial work as in USSR. In Yugoslavia, judges may be re-elected or reappointed, and the judges may also be recalled or relieved of office during their tenure of office. 68/

182. In many countries, the press and other mass media make the public accountability of the judiciary a strong disciplining factor. Sometimes, the publicity also poses a threat to the independence of the judiciary by tendentious, irresponsible and sensational publications. Rheinstein observed in 1947 that "of all the controls of judicial activity, that by public opinion is among the most effective". 69/ In the United States of America the press is protected by the preferred right of freedom of speech enshrined in the First Amendment and insulated against the punitive displeasure of the judiciary in the form of contempt of court proceedings as in the United Kingdom.

183. In the Sunday Times case 70/ the European Court of Human Rights found by a majority of 11 to 9 (on 26 April 1979) that the decision of the House of Lords on contempt of court in the thalidomide case, A.-G. v. Times Newspapers Ltd.

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

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

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

constituted a breach of article 10 (freedom of expression), in that the ban on publication went further than was necessary in a democratic society for maintaining the authority of the judiciary. 71/

184. Apart from the questions relating to sub-judice rules and the law of contempt of court, the operational impact of public accountability is sometimes more salutary than the appraisal of judges by lawyers or by their colleagues or by academics because the mass media audience is much larger and public odium is intolerably embarrassing for a judge. By the same token, the dangers of public criticism by journalists based on half-truths buttressed by lack of professional understanding of what the judges do, are not inconsiderable. The question untimately is of the quality, motive, style and the substance of the criticism. On the one hand, there is the danger of trial by the press and justice by proxy, if the sub-judice rule is allowed to be broken indiscriminately. On the other hand, there is fundamental public interest in the freedom of speech and expression. And the two must be balanced in the same way as the principles of judicial independence and accountability. Lord Denning put the broad principle pithily when he observed: "[...] the Press plays a vital part in the administration of justice. It is the watchdog to see that every trial is conducted fairly, openly and above board [...]. But the watchdog may sometimes break loose and has to be punished for misbehaviour."72/

185. Offences against the administration of justice and attempts to interfere with the judges in their judicial functions are punishable in most legal systems, but the law of contempt of court and its elaborate rules are a particular contribution of the common law. 73/ As Lord Simon said in A.G. v. Times Newspapers Ltd. 74/ the law of contempt seeks to vindicate the public interest in due

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

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

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

74/ Supra, p. 315.

administration of justice. As pointed out in Johnson v. Grant: 75/ : "[...] The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. It is not the dignity of the Court which is offended - a petty and misleading view of the issues involved; it is the fundamental supremancy of the law which is challenged." The application of the law of contempt differs from one country to another. In India, the Supreme Court once chastised a leading Marxist politician and the chief minister of a state for his ideological condemnation of the judiciary and upheld his conviction for contempt of court. 76/ On the other hand, the Courts in India have also taken the view that public expression of views on matters of great national importance did not fall within the mischief of the contempt of Court. In the well known case of Nebraska Press Association v. Stuart, Chief Justice Burger said that a pre-trial publicity - even pervasive adverse publicity - does not inevitably lead to an unfair trial, a view which would find relatively few subscribers in many other countries which have adopted the common law rules of the contempt of court. The Phillimore Committee in the United Kingdom recognized the dangers of trial by newspapers or television but recommended the replacement of the "prejudgement" test by the test of "serious risk of prejudice". In 1982, the Canadian Law Reform Commission in its final report accepted the need to protect the fairness of particular trials from serious interference even at the expense of freedom of speech but not so as to muzzle the press unduly. 77/

186. The Contempt of Courts Act, 1981 was enacted in the United Kingdom inter alia, to harmonize the law of England and Wales with the majority judgement of the European Human Rights Court in the Sunday Times case. 78/ It has been said that what the Act does is "to maintain the basic stance of the ultimate supremacy of the due administration of justice over freedom of speech but to shift the balance a little in favour of the latter". 79/ It may also be pointed out that apart from the majority decision on the particular facts of the Sunday Times case, the European Court did unanimously agree that one of the purposes of the contempt law is to maintain the authority and impartiality of the judiciary, and held it to be legitimate in principle. That is the limit of the law of contempt, so that it remains essentially a shield and does not become an instrument of suppression of freedom of speech and public accountability. The same principle applies to holding the court in camera, which is justified only if it advances the cause of justice but not if it is employed merely to evade public accountability. Courts are sometimes invited to hold certain proceedings in camera and to preserve the anonymity of parties but this ought not to be done to avoid public accountability Equally relevant is the procedure of public pronouncement and publication of the judgements of courts so that they are there for any one to examine and comment upon. Individual opinions of judges, dissenting or concurring, also serve the purpose of public accountability of the judciary and perhaps a sense of accountability to posterity, but in civil law countries dissenting opinions of

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75/ 1923 SC 789 (at p.790) cited with approval in A.G. v. Leveller Magazine Ltd. (1979) A.C. 440 at 459.

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

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

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

79/ Ibid., p. 85

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

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

188. It has to be borne in mind that impartiality is not a technical conception. It is a state of mind. 80/ Impartiality must also have a human face. Judges no doubt form a part of a given system, but they should nevertheless be "as free, impartial and independent as the lot of humanity will admit". 81/ Independence is a condition precedent for impartiality.

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

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80/ Hughes, C.J. in United States v. Wood (1936) 299 United States 123 (p.145).

81/ Constitution of Massachusettes adopted in 1780.

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

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

191. To make this alliance effective and meaningful there is need for training judges, prosecutors, lawyers and law enforcement officials in the field of human rights and for strengthening legal institutions, particularly in third world countries. This has been emphasized time and again by non-governmental organizations 82/ in different fora of the United Nations. This developmental initiative, if imaginatively implemented with the assistance of non-governmental organizations would go a long way in creating an enduring indigenous infrastructure in every country. A world-wide sense of professional solidarity among judges and lawyers would help to provide mutual assistance and would assist in building up a community committed to the basic values of the independence of the judiciary. In the ultimate analysis, the defences of the independence of justice must be built up in the public mind, in the minds of those who operate systems and subsystems of power in the society, and above all in the minds of judges, jurors, assessors and lawyers themselves, and this is particularly so in the changing and challenging age in which we live.

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