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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*

CONTENTS



*/ This addendum contains Chapters VIII to X inclusive.

## VIII. INDEPENDENCE AND IMPARTIALITY OF JURORS AND ASSESSORS

192. The use of jurors and assessors in the process of adjudication is not common to all the legal systems of the world. As would appear from the country profiles which follow, jurors are, generally speaking, drawn from the lay population whereas assessors are chosen because of their special knowledge or technical competence. They have a collegiate character in this function. There are, however, many jurisdictions where the designation of assessor or associate judge is used for a lay juror drawn from the inhabitants of the area without any reference to technical competence in a specialized field. An assessor who is chosen for his or her technical competence in a specialized field is somewhat like an independent expert witness who is also assigned an adjudicative role. A technical assessor's role in adjudication is advisory in some jurisdictions; in others, an assessor participates as a judge with a limited status or as a full member of a court. An assessor may be a lawyer or a lay person or a technical expert.

193. The Statute of the International Court of Justice empowers the Court to provide for assessors to sit with the court or with any of its chambers, without the right to vote. In Scotland and South Africa, the title is also used for a qualified lawyer who sits with a magistrate and advises him on law and procedure. It is also applied to an official of a local authority who sets value on property for the purposes of rating. In most socialist constitutions, an assessor exercises the same rights and duties as a judge. Almost all cases are heard in the first instance with assessors. Assessors are elected and are removable in the same way as judges and they have the same role and responsibilities.

194. In some countries, assessors are only expert witnesses or advisers. Members of Nyaya Panchayats, in India, constitute a distinct court, functioning by themselves and without any judges; they are like elected lay judges to whom a limited civil and criminal jurisdiction has been entrusted. The functions of jurors also vary from one jurisdiction to another. In some jurisdictions there are jury trials both in civil and criminal cases; in others there is either a severe decline or a complete absence of jury trials in civil cases. In civil cases they determine the amount of the claim to be awarded. In many jurisdictions, they are arbiters of facts only and their function is only to return their verdict on the guilt or innocence of the accused. In other jurisdictions, they participate fully along with professional judges both in the decision on the guilt or innocence of the accused and on the sentence. In most jurisdictions, jurors must deliberate by themselves, in others, jurors and judges deliberate together. The fundamental norm which emerges from all these diversities is that the impartiality and independence of jurors and assessors, wherever they are part of the justice system, is essential to a fair trial and the proper administration of justice.

195. The origin of the jury system is obscure 1/. The jury system has been known and was introduced in many European countries as a part of the process of democratisation, but has been abandoned or altered or has been retained only in cases of serious crimes. In some countries it has yielded place to trial with a single judge or a bench of judges with or without lay assessors. This is what happened in South Africa, where the jury system went out of favour in 1969 2/. In India, the jury system was originally introduced in some parts but was virtually phased out long before the Law Commission recommended the total abolition of juries in 1958. In Japan, a provision was made for the system when the German Criminal Code was adopted but it remained a dead letter 3/.

196. In France, the Criminal Procedure Code and, later, the Code of Penal Procedure, which is now in force, abolished the grand jury but retained the trial jury. The role of the grand jury was entrusted to a court composed of professional judges. Under a 1941 Act, members of the jury and professional judges have the same powers. They hold deliberations to determine guilt and the length of sentence. The Assize Court, which is composed of three professional judges and nine jurors, tries the most serious offences, such as assassination, murder, rape and assault resulting in death and aggravated theft. Jurors are paid compensation for the costs they incur in the exercise of their functions. They receive a professional allowance, travel costs and a per diem.

197. The presiding judge of the Assize Court conducts the proceedings, but in rendering the judgement, each member of the criminal jury and each judge has one vote and the votes of the professional judges do not have greater weight. The Assize Court's decisions are taken by secret ballot. Both the professional judges and the jurors participate equally both in determining guilt and handing down sentences. The presiding judge cannot force the members of the jury to accept an agreement. French citizens who are at least 23 years of age, who are able to read and write French and who enjoy political, civil and family rights are eligible for jury duty. Those who are ineligible for jury service include persons who may have incurred some criminal or civil disability. Jury duty is compulsory, except for those in any organ of the Government, or in the employment of the Government, Members of Parliament, members of the judiciary, police and military officers, persons over 70 years of age, persons who do not live in the department where the Assize Court sits

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1/ See William Forsyth, History of Trial by Jury, London (John W. Parker), 1852, p. 468; W. R. Cornish, The Jury (Pelican Book), 1971, p. 328; Report of the Departmental Committee on Jury Service, Cmnd. 2627, 1965.

2/ See Cornish, ibid., p. 18.

3/ Arthur von Mehren, Law in Japan, 1963, pp. 312 ff.

and any person who furnishes a valid excuse. Jurors are drawn by lot from the voters' list in each commune.

The oath of jurors defines their obligation "You swear and promise to examine with the most careful attention the charges against X; not to jeopardize the interests of the defendant or of the society which accuses him; not to communicate with anyone until after you have made your statement; to take no account of hatred, malice, fear or affection; to decide on the basis of the charges and the evidence according to your conscience and inner conviction, with all the impartiality and firmness of a free and honest person; and to keep the deliberations secret even after you have ceased to exercise your functions". The juror's oath in France is a veritable charter of his impartiality and independence. All members of the jury are liable to criminal proceedings if the principle of secrecy is violated.

198. The rules relating to challenges and legitimate suspicion prevent conflicts of interest from arising between the defendant and one or more members of the Assize Court. The rules permit the defendant to challenge up to five jurors and the Office of Public Prosecutor to challenge up to four jurors without going into the grounds of any challenge. Under the general principles of law, the members of an Assize Court cannot be prosecuted or investigated because of any decision rendered by the court. The members of a jury of an Assize Court enjoy the same safeguards as professional judges. Any person who tries to influence the jurors of an Assize Court by threat or bribery is liable to be prosecuted. A juror is also liable to sanctions for failure to observe the principles of impartiality and independence.

199. In Belgium, the jury system was reinstated for all criminal cases, as well as for political and some other offences by a decree of national congress of 19 July 1831 which enacted the Constitution. The Law of 21 December 1930 organized the recruitment of jurors on a more democratic basis: desirous of making jurors representative of the population as a whole, the Belgian Parliament decided inter alia, to admit women jurors. The jury system exists in the courts of assizes solely for the trial stage in criminal proceedings in certain categories of cases. Article 98 of the Constitution states: "The right of trial by jury shall be established in all criminal cases and for all political offences and offences of the press". A crime in this context is defined by reference to the quantum of punishment. A misdemeanour or a lesser offence is not triable by jury. The Court of Assizes consists of a presiding judge and two other judges known as assessors; it tries cases with the assistance of a jury. The assessors are designated for each case by the court of first instance of the judicial district in which the Assizes are held.

200. The presiding judge has the task of directing the proceedings. He enlightens the jurors on their duties, explains the case on which they are to return a verdict and draws their attention to their duties. The jurors have the right to put questions both to the accused and to the witnesses. Upon the conclusion of the proceedings, the presiding judge reminds the jurors of their

task. The presiding judge puts the appropriate questions to the jury in the form specified by the law. Later, when the jury has completed its deliberations, the presiding judge calls for the verdict to be returned. He signs the document recording it and calls for the accused to be brought in. He has the power to send back the jury to the deliberations room if there is a discrepancy in the verdict. If a verdict of not guilty is returned, the presiding judge acquits the accused and orders his release. If the accused is found guilty, the court and the jurors, under the chairmanship of the presiding judge, decide jointly on the penalty to be awarded. If the judges are unanimously of the view that the jurors have erred as to the substance in returning a verdict of guilty, the court may suspend its judgement and adjourn the case until the following session to be examined by a new jury. The court may order this measure only on its own initiative immediately after the jury has returned its verdict and solely in the case where there is a conviction, and never when the accused is held not guilty.

201. The basic principle of the whole system is that the jury alone returns the verdict as to guilt. The rules in force make it perfectly clear that the jury must discuss and take its decision without receiving any suggestions from representatives of the judiciary. The law, however, lays down one exception in the interests of the accused. When an accused is found guilty of the main charge only by a simple majority, the law specifies that the judges must consider the same issue and if a majority of the members of the court do not agree with the majority of the jury, the accused is acquitted. On the other hand, when an accused has been found guilty of a breach of criminal law the judges and the jurors form a collegiate body to decide on the sentence by a majority.

202. The qualifications required for jurors are broadly analogous to those in France. In Belgium, a juror should be not less than 30 and not more than 60 years of age. Since he must be registered on the general electoral list, a juror must also meet the various criteria laid down by the electoral code.

203. There are in Belgium a number of regions having a particular linguistic régime. There is a monolingual Netherlandish-speaking region, a monolingual French-speaking region, a bilingual French-Netherlandish speaking region and a German language subregion. Since the proceedings of the Court of Assizes must be conducted in one or the other of these languages according to the region concerned, it follows that only persons with a knowledge of the language used in the proceedings can be designated as jurors. Anyone not fulfilling that condition would necessarily be omitted from the list. It is also provided that any person who has previously acted in a police capacity or participated in an enquiry or an examination into the case or who has been a witness, an expert, an interpreter, a complainant, an accuser or a party in the case, may not be a juror.

204. Jury service is compulsory. Article 316 of the Criminal Code provides a pecuniary penalty for abstaining from replying to the inquiry of the authorities made in order to draw up a list of jurors or for making a false declaration for the purpose of being dispensed from performing the functions of juror. A penalty is also provided for a juror who fails to appear without a valid excuse at the Court of Assizes on the appointed day and also against any juror who after having appeared, withdraws without the presiding judge's permission before the date of expiration of his functions.

205. Lots are drawn for jury service in such a manner that the same juror is not called upon to sit in more than one case during the same session or at the same time in two different courts of assizes. The entry of a person's name on a final list of jurors is not open to any appeal. The process of selection of the titular members of the jury involves a series of steps taken by the representatives of the executive and by the judges. The trial jury is complete when there is a list of 12 names of jurors who are not challenged. Both the accused and the prosecution may challenge up to six jurors. The jurors' oath in Belgium is similar to that in France.

206. Later on, when the jurors withdraw to their deliberations room, the foreman of the jury must read to them the following instructions, which must in addition be posted in large characters in the most visible place in the rooms: "The law does not require jurors to account for the way in which they have arrived at their verdict; nor does the law prescribe any rules with regard to the wright or amplitude of the evidence; the law requires jurors to reflect in their own innermost consciences on the impression made upon them by the evidence brought against the accused and the means adduced by him in his defence. The law does not say: "You are to hold as true any fact attested by such a number of witnesses"; nor does it say "you must not regard as sufficiently established any evidence which is not recorded in certain minutes or in certain documents, attested by so many witnesses or backed by certain indications". In the matter of jury deliberations, secrecy is the rule. The Code of Criminal Procedure states that jurors must not leave their room without having reached a verdict and that no one may enter during the deliberations for any reason whatsoever without written permission from the presiding judge. The jurors are not allowed to communicate with the outside world with regard to the case. Anyone who interferes with the jury and any juror who allows himself or herself to be corrupted or influenced is liable to be punished.

207. In Switzerland, Geneva was the first canton to introduce in 1794 the jury system, which in 1842 was made mandatory for major crimes. It was followed by the Canton of Vaud , then by the Canton of Bern and by some 10 other cantons, influenced by democratic ideas of the nineteenth century. The institution was introduced at the federal level by the Federal Constitution of 1848, thus giving rise to the Federal Assizes. Jurors are known as assessors. The institution of "assistant" (assessors) is based on an age-old tradition

that common sense and the experience of life of the layman are beneficial to the administration of justice. Jurors-assessors are not specialists in the fields in which they are called upon to serve, except in the case of the specialized tribunals which call in specialists as part-time judges. Jurors-assessors sit on the collegial tribunals of first instance. The president of the tribunal directs the deliberations but assessors are otherwise on the same footing. Federal jurors are called in when the Federal Assizes deal with: crimes or offences against the Confederation (revolt, high treason or violence) or against international law; certain political crimes or offences; charges made against officials appointed by a federal authority, if such an authority summons them before the Federal Assizes. Federal Assizes sit very rarely. The President of the Federal Assizes who is a member of the criminal division of the Federal Court presides over the trial, draws up the questionnaire for the jurors, furnishes legal clarifications and explains to the jurors their duties. If the jury so desires, the President may be called upon in the deliberating chamber to supplement his legal clarifications. From the disciplinary point of view, jurors are subject to the criminal division of the Federal Court.

208. In the Cantons, there are certain considerable variations. Whereas federal jurors decide only on the facts and their legal status, Bernese jurors deliberate and vote with the judges, on an equal footing, both on the facts and on the penalty to be imposed and the other points to be settled. The Canton of Geneva has an intermediate system: the jurors alone determine the facts, but they vote with the President on the quantum of the sentence. Jurors always have the right to ask questions of the persons making depositions. It is possible that the jury may be pressed into agreement, since the President or the judges have an opportunity to intervene in the deliberations held in camera. All Swiss citizens having the right to vote may sit on a Federal Assize jury. Jury service is mandatory except for citizens who have reached the age of 60 or who are unable to discharge this duty for reasons of illness or infirmity. Jurors are chosen by the cantonal parliament for a period of six years.

209. At least three weeks before the opening of the Assizes, the criminal division of the Federal Court draws up a list of jurors by lot. The Attorney-General of the Confederation and the accused may each challenge up to 10 jurors without giving reasons. According to the oath or affirmation of jurors and the traditions relating to jury trials, jurors undertake to observe the law; to follow the deliberations attentively; to examine the evidence carefully; to cast their vote as impartial judges, in full awareness and conviction, and exclusively on the basis of the deliberations; and to maintain secrecy. In Geneva, jurors are strictly forbidden to leave the deliberating chamber. Both the Bernese and the Genevese rules of procedure further require jurors to observe secrecy concerning their deliberations and voting even after the trial is over. The isolation of jurors during deliberations and voting, and the

obligation upon them to observe secrecy, are undoubtedly safeguards against any pressure which may be exerted on them. In addition, there are certain general provisions for penal sanctions which may be applied to anyone exerting unlawful influence or duress on jurors.

210. In Colombia, the jury system applies only in cases of homicide. Colombian legislation makes no provision for any financial or other compensation for jurors. The jurors are selected by the High Court of the judicial district concerned, where each member of the Court must send to the President during the last fortnight in November, a list of not less than 100 names of candidates honourable and competent. On 1 December of each year, the Court meets in full session to appoint the necessary jurors. Those who obtain three quarters of the votes of those present are accepted. Jury service is compulsory except for those over 60 years of age or those who may be excused for valid cause.

211. It is not permissible to use the procedure of challenge in order to obtain or exclude jurors of a particular sex, colour, race or personal or occupational background. The judge orders that six citizens chosen by lot are to act as jurors and makes arrangements for each of them to be notified personally. With the notification, each juror receives a copy of the charges against the accused. When the jury is assembled, all the persons present must stand and the judge administers the oath to each one of the jurors in turn. Jurors are not allowed to have a conversation of any kind with anyone regarding the case in which they are acting or have acted as jurors.

212. In the Soviet legal system, people's assessors play an important part 4/. There is an emphasis on the collegiate nature of adjudication proceedings. Cases are examined collectively in all courts. In courts of original jurisdiction cases are decided by a judge and two people's assessors 5/. While the people's judges of the county or city people's courts are elected by local citizens on the basis of universal, equal and direct suffrage by secret ballot for a term of five years, the people's assessors are elected at general meetings of factory or office workers and peasants at their place of work or residence, and at meetings of members of the armed services in their units for a term of two years 6/. A provincial, territorial or city court or the court of an autonomous region or national area, or the Supreme Court of the Union Republic always includes people's assessors. So also the Supreme Court of the USSR. Any citizen of the USSR who enjoys the right to vote and has attained the age

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4/ See generally, Hazard, The Soviet Legal System.

5/ Ibid., p. 62ff. (art. 8 of "Fundamentals of Legislation as the Judicial System of the USSR and of the Union and Autonomous Republics", December 25, 1958 (1959) Vedomosti Verkhovnogo Soveta SSSR, No. 1, item 12).

6/ Ibid. (art. 19 of "Fundamentals").

of 25 years by election day may be elected judge or people's assessor 7/. When discharging their duties in court people's assessors enjoy the same rights as the judge 8/. People's assessors are empanelled according to a roster for not more than two weeks a year with the exception of those cases when a longer period is required to complete the hearing of a case begun with their participation 9/. Judges and people's assessors may be recalled and deprived of authority before their term of service has elapsed by their electors or by the body electing them or by force of a court sentence passed on them 10/.

213. An interesting illustration of the effective and independent role of people's assessors in the Soviet justice system is that an assessor has the right to dissent, and his or her individual minority opinion may prevail on appeal 11/.

214. The Sixth Amendment of the American Constitution guarantees speedy and public trial by an impartial jury. The constitutional requirement of trial by an impartial jury has been interpreted and expounded by the Supreme Court in a catena of cases. It contemplates the selection of jurors from a cross section of the community, without systematic and intentional exclusion of economic, racial, political and geographical groups 12/. This is obviously the most fundamental norm relating to the impartiality of the jury system. In Taylor v. Louisiana 13/ (1975), the Supreme Court ruled that women could not be excluded or given automatic exemption from jury service per se on the ground of sex because such exclusions or exemptions result in juries that do

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7/ See generally, Hazard, The Soviet Legal System, (art. 29)

8/ Ibid., (art. 30).

9/ Ibid., (art. 31).

10/ Ibid., (art. 35).

11/ V. Zaichuk, Ukrainian S.S.R. Minister of Justice, "An Individual Opinion", Izvestia, May 22, 1975, p.5.

12/ Smith v. Texas, 311 U.S. 128 (1940); Thiel v. Southern Pacific Co., 328 U.S. 217 (1946); Fay v. New York, 332 U.S. 261 (1947); Swain v. Alabama, 380 U.S. 398 (1965); Taylor v. Louisiana, 419 U.S. 522 (1975).

13/ Ibid.

not represent a cross section of the community, and thus violate the Sixth Amendment guarantee of a fair jury trial. There are formal mandates in most States requiring that no one may be excluded from jury duty because of race, colour, creed, religion, sex or national origin. These formal requirements are not always met but they are a measure of essential safeguards for fair and impartial jury trial.

215. A jury of one's peers or equals may not necessarily be impartial. A jury may be impartial as between the parties but may not be sufficiently fair in approach. It may be representative but may not be solicitous for the protection of minorities or for the prevention of discrimination. It may be so chosen that an accused person may be subjected to an unfair trial. There may be risk of partiality 14/ on account of the jurors' status; personal or occupational background, financial or material interest, directly or indirectly in the outcome of the case; feelings, emotions, knowledge, impressions or image of the parties of the case, circle of friends and their opinions, and myriads of unaccountable factors. Rules and reforms have to be directed to secure the independence and impartiality of jurors and their freedom from bias and prejudice, because the jury functions as an integral part of the administration of justice whenever in any case or country trial by jury is held.

216. There are many institutions and reform movements concerning the jury system 15/ In the United States of America the most numerous, extensive and

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14/ A remarkable study by Hans Zeisel, some Data on Juror Attitudes Towards Capital Punishment, Univ. of Chicago Law School, 1968 demonstrates the proposition with jurimetric and behavioural methods.

15/ See American Bar Association, The Improvement of the Administration of Justice 5th ed. 1971; American Bar Association Project on Standards Relating to Trial by Jury May 1968; Robert Neiland, Pattern Jury Instructions, (Am. Judicature Society, 1979). See Kelven and Zeisel, The American Jury, ibid.. Also Federal Jury Selection, Hearings before the Sub-Committee on Improvements in Judicial Machinery of the Committee on the Judiciary (U.S. Senate), 90th Congress (First session), March-July, 1967; How Can the Administration of Justice be Improved in the U.S.? (Excerpts and Bibliography) compiled by Congressional Research Service (Library of Congress), Document No. 92-10, 92nd Congress (First Session), 1971; Anthony Caine and Marjorie Kravitz, Jury Reform (National Institute of Law Enforcement and Criminal Justice), 1978.

sustained research, official and academic, have been undertaken in respect of the jury system. The Chicago Jury Project may be described as a monumental project of unequalled magnitude. Universities, institutes, committees and commissions in England 16/, Canada 17/, Australia, New Zealand and other countries 18/ have probed different aspects of the defects, and demerits of the jury system and have from time to time counselled many reforms. There is much that is common in principle and outlook in different countries.

217. Jury service is viewed by some as an onerous and unwelcome duty and by others as a precious and inalienable right 19/. Whether it is a right or a duty and whether or not it is welcome, it is a highly responsible office, for it is on the verdict of the jury that the fate of a person and the due administration of justice of the community depends. The jurors have to be both independent, impartial, fair and just and without previous knowledge or prejudice 20/.

218. The composition of the jury is the most important key requisite for a fair trial. It follows, as a matter of principle, that jury service should extend without any discrimination of any kind by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements. The names of the prospective jurors should be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court jurisdiction. The jury source list should be representative by a cross-sectional standard 21/ and should be as inclusive of the adult population in the jurisdiction as is feasible. The Court should periodically review

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16/ Besides the Morris Report, see also Justice, The Future of Jury Trial (1974, unpublished, IALS).

17/ See, e.g. Law Reform Commission, Saskatchewan, Proposala and Reform of Jury Act, December 1979.

18/ Second Interim Report on the Committee on Court Practice and Procedure, JURY SERVICE, Dublin, 1966. See also Scottish Home Dept., Civil Jury Trial in Scotland, 1959. Cmnd. 851.

19/ Cmnd. 2627, p. 7.

20/ See, however, Regina v. Box (1964) 1 Q.B. 430.

21/ See Daughtrey, M.D., "Cross Sectionalism in Jury Selection Procedures, Taylor v. Louisiana", Tennessee Law Review, Vol. 43 (Fall, 1975), No. 1, pp. 1-107.

the jury source list for its representativeness and inclusiveness. Should the court determine that improvement is needed in the representativeness or inclusiveness of the jury source list, appropriate corrective action shall be taken. Random selection procedures should be used at all stages throughout the jury selection process so that there is no loading or packing of jury. The frequency and length of time that persons are called upon to perform jury service and to be available therefor shall be the minimum consistent with the needs of justice, lest jury service should assume a punitive aspect.

219. Automatic excuses or exemptions from jury service should be curtailed in order to distribute responsibility in a reasonable and equal manner; exemptions should be granted only on a functional basis. The grant of automatic exemptions in an anomalous and invidious manner should be avoided. Eligible persons who are summoned may however be excused from jury service but only for valid reason or excuse by the court, or with its authorization. Examination of prospective jurors should be limited to matters relevant to determining whether to remove a juror for cause and for exercising peremptory challenges as may be permitted under the law. If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case fairly and impartially, that individual should be removed from the panel. Such a determination may be made on motion of a party or on the judge's own initiative. A juror who has knowledge of a defendant's bad character or previous conviction should not be sworn. In jurisdictions where peremptory challenges are permitted, their number and procedure for exercising them should be uniform for the same type of case. Peremptory challenges should be limited to a number no larger than necessary to provide reasonable assurance of obtaining an unbiased jury.

220. There are certain restrictions on eligibility and qualification of jurors which raise little or no controversy. It is generally found that only citizens are eligible for jury service, and there is no age limit. Requirement of citizenship may, however, work hardship if there are large numbers of migrants without citizenship status and if there is widely prevalent prejudice against them in a given community. The upper age limit varies from country to country and from time to time.

221. Let us take the example of England and Wales with regard to conditions of eligibility. The age limit was fixed at 60. The Committee chaired by Lord Morris Borth-y-Gesst recommended the upper age limit of 65 in 1965. It recommended the continuance of the lower age limit of 21. It also recommended that no one should be qualified to serve on a jury who cannot read, write, speak and understand English without difficulty. In a multi-racial and multi-lingual country with varying degrees of linguistic competence it may be difficult to apply the test. What is essential is to apply it without prejudice. A residence requirement is also stipulated for jury service. The Committee recommended five years of continuous residence since the age of 16. Property qualifications for jurors may lead to class bias and is open

to objection. In England, property qualifications did not operate as a stringent rule of exclusion in recent years because the property values as a condition of eligibility were laid down in 1825 and properties have been substantially revalued since. A number of persons became newly eligible for jury service not by reason of any change in their ability or status but solely because of the assessment made of the rateable value of their houses. The Departmental Committee took the view that jury service was a valuable social and educational experience and that it is desirable that as many people as possible should play their part in the administration of justice. Residential requirements in a defined locality appear to be reasonable, but the localities should not be defined so exclusively as to deny the cross-section character of the jury. Jury service is confined to those who are entitled to vote and if the franchise is restricted on any inappropriate grounds, it results in impermissible exclusion and discrimination. Similarly, tests of education and intelligence may lead to elitism, although it would have the effect of improving the quality of jury verdicts. There is general agreement that jurors should be selected on a genuinely and scientifically random basis, eliminating suspicions of jury packing.

222. Exemption from jury service raises issues vital to the cross-sectional representativeness of the jury. As a matter of principle, the responsibility for jury service should be shared by everyone who is qualified and exemptions should not be granted freely or in an anomalous and invidious manner. The courts should exercise their judicial discretion in granting excuses. However, there are certain categories which by the nature of their calling may be found to be deserving of exemption. The question of exemption has to be considered in each country and jurisdiction in the light of the prevailing conditions. All that can be said is that functional considerations should predominate in granting exemptions and excuses 22/.

223. Exclusion from jury service raises important questions. In many countries, clergymen are ineligible. Those who suffer from physical handicaps or from mental disorders, making them incapable of carrying out the duties of jurors are generally excluded. In many countries persons who have been convicted of criminal offences are excluded from jury service. The British Departmental Committee agreed with Lord Chief Justice Goddard who observed in Kelly's case 23/ that it would be disastrous to hold that the conviction for a petty crime, technically a felony, conferred disqualification for life on the offender who might have escaped with no more than a nominal penalty. The Committee

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22/ See The Law Reform Commission of Western Australia, Working Paper on Exemption from Jury Service Project 71, August 1978. See also E. J. Griew, Dishonesty and the Jury, Leicester Univ. Press, 1974.

23/ Cmnd. 2627 (1965) p.44.

recommended that disqualification in such matters should cover only those persons who within the previous five years have been in custodial detention, having been convicted of an offence and sentenced to three months or more, or to an indeterminate sentence, without the option of a fine. Systematic exclusion from jury service constitutes the greatest danger to its credibility. The jury pool may be so prepared that certain classes would never be represented in it. For example, in 1961, the United States Commission on Civil Rights reported that total or partial exclusion of blacks from jury service was common place in the United States 24/. In 1970, the same Commission noted that "serious and widespread underrepresentation of Mexican-Americans on grand and petit juries existed in states courts in many areas of the Southwest"25/. H. R. Alker and his colleagues saw jury selection as a biased social process in their study of eastern Massachusetts 26/. Bias against women, persons under thirty years of age, minorities and members of lower income groups is also found in jury selection procedures in many countries 27/.

224. Conditions of jury service and levels of dissatisfaction vary from country to country. An average juror does generally look upon the duties to which he is summoned with anxiety and apprehension 28/. A good deal of time is also taken in the selection of a particular jury. The system of peremptory challenge which is permitted in certain systems enables parties to exclude certain jurors without any cause. Where such peremptory challenges are permitted, the number of such peremptory challenges and the procedure for exercising such a right should be uniform as far as possible. The functional test scope for permitting peremptory challenges should be so applied as to limit the number and the procedure to be followed for the purpose of obtaining an unbiased jury. Examination of prospective jurors sometimes is prolix and goes far afield, causing dismay, embarrassment and a disinclination to serve. Such examination

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24/ See Rita Simon, op.cit., p. 30.

25/ Ibid.

26/ H. R. Aler et al., "Jury Selection", Law and Society Review.

27/ See (Fall 1976) pp. 9-41. Charles Gary and Demis Riordin, "Grag Orders: CuiBono", Stanford Law Review (Feb. 1977).

28/ See Law Reform Commission of Canada, The Jury in Criminal Trials, Working Paper 27, 1980; Manitoba Law Reform Commission, The Administration of Justice in Manitoba (A Review of Jury System), 1975; Sarah McCabe and Robert Pirves, The Jury at Work, Oxford 1972; same authors, The Shadow Jury at Work (1974). See also Anthony A. Cain and M. Kravitz, Jury Reform, ibid.

should be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges. If the judge determines during the examination of prospective jurors that an individual is unable or unwilling to hear the particular case at issue fairly and impartially, that individual should be removed from the panel. Such a determination may be made on the motion of a party or on the judge's own initiative. The role and the responsibility for administration of the jury system is formally and qualitatively under the control of the judiciary at different stages. To begin with, the notice summoning a person to jury service should be in writing, easily understandable, and delivered sufficiently in advance. It should contain a brief and lucid explanation of the nature of the work of the jury. Courts shall provide some form of orientation or instruction to persons called for jury service to increase prospective jurors' understanding of the judicial system and prepare them to serve competently as jurors. Courts shall employ the services of prospective jurors so as to achieve the best possible use of them with a minimum of inconvenience and loss of life. Courts should at all times provide adequate protection for jurors from threat and intimidation and the privileged secrecy of jury deliberations should be protected.

225. Courts should provide an adequate and suitable environment for jurors, and jury facilities should be arranged to minimize contact between jurors and parties, counsel and the public, without depriving the jury of reasonable comfort. Persons called for jury service should receive a reasonable allowance. Employers should be prohibited from penalizing employees who are called for jury service.

226. The trial judge should in simple language directly following empanelment of the jury, give preliminary explanations of the jury's role and of trial procedures; prior to commencement of deliberations, direct the jury on the law. A jury should be sequestered only for the purpose of insulating its members from improper information or influence. Standard procedures should be promulgated to make certain that the inconvenience and discomfort of the sequestered jurors is minimized.

227. Jury deliberations are secret and jurors cannot be asked to give reasons for their verdict. The traditional rule has much to commend itself and is an aspect of the nature of the office and functions of jurors. They are not professional judges learned in the law. In the United States it would amount to the offence of eavesdropping to tape or record jury deliberations 29/. Another equally important principle is that a jury cannot be intimidated or threatened by the judge. What constitutes intimidating or threatening a jury is of course a matter ultimately of a judicial verdict by a higher court. The Court of Appeal in England had occasion to review the law on the

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29/ Connish, op.cit., 125. Also see Busch, Law and Tactics in Jury Trials, chap. 23, referred to by Cornish, supra, p.312.

subject in R. Rose and others (1982) 2 All ER 536. In that case the court clerk entered the jury room and told the jury that they would be discharged if they did not reach a verdict by a certain time. The court deplored the grave material irregularity and quashed the conviction. The courts do, however, exercise considerable influence on the jury in reaching their verdicts, although American judges are more fettered than the judges in England 30/.

228. The American Bar Association and the American Law Institute have called for the restoration of the English system. It may be noted that in several states in the USA, judges' instructions are given in wriring and are given before counsel address the jury. But the fact remains that the jury is free to reach its verdict according to its own conscience and in this the jurors are free of the judge. Between the judge and the jury, there is a delicate balance of powers and functions and this balance is best secured when the principles of independence and impartiality are observed and fulfilled.

229. The history of jury system and the problems relating to the working of the jury system in different countries of the world indicate a broad consensus on the basic concept of the impartiality and independence of jurors. At the heart of this concept is the fundamental norm of the cross-sectional principle in the composition of the jury and the principle of non-discrimination in the selection of jurors. The opportunity for jury service should be extended without distinction of any kind by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status. There should be no attempt to exclude any particular group or class or shade of opinion. To secure the observance of the cross-sectional principle and to achieve the objective of non-discrimination in the selection of prospective jurors, constant vigilance in the evaluation of the juror selection procedures and practices is necessary. Broadly, the names of prospective jurors should be drawn from a jury source list compiled from one or more regularly maintained lists of persons residing in the court's jurisdiction. The jury list should be representative and should be as inclusive of the adult population in the jurisdiction as is feasible. The court should periodically review the jury source list to ensure that it is truly and fully inclusive. Should the court find at any time that improvements are needed to make the list more representative and inclusive, it should promptly take appropriate, corrective action.

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30/ 21 Oregon Law Review 1, cited by Cornish, ibid.

230. Random selection procedures should be used at all stages throughout the jury selection process. It is necessary to eliminate all automatic excuses or exemptions. Jurors who may be eligible may be excused only for valid reason by the court or with its authorization. There are many systems in which prospective jurors may be challenged for stated reasons. It is necessary to maintain the dignity of the jury system to limit the examination of prospective jurors to matters relevant to the issue of removal of a juror for cause or for exercising peremptory challenges. Once it is found by a judge that a prospective juror is unable or unwilling to hear a particular case fairly and impartially, the individual should be discharged from the duties of jury service. The number of peremptory challenges and the procedure for exercising them should be made uniform as far as possible. Peremptory challenges should be limited to a number which is considered necessary and adequate to provide a reasonable assurance of obtaining an unbiased jury. The responsibility for the administration of the jury system should vest in the judiciary, either under a statute or a set of clearly formulated rules. Persons called for jury service should receive a reasonable allowance. There should be a provision for jury pay for employees by the employers if adequate allowances are not paid to jurors by the justice system. Employers should be prohibited from penalizing those who are called for jury service. Courts should provide adequate and suitable environment for jurors and facilities should be so arranged for jurors as to minimize contact between them and the parties, lawyers and the public. Adequate protection should be provided to jurors to insulate them from threats, influence, pressure interference or intimidation, and steps should be taken to ensure that the time of jurors is not wasted, that they are not put to undue inconvenience, and there is optimum utilization of jury time.

231. Courts should provide appropriate orientation and instruction to persons called for jury service to assist prospective jurors' understanding of the judicial system and their role in the judicial proceedings. The trial judge should give preliminary explanation in simple language of the jury's role and of trial procedures before the trial begins and should direct the jury on the law at an appropriate stage in the proceedings. Secrecy of the jury's deliberations should be strictly enforced. Jurors should not be required to give their reasons for the decision reached by them at any time. A jury should be sequestered for the purpose of insulating its members from improper information or influence but steps should be taken and procedures should be devised to ensure that the inconvenience and discomfort of sequestered jurors is minimized.

## IX. INDEPENDENCE OF LAWYERS

232. The legal profession has an ancient pedigree 1/. It is quite possible that in the dim and distant past, as law took the place of brute force, sanguinary duels and wagers by battle were replaced by adjudication in courts and lawyers replaced representative pugilists. Among ancient Hindus, a person well versed in law offered gratuitous legal aid as a matter of simple justice or because of some social connection or kinship but there was no professional class of legal practitioners 2/. Amongst the ancient Athenians there was no distinct professional class of men whose particular office it was to speak on behalf of parties in a court of justice; there was no clear differentiation between the function of the agent for litigation and that of the advocate 3/. Advocacy was an art, the eloquent performance of orators and the persuasiveness of the Patroni Causarum, but not yet an organized profession. Niebuhr 4/ tells us that the origin of the counsel-client relationship goes back to the paternal protection of patroni for protégés. The term Advocatus came to be used for a pleader after the time of Cicero. Its connotation meant "a friend who, by his presence at a trial, gave countenance and support to the accused" 5/. Exigencies of legal representatives led to the practice of appointing an agent or attorney, called cognitor or procurator 6/. In course of time the agents for litigation became attorneys. The Islamic legal tradition gave pride of place to jurists and juris-consults whom the Islamic judges consulted

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

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

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

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

5/ Ibid.

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

often and regarded highly, but representation by professional attorneys was not explicitly recognized 7/.

233. To turn to the contemporary situation, it may be noted that, in France, for instance, there were 15,250 lawyers, including 3,369 lawyer trainees, on 31 December 1982. The legal profession in France is regarded by common consent as a liberal and independent profession and a lawyer is not regarded as a "wage-earner". Any activity which jeopardizes the independence and liberal nature of the profession is considered incompatible with the practice of law.

234. In order to enter the legal profession in France, a person should be a French national, should hold a master-of-law degree entailing four years of studies following the baccalaureat at the secondary level and should have completed one year of theoretical and practical training in a professional training centre. Candidates may then be sworn in and accepted for probationary training for two years which may be extended up to five years at the trainee's request. After such training, lawyer trainees may be included in a list for admission to the bar.

235. Courses for students at legal training centres include the study of statute law, legal ethics, and practical training in the drafting of legal opinions and legal documents, the conduct of proceedings, the protection and enforcement of rights, and public speaking. Additional courses are also organized. A lawyer trainee who becomes a member of a bar association attends hearings and works generally as a lawyer's associate. The lawyers in each court of first instance form a bar association, which is administered by a Bar Council. The Bar Associations are formally recognized by law as autonomous. The Bar Associations are legal persons in public law. Their organization and administration are governed by legislative and statutory provisions. They exercise the function of regulating the profession and protecting its interests. They enjoy legal status. A Bar association is represented by the head of the bar association, who is assisted by the members of its Bar Council. Members of bar associations are subject to their rules and regulations.

236. The Bar Councils ensure that lawyers fulfil their obligations and their rights are protected. The functions of the Bar Council are, inter alia, to

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7/ See however, Osman Abd-el-Malek al-Saleh, "The Right of the Individual and Personal Security in Islam" in The Islamic Criminal Justice System edited by M. Cherif Bassiouni, 1982, pp. 55-90, and p. 83. See also Awad M. Awad, "The Right of the Accused under Islamic Criminal Procedure", in Bassiouni (ed.), ibid., pp. 98-99; and Al-Khushani, Kitab Al-Qudat Bi-Qwituba, quoted, ibid., p. 99.

uphold the principles of honesty, impartiality, restraint and fellowship on which the legal profession is based and to undertake any supervisory tasks required for the honour and integrity of its members; to ensure that lawyers behave properly in court and serve as officers of the court; to take disciplinary measures either on its own initiative or at the request of the Public Prosecutor or the President of the Bar Association. The Bar Council is the first-level disciplinary body, the second-level body being the Court of Appeal. Any violation of the laws and regulations, any breach of professional rules and any lack of honesty, honour or tact, even in connection with matters not relating to the legal profession, may expose the lawyer concerned to disciplinary measures. Disciplinary action is distinct from criminal and civil action. Disciplinary measures may include a warning, a reprimand, suspension for not more than three years, dismissal from the Bar or from a training course and withdrawal of an honorary title. These disciplinary measures may be referred to the Court of Appeal by the lawyer concerned or by the Public Prosecutor.

237. As members of a legally constituted Bar association, lawyers have rights and duties. Briefly, their rights are: (a) to give advice and opinions on legal and administrative matters; to reconcile the parties to a dispute; and to prepare relevant legal documents; (b) to assist and defend their clients in court or in disciplinary proceedings. Lawyers are subject to the discipline of their profession and are bound by its ethics. A lawyer must maintain professional confidentiality, which applies to any statement or document by a client which is brought to his or her attention in confidence or during the investigation. A lawyer has an obligation to maintain his or her professional dignity. Lawyers are prohibited from canvassing for or soliciting clients. Advertising is allowed only if it provides public information. A lawyer should ordinarily hold consultations in his own office. A lawyer has the duty to remain independent vis-à-vis everyone. In order to safeguard his material independence, his fees cannot be too closely linked to the monetary benefits the client may derive from the trial. In order to safeguard his moral and intellectual independence, he is free to refuse or return a case. He is responsible for the arguments he puts forward in court. He must not accept any ties of subordination to anyone, particularly any enterprise involved in the dispute in question. A lawyer has an obligation to be tactful. Parties with opposing interests cannot be assisted or represented by the same lawyer. Compensation for a lawyer's professional services are determined by agreement between the lawyer and his client. Fees may not, however, be set in advance with reference to the outcome of the case. A lawyer must assume responsibility for any case he accepts. He is under an obligation to respect judges. He is required to fulfil duties towards his colleagues and to foster professional solidarity.

238. Any activity which jeopardizes the independence of a lawyer and the liberal nature of the legal profession are incompatible with the practice of law. For instance, the practice of law is incompatible with any commercial activities, whether exercised directly or through an intermediary; with the functions of a member of a partnership, or of a manager of a limited liability company, or the office of president of a board of directors or that of a member of the board or the post of director-general of a corporation or the director of a company, unless its purpose is only to manage family or professional affairs. Any lawyer who is elected as a general councillor may not, during his term of office, perform any of the functions of his profession, either directly or indirectly, vis-à-vis the department where he has been elected or vis-à-vis the communes and public services of that department or those communes. Any lawyer who is elected to parliament is subject to the incompatibilities provided for in the Electoral Code. The practice of law is also incompatible with an office or post in the Government and with working as auditor, professional accountant or chartered accountant. A lawyer cannot accept any wage-earning employment. He cannot accept any government employment or function, not even any assignment under the Courts, except that of receivership.

239. The practice of law is, however, compatible with educational functions, the functions of a deputy magistrate, an assessor in the juvenile courts or special courts for the protection of farm tenants, a labour court judge and a member of social security and agricultural insurance commissions of first instance. A lawyer who is elected to municipal office may not perform any of the functions of his profession, either directly or indirectly, vis-à-vis the commune. Lawyers who are former government officials may not practice law vis-à-vis the administrations within the jurisdiction of the ministerial department to which they belonged for a period of five years from the time when they ceased to exercise their functions. A lawyer is under no obligation to accept cases. He is free to accept or refuse a case without having to state the grounds for his decision.

240. Lawyers enjoy certain immunities during defence proceedings in court. They may not be sued on the grounds of defamation, insult or injury for any statements they make or documents they produce in court. Despite such freedom, however, lawyers are under an obligation of reserve to act discreetly and show respect for the courts. A person in custody is allowed to communicate with his lawyer while he is under investigation and on trial and at the stage of sentencing. Communications between lawyer and his client are confidential. Immediately after the first hearing, the accused person may communicate freely with his lawyer. There is no exception to this rule. This right is available after the investigation has been completed and throughout the trial proceedings,

as well as during direct summons proceedings. During proceedings for sentencing, a convicted person may continue to communicate with the lawyer who assisted him during the proceedings. Lawyers who did not assist a convicted person during the proceedings may also be authorized to communicate with him.

241. Every lawyer has to be insured, either individually or collectively, i.e. by the Bar for any professional civil liability he may incur as a result of acts and comissions committed in the exercise of his functions. A lawyer may also incur personal liability for any funds, property or assets entrusted to him as his client's representative or in his client's interests.

242. Although the basic pattern and principle is that there are no set fees and fees are stipulated between a lawyer and his client, some Bar associations have published recommendations relating to fees. In its ruling of 9 November 1981, however, the Trade Competition and Price Commission found that, since such a publication might lead lawyers and their clients to consider such rates as standard minimums, it would limit the exercise of fair competition and should thus be prohibited. There is provision of free or subsidised legal aid by the State.

243. Monaco, which has only 14 lawyers, follows the French system and the profile of the Belgian legal profession also closely resembles that of France. The essential features are the same. The characteristic is its commitment to public service. In Belgium, lawyers hold a monopoly for pleading with a few exceptions specified by the law. In order to be eligible to become a lawyer, a person must have served three years as a probationer. Probationers are primarily responsible for legal aid to less advantaged persons. The judicial system provides for the intervention of a lawyer to represent persons in courts at all levels. The right to conduct a case before the court of cassation is held by lawyers of that court only. Those lawyers, very small in number also form an order. The fundamental principle of the independence of lawyers is expressed in article 44 of the Judicial Code in the following term: "Lawyers shall freely practise their profession in the cause of justice and truth".

244. The Act of 9 April 1980 provides for the remuneration of probationary lawyers responsible for providing legal aid. The provision is meant to strengthen the legal system, and to enlarge the professional experience of trainees. The universities provide legal education not only to those to be called to the Bar or those who would perform judicial functions, but also to those who would compete and qualify for public offices and for employment involving knowledge of law in private enterprises. Legal curricula in the universities do not provide a strong input of legal ethics and human rights in the training of probationary advocates. However, some attention is devoted to these subjects. Lawyers enjoy the right of all citizens to freedom of

association as guaranteed by the Constitution subject to the rules of their professional ethics.

245. As in France, the Bar Councils function as the managing bodies of the Bar Associations and the President of the Bar Council (bâttonier) represents the Bar. The Bar Associations regulate and safeguard the structures which determine the practice of the profession; guarantee the orderly exercise of professional practice; and punish breaches of discipline by lawyers.

246. The oath provided for in article 429 of the Judicial Code imposes on lawyers the obligation of fidelity to the laws of the Belgian people. Under article 456, the Bar is required to maintain the principles of dignity, integrity and scrupulousness which are considered as basis to the legal profession. Article 445 of the Judicial Code forbids lawyers to engage in any form of malevolent attack, in particular against the established authorities. Probationers are primarily responsible for providing legal aid. Lawyers are obliged under article 466 of the Code not to refuse their services when they are appointed ex officio unless they are excused or exempted. The Bar Council is the "master of the roll and of the list of probationers".

247. Education concerning law and practical legal training and legal ethics is given to probationers either through lectures within the Bar or by means of the assistance which the "chief" provides to his probationers. It is commonly acknowledged that in practice such assistance is often extremely limited. Law reform is promoted mainly by law teachers in universities and sometimes by probationers who often work as university assistants and participate in seminars. The Bar does not appear to play a very active role in promoting law reform.

248. Articles 444-446 of the Judicial Code comprise the rules governing professional ethics for lawyers. These rules relate to respect for the honour and reputation of individuals, and refraining - in pleadings and writings - from malevolent attacks on institutions. They establish the obligation of providing legal aid. In Belgium, as in other countries, rules of legal ethics are only partly expressed in texts. The Judicial Code formulated only a few fundamental obligations which are incumbent on lawyers and in addition it establishes provisions relating to applicable sanctions and procedures. Disciplinary law is largely unwritten. Respect for the rules of professional ethics is ensured by the Bar Council and General Council of the Bar. The rules of procedure applicable to disciplinary proceedings are expressed in a series of provisions which are formulated in the Judicial Code. The system is similar to that in France.

249. The incompatibilities and prohibitions relating to the profession of a lawyer are based on the independence inherent in that profession. The

Judicial Code makes the profession of lawyer absolutely incompatible with that of a serving member of the bench or parquet, with the public office of clerk of the court, and with the public offices of notary and bailiff. It also makes entirely incompatible with membership of the Bar the post of a State official and the practice of business in which the lawyer engages personally on his own account. Relative incompatibilities are left to the judgement of the competent authorities of the Bar. In principle, public or private posts and activities are incompatible with the profession of lawyer unless they jeopardize neither a lawyer's independence nor the dignity of the Bar. Lawyers who are members of the legislative chambers or those who are provincial or communal councillors are covered by statutory prohibitions in the Judicial Code. However the participation of lawyers in the political, social and cultural life of the country is not limited in any way.

250. Article 29 (I) of the Royal Decree of 21 May 1965 states that lawyers are permitted to communicate freely at all times: (a) with prisoners who have not received a final sentence and who have requested their services or whose assistance has been entrusted to them, but only after their first hearing except in cases of a legally ordered ban on such communication; (b) with mentally defective persons who have been interned under the Social Defence Act and for whom they have acted as counsel; (c) with prisoners who have requested their services or whose assistance has been entrusted to them; (d) with persons who have received a final sentence and interned recidivists for whom they have acted as counsel when these prisoners request or accept a visit; (e) on the prior authorization of the President of the Bar of the district where the establishment is situated, with persons who have received a final sentence and prisoners interned under the Social Defence Act for whom they have not previously acted as counsel. Prisoners have similar freedoms and rights of communications with lawyers of their choice without any censorship.

251. In the field of his professional activities, as in other fields, a lawyer is subject to censure; he is answerable for his failings in disciplinary matters to the authorities of his Bar. He is answerable in the civil court when he causes injury to another person, since a fault by a lawyer entails civil liability. This fault may result from any errors or delays in his actions for the party. The law sometimes expressly stipulates the obligation to make amends. A lawyer is also answerable in damages.

252. Lawyers may, on a personal basis, take out a contract of insurance to protect themselves against claims of damages. In fact, an increasing number of Bars now conclude collective contracts with insurance companies for the benefit of all their members. In the latter case, since the amount payable is very often subject to a ceiling, most lawyers find it advisable to take out a personal supplementary insurance. One of the prerogatives of a lawyer's position is that he should determine the amount, but with due deference for

moderation. The right of a Belgian lawyer to fix fees is subject to contractual stipulations and the ultimate control of the Bar Association. The Belgian legal system condemns the quota litis agreement or a clause relating the amount of fees to the outcome of the trial through the application of a percentage system. A survey shows that slightly less than 25% of the lawyers receive a small income; another 25% receive a relatively large income; 10% receive a large income; and nearly 17% receive a very large income. The situation of the 96 probationers surveyed showed that their method of remuneration varied widely. Thirty-six were paid by the case; 24 paid by fixed salary which was often lower than the guaranteed minimum wage; 15 were paid in accordance with a combined system; 11 were paid by the hour and 10 received no remuneration. In these cases, the remuneration was that accorded by the "chiefs"; this did not cover the personal income which probationary advocates might receive by handling their own cases, but such cases are few and bring in little income.

253. In Switzerland, provisions designed to protect the independence and freedom of lawyers are contained in the usages and customs or status of the cantonal Bars which represent codifications of accepted conventions and the rules of legal ethics. The independence of the legal profession is implicit in the working of the legal system and is instilled as a basic value through university legal education and professional training which entitles a person to be admitted to the legal profession. An entrant must be a Swiss citizen, domiciled in the canton in which he wishes to practise. He should have a degree from a Swiss University or should have passed a special theoretical and practical examination. It is also a prerequisite to complete a probationary stint of two years in a lawyer's office and to pass the probation examination. During the probationary period, there is little financial sustenance in the form of remuneration. Legal ethics and human rights form the subject matter of courses in the universities as well as those organized by lawyers' associations.

254. At present, Switzerland has 24 cantonal lawyers associations which embrace over 90 per cent of all the lawyers practising at the bar. Legally speaking, except in the canton of Ticino, they constitute under private law associations as defined in article 60 of the Civil Code. In turn they form the Swiss Federation of Lawyers (FSA). In addition, the Swiss Federation of Democratic Lawyers consists of about 120 lawyers.

255. The Swiss Federation of Lawyers and cantonal lawyers associations of purposes in common, namely:

To protect the professional and economic interests of the members;

To safeguard the honour and dignity of lawyers;

To establish and maintain good relations between the members as a fraternity;

To contribute to the development of law.

The Federation also endeavours, as part of its aims: to settle any disputes which may arise between cantonal associations; to represent the interest of the profession vis-à-vis the federal authorities; to maintain contact with the bars of other countries.

The Bernese and Genevese Lawyers' Association provide the public with simple, low-cost consultations and they organize free consultations regularly on a rota system (approximately once per member per year). This service is obligatory for the members of the Bernese Bar. The activity of lawyers is equally important in regard to legal aid at reduced fees.

256. The Genevese Section of the Association also publishes explanatory brochures on legal remedies for prisoners, women, tenants. The lawyers associations organize lectures on various legal subjects with the help of the cantonal universities. Most of these associations also publish an in-house bulletin. The Genevese lawyers association organizes each year a number of courses in professional legal ethics and pleading techniques for lawyers in the probation stage. The lawyers associations are regularly consulted in the context of cantonal and federal legislative procedures. The Genevese lawyers association has an emergency fund enabling it to assist any of its members in financial difficulty. It also takes action when, for example, a replacement has to be found for one of its members who is seriously ill.

257. The independance of a lawyer is understood to mean that lawyers should be free to practise law. It means that a lawyer must also remain independent of his client and must not become so identified with him as to be oblivious of his duties to the legal system and the ethics of his profession as well as his professional colleagues and employees. are required to observe professional secrecy. He must not serve parties whose interests are opposed. Lawyers fees must be in keeping with the tariff established by the associations to which they belong, bearing in mind the time devoted to the case, its complexity and the financial situation of the client. A lawyer must not contact the opposite party directly when the latter has briefed a lawyer. The rules of professional ethics also apply to the relations between a lawyer and his colleagues. He must not undertake a case which implicates a colleague unless the interests of his client make this unavoidable.

258. In the canton of Geneva, authorization of the President of the Bar is necessary. Similarly, he must not undertake a case previously entrusted to one of his colleagues without informing the latter and without approaching his client concerning payment of his colleague's fees. The President of the Bar may be asked to settle out of court any conflict or difference of opinion arising between lawyers.

259. Within a lawyer's association, the President and the board of the association are responsible for ensuring observance of the rules of professional

ethics. The statutes of the Genevese Lawyers' Association expressly provide that the board of the association is competent to take disciplinary measures (differing from those of the official supervisory body) ranging from admonition to expulsion.

260. As official supervisory bodies, the Cantonal Chamber in the case of Bernese Lawyers and the Cantonal Supervisory Commission in the case of Genevese Lawyers may impose disciplinary sanctions including suspension or disbarment of a lawyer. Disputes concerning the fees asked by lawyers may be brought before the Cantonal Chamber of Lawyers in the canton of Bern or the Cantonal Fees Commission in the Canton of Geneva, which may check whether they are in accordance with the tariffs or the directives applicable in the matter.

261. In the Canton of Bern the Chamber of Lawyers consists of nine members, namely four lawyers and five judges under the President Cantonal of the Supreme Court. It applies disciplinary sanctions in the form of admonition, fines up to 300 francs, suspension up to one year and disbarment. In the Canton of Geneva, the Supervisory Commission is composed of two members designated by the lawyers, the Attorney-General, the President of the Court of Justice, the President of the Court of First Instance and four members designated by the Grand Council and the Council of the State respectively.

262. Genevese law expressly provides that the profession of lawyer is incompatible with the profession of notary. This is not the case in the Canton of Bern. The statutes of the Genevese Lawyers' Association and the Genevese usage and custom indicate that a lawyer must devote his main activity to the exercise of his profession. He may not carry on another activity on the side except in so far as this is compatible with the dignity of the profession. Such would not be the case with purely commercial activities or activities remunerated on a piece-work basis. According to the theory, a lawyer may not at one and the same time be an official or a correspondent or employee of a third party not a lawyer or work in partnership with the latter. This same idea of independence and dignity of the legal profession is embodied in the usage and custom of the Bernese Bar. There is no restriction on the participation by lawyers in the political, social and cultural life of the country, but it must not be for the ends of publicity amounting to advertising and designed to enhance their professional activities.

263. The laws governing federal procedure (civil, penal and administrative) expressly dispense lawyers from the obligation to give information or act as witnesses in the court in cases concerning their clients. The same is true of Bernese and Genevese procedure. This means also that documents intended for a lawyer or transmitted by the client to the lawyer to enable him to exercise his profession, or while exercising it, may not be confiscated. The authority

designating defence counsel may as far as is feasible bear in mind the wishes expressed by an accused person.

264. The legal relationship between lawyer and client constitutes a contract governed by the provisions of the Code of Obligations, under which a lawyer is responsible for the proper and faithful execution of his mandate. He is responsible for any damage he may cause to his client, intentionally or through negligence. This applies, for example, if he neglects to observe time-limits or commits any act indicating a dereliction of professional duty.

265. The Federal Court has ruled that in judicial proceedings the lawyer enjoys the right of free criticism, which in fact derives from the right of the party for whom he is acting to defend himself. In this context a certain measure of exaggeration is tolerated. The lawyer will be violating his trust only if he acts in bad faith or expresses himself in an improper manner. The Federal Court is more hesitant in regard to public statements (press conferences, for example) made by a lawyer. It acquiesces in them only in exceptional circumstances for example in order to safeguard the interests of the client or to ward off personal attacks made on the lawyer. In such circumstances, the lawyer is required to remain objective in what he says and the way in which he says it. In cases of a political character, disciplinary procedures are not infrequent or rare.

266. In England, as in France and other countries legal representation evolved slowly. In ancient times, appointment of an attorney was allowed only on special grounds and by formal authorization in court or by special writ 8/. By the time of Edward I, in the thirteenth century, however, there were already two types of lawyers, attorneys and pleaders. The distinction between the two types was sharply drawn. As late as the fifteenth century, attorneys might be members of the Inns of Court, but sometime in the sixteenth century, their links with the Inns of Court were snapped and they were without an organization, without much of a professional tradition and without any effective discipline. In the fifteenth century another clan of persons, called solicitors, began to appear in Chancery, but it was only in 1750 that a statute provided for

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

solicitors to be admitted as attorneys and these two types of agents for litigation became fused. In 1825, the Incorporated Law Society was founded: in 1831, it was given a charter; and by the end of the century it had become recognized as the authority for "the education, admission and regulation of solicitors and the repression of professional malpractice" 9/. The term superseded the term "attorney" in England.

267. The other branch of the legal profession in England consisting of barristers has a long and uninterrupted lineage. In the mid-thirteenth century we find serjeants-at-law and their apprentices who became the barristers of the later period. Fortescue (1386-1479) who was Chief Justice of the King's Bench from 1442 to 1461 enumerates three categories within the legal profession: (a) judges and serjeants; (b) apprentices organized in the Inns of Court and Inns of Chancery; and (c) attorneys. There were four Inns of Court and some 10 Inns of Chancery. The Inns had benchers and students who taught and studied law. In later years, attorneys were assimilated to the solicitors' branch of the legal profession and the category of serjeants evolved into the category of senior barristers known as Queen's (or King's) Counsel, Q.C. for short. The Inns have retained their character as institutions of professional legal education and qualification and function as homogeneous professional bodies with an important role in inculcating a strong sense of professional ethics and a sense of public responsibility. Both judges and barristers belong to the Inns.

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

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9/ Pound, op.cit., p. 687.

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

269. Among the colonies of Great Britain, America began by forbidding and expelling lawyers from litigation. It was soon discovered that "the work that ought to have been in the hands of trained, responsible members of a profession got of necessity in the hands of minor officers of the courts, sharpers and pettifoggers" 10/. In New York and Maryland in the seventeenth century, sheriffs, constables, clerks and justices of the peace were flourishing as practising attorneys in their own courts and legislation had to be enacted to prohibit them from doing so 11/. The confusion persisted even as late as 1759 when John Adams found the practice of law in the "grasping hands of deputy sheriffs, pettifoggers and even constables" 12/. During that period, however, there were, at the higher stratum of the legal profession, many educated and well trained lawyers. According to Warren, 115 Americans were admitted to the Inns of Court in England from 1760 up to the Revolution 13/. Eight institutions of learning, where prospective lawyers could receive liberal education, had been established before the Revolution. The Revolution, however, engulfed the legal profession in a serious setback.

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

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10/ Ibid., p. 688.

11/ Riley, "The Development of the Legal Profession in Maryland" (1899), quoted by Pound, ibid.

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

13/ Warren, History of the American Bar (1911), p.194 ff.

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

271. The legal profession in the countries once colonised by Great Britain took its inspiration from the Inns of Court, the Law Society in England and the Faculty of Advocates in Scotland. It flourished as an independent profession in the Indian sub-continent, later India, Pakistan, Bangladesh and Burma, even during the colonial era. Many Indian lawyers in the era were called to the Bar in England. Others qualified within the country. Many of the Indian lawyers became High Court and Federal Court judges. During British rule, the principle of the autonomy of the legal profession was acknowledged by convention as well as by statute. The legal profession became quite influential. Today, India alone has more than one fourth of a million lawyers on its common roll of advocates. A very small number of them is designated as senior advocates on the basis of their standing at the Bar. The Constitution of India entrenches fair trial safeguards and guarantees to all citizens the four most relevant rights, namely the right to freedom of expression, freedom of association, freedom of assembly and the freedom to practise any profession. A parliamentary statute deals with admission to the Bar and the organization of the Bar Councils and their powers and functions. There is a Bar Council in every State where members are elected by all advocates on the rolls in that State. It regulates admission to the Bar on a basis which is uniformly applicable throughout the country. It exercises disciplinary jurisdiction. At the all-India level, there is a statutory body known as Bar Council of India with appellate powers in disciplinary matters, and matters relating to legal ethics, lawyers' welfare and legal education. The courts have no disciplinary jurisdiction over lawyers except in respect of contempt of court proceedings.

272. Legal education is imparted primarily in the universities in a three-year course leading to a law degree following a three year university degree course. The Bar Council of India, however, has supervisory control over the curriculum of legal education in the universities. At present there is no separate examination for law graduates seeking enrolment as advocates. Legal training is relatively inexpensive, socially disadvantaged sections of the society are provided with financial assistance to facilitate their educational careers. The teaching input specifically in respect of legal ethics and human rights in the course of legal education is meagre except that the study of constitutional law in India has a strong human rights element in it. A few of the law schools have legal aid clinics and courses on Law and Poverty 14/. The Bar Council Trust holds occasional seminars, workshops and continuing education courses. The Bar Council of India has recently taken the initiative to establish a National Law School as a peak of excellence and to introduce a five-year course of legal education throughout the country 15/ with a more specialized course content and greater professional orientation. The number of law schools and students preparing for law degrees is so large that the Bar Council cannot closely supervise the content or quality of legal education, or give it a sense of purpose and direction. Moreover, universities are autonomous and do not always see eye to eye with the Bar Council in matters concerning legal education.

273. New entrants to the legal profession often face considerable hardship during the initial years, although at the top the Indian Bar is exceptionally affluent and influential. Since the advent of Independence, there has been an extraordinary increase in the numerical strength of the Bar. The Indian Bar is now far more representative of all sections of the society. In that sense its composition today has a wider base of social origins. In the process, it may have lost some of its elitism and homogeneity but its professional cohesion and solidarity shaped by its numerical strength, public visibility and accessibility and the explosion of public law litigation are important factors in maintaining its adherence to the professional ethos of independence and its allegiance to the rule of law.

274. In addition to the Bar Councils in the States and the Bar Council of India, which are statutory bodies, lawyers practising in every court or special jurisdiction have a voluntary Bar association. Every High Court has its own Bar Association. The Supreme Court Bar Association is regarded as a premier

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14/ See Singhvi, L. M., et al: (ed.) Law and Poverty, 1971.

15/ See Report on Legal Education by the Bar Council of India, 1983.

professional body and commands great respect and influence. There are numerous other lawyers' organizations operating on a voluntary basis. All of them take active interest in the cause of the independence of the judiciary. Some of them are involved in the promotion and protection of human rights; others are active in legal aid or law reform or lawyers' welfare. There is an Indian National Centre for the Independence of Judges and Lawyers (ICIJL). A massive programme of legal aid and advice with an emphasis on public interest litigation and legal literacy for the common man is being implemented on an all-India basis with large government funding through a committee headed by a judge of the Supreme Court of India, now Chief Justice of India.

275. Rules of professional ethics are codified and are also part of the conventions and the traditions of the profession. Law practice is incompatible with employment in the Government or any corporation except as a law officer in certain jurisdictions. A lawyer is not permitted to carry on any trade or commercial activity or any other profession. A lawyer is free to take part in the political, social and cultural life of the country; indeed lawyers are in the forefront of social and political life. A lawyer is not permitted to solicit or advertise. He should always conduct himself in a manner which is consistent with the dignity and the honour of the legal profession. He must show due respect to the judges. He is expected to be free, fair and fearless in his advocacy. A lawyer enjoys immunity for what he says in the court room. He is not supposed to use intemperate or defamatory language. A judge may admonish him for a breach of etiquette and may in a given case make a report to the Bar Council for disciplinary action. A lawyer is obliged to work faithfully and diligently on behalf of his client. Professional negligence renders him liable in damages besides disciplinary penalties which may entail censure, suspension or disbarment. Theoretically a lawyer cannot refuse to accept a case except for a good excuse. An amicus curiae brief on behalf of an indefended or indigent accused is by convention never declined.

276. Communications between lawyers and clients are confidential and privileged but a lawyer may breach confidentiality to prevent the commission of a crime. There is no immunity or privilege in respect of a conspiracy between a lawyer and his client to commit a crime. Any person in custody has a guaranteed right of access to his lawyer and vice versa. A client has a right to retain or relieve his lawyer. A lawyer's right to withdraw from a case accepted by him is subject to the permission of the court. Lawyers are liable in damages in respect of their professional activities but there is hardly any professional malpractice or negligence litigation in India. Professional risk insurance is not in vogue. Lawyers' fees are a matter of private contract. Although a scale of fees is prescribed by the rules for the purposes of taxation of fees and award of costs, it is not binding on the advocates for the purpose of accepting professional engagements.

277. The number of lawyers in Bangladesh and Pakistan is quite large. In Pakistan, there are more than twenty three thousand advocates. The legal profession in Pakistan is governed by the Legal Practitioners and Bar Councils Act, 1973. The Bar Councils are self-governing bodies. They deal with the disciplinary matters relating to advocates. A Bachelor's degree and a degree in law from a university makes a person eligible for enrolment as an advocate. In addition to the statutory Bar Council, there are voluntary Bar associations which are autonomous and influential. The Bar Councils lay down the rules of professional ethics and etiquette. They also have the disciplinary jurisdiction. Lawyers cannot engage in any trade or occupation. By virtue of section 59-A of the Legal Practitioner and Bar Councils Act, 1973, it is provided that a Bar Council and a Bar Association shall not indulge in any political activity directly or indirectly. Communications between lawyers and their clients are privileged. A person in custody and his lawyer have a right of access to each other. A lawyer can refuse any brief he likes. There is no prescribed scale of fees.

278. In Singapore, lawyers are known as advocates and solicitors. There are more than 1,000 advocates and solicitors. Some of the relevant laws safeguarding the independence of lawyers are those in the Legal Profession Act, the Supreme Court of Judicature Act, the Subordinate Courts Act and the Evidence Act. Lawyers are free to practise in any areas of the law. They are regarded in law as officers of the Supreme Court of Singapore. Interference with the proper conduct of their duties to the Court may amount to a contempt of Court. Lawyers have their own Inquiry and Disciplinary Committees insofar as their professional conduct and duties are concerned. They are also subject to the control of the Supreme Court. Legal education imparts to the student knowledge of a variety of substantive and procedural law, for example, Constitutional and Administrative Law which includes a study of the fundamental liberties of human beings, the independence and importance of the judiciary in ensuring the rule of law, and the remedies available to a person aggrieved by any action or decision of the government. Studies in Humanities have also been introduced to broaden the vision of the law student.

279. The Constitution provides for the right to form associations. The Legal Profession Act established by a body corporate called the Law Society of Singapore. Every advocate and solicitor is a member of the Society. The purposes of the Society, as listed in the Legal Profession Act, include, inter alia, the following: to maintain and improve the standards of conduct and learning of the legal profession; to facilitate the acquisition of legal knowledge by members of the legal profession and others; to assist the Government and

the courts in all matters affecting legislation, and the administration and practice of the law in Singapore; to represent, protect and assist members of the legal profession in Singapore and to promote in any manner the Society thinks fit the interests of the legal profession in Singapore; to make provision for or assist in the promotion of a scheme whereby impecunious persons on non-capital charges are represented by advocates.

280. Lawyers are governed by the Advocates & Solicitors (Practice and Etiquette) Rules, 1936. Generally, these rules regulate the conduct of lawyers towards one another in litigation, prohibit advertisement and touting, prohibit the dividing of costs or profits with any unqualified person and also contain rules as to the keeping of accounts.

281. The enforcement of such practice and etiquette rules is generally undertaken by the Law Society. There are rules on proceedings before the Disciplinary Committee. The lawyer complained against shall be a competent but not a compellable witness. He may appear before the Disciplinary Committee in person or be represented by another lawyer. Such proceedings are governed by the Evidence Act and the Disciplinary Committee has regard to the Courts' practice and procedure.

282. Lawyers are also subject to the control of the Supreme Court and may be struck off the roll of advocates and solicitors, or suspended from practice for any period not exceeding two years, or censured, if due cause is shown. The lawyer may be struck off the roll, suspended from practice for any period not exceeding two years or censured, if he carries on by himself or any person in his employment any trade, business or calling that detracts from the profession of law or is in any way incompatible with it, or is employed in any such trade, business or calling. What trade, business or calling would fall within the ambit of the above would have to be decided according to the facts of the particular case.

283. The Council of the Law Society of Singapore has taken the stand that a lawyer may be employed as a part-time secretary in a limited company, and that a lawyer may be a director of companies also. Lawyers here may also be involved in the political, social and cultural life of the country. There are lawyers who are Members of Parliament, members of social clubs, political parties and religious groups, and there are others actively involved in choirs and orchestras.

284. There is no professional obligation to accept cases. A lawyer may refuse a case if there is a likelihood of a conflict of interest, or if the case is one involving areas of law in which the lawyer is not competent. Professional

confidentiality is required to be observed on the same basis as in India. Article 9(3) of the Constitution of Singapore provides: "Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice".

285. Lawyers may be liable in negligence in respect of their professional duties to their client. They may be insured in respect of such liability. The extent of insurance will of course depend on their means and the scope of legal work they are engaged in. Any person who intimidates or threatens a lawyer who takes up unpopular causes may be held to be in contempt of Court. Wherever necessary, the police will be requested to provide adequate protection for the lawyers in and out of court.

286. For civil cases, in respect of contentious legal business, the Rules of the Supreme Court and the Subordinate Courts Rules provide for fixed costs for certain items of work, discretionary costs for others, and a minimum and maximum limit for the rest. The Solicitors' Remuneration Order 1974 regulates the scale of fees where non-contentious business is concerned. In criminal cases, no provision is made by law governing the scale of fees payable by a client to his lawyer and it is left to the client and his lawyer.

287. In Indonesia, 16/ every citizen has the right to represent others in court and no professional qualifications are necessary for the practice of law. As a result there are many persons who practise law without having passed any qualifying examinations to become advocates and without any formal academic or professional training. There are two Bar associations, Peradin representing qualified private practitioners and Persahi which admits anyone who practises law irrespective of whether or not he is qualified. Those who practise law without any formal or legal education or training are colloquially called "bush lawyers". The bush lawyers would appear to be para-legal practitioners.

288. With the formally trained and enrolled lawyer population of more than 250,000, there are many who take the view that a substantial number of para-legal persons are required to render the required legal services. A large number of such para-legal persons do already engage in conveyancing, drafting and litigation, particularly in small towns and in the countryside on the Indian sub-continent. The question of professional standards poses a serious difficulty in respect of persons who have not had any legal education and training and who are not subject to the disciplinary control of any Bar association.

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16/ C.I.J.L. Bulletin No. 12 (October 1983) page 1.

It appears that in Indonesia, there is no established code of ethics or system of disciplinary proceedings against those practising law whether qualified or not. It seems that without such a code of ethics and without any autonomous body of the Bar exercising disciplinary jurisdiction, the independence of the legal profession or of the functions of a lawyer cannot be adequately safeguarded. A system of para-professional legal training and of registration, as well as a code of conduct and liability in disciplinary jurisdiction, should be provided for para-legal practitioners when a need for such a class and their services is felt.

289. The legal profession in Israel is self-governing through the Chamber of Advocates set up under the Chamber of Advocates Law, 1961. It is, however, subject to inspection by the State Comptroller (the Ombudsman). On admission, a lawyer declares solemnly that he undertakes to uphold the honour of the profession and to act for the benefit of his clients loyally and to assist the court in doing justice. Apart from a general provision giving every person the right to be represented by a lawyer before any State or local authority or other body or person carrying out public functions by virtue of law, an advocate is enjoined by statute to act in keeping with professional ethics. He is also obliged to maintain professional secrecy unless it is waived by the client. The rules relating to professional ethics established in 1966 require an advocate to promote the rights of clients devotedly and fearlessly. He may not represent parties with conflicting interests. Once an advocate has begun to deal with a matter he must continue with it and not withdraw unless serious differences arise with the client or he is prevented from doing so by law or professional ethics; if the matter is already before the court he may only withdraw if his instructions are withdrawn or another lawyer has been appointed by the client.

290. Egypt has about 40,000 lawyers. Lawyers are divided into two categories: (a) lawyers in private practice and (b) lawyers employed by the public sector and governmental bodies and institutions. Article 10 of the new Act No. 17 of 1983 concerning the practice of law, corresponding to article 56 of Act No. 61 of 1968, stipulates that the name, place of residence and professional business address of practising lawyers shall be entered in a general register. The following lists are annexed to each register: (a) lawyers in pupillage (b) lawyers with right of audience in courts of first instance or their equivalent (c) lawyers with right of audience in courts of appeal or their equivalent (d) lawyers with right of audience in the Court of Cassation, and (e) non-practising lawyers. The name, address and employer of lawyers employed in the public sector and by governmental bodies and institutions shall be entered on a separate list. Act No. 17 of 1983 forbids any lawyer on the public sector list to engage in any proceedings or activities, of a type normally undertaken by lawyers in private practice, for any person other than the one by whom they are employed. Any action carried out in violation of this provision is deemed

to be null and void. Article 56 of the Egyptian Constitution promulgated in September 1971 stipulates that: "The establishment of trade unions and federations on a democratic basis is a right guaranteed by law. Such trade unions and federations shall have corporate personality and their participation in the implementation of social plans and programmes, in the improvement of standards of professional competence, and in the promotion of co-operation and solidarity among their members and the protection of their interests shall be regulated by law. They shall hold their members accountable for their professional conduct under the various ethical codes of honour and shall defend the legally prescribed rights and freedom of their members".

291. Act No. 17 of 1981 provides as follows: Lawyers cannot be held in contempt of court and cannot be arrested for any criminal or trade union offence. In such cases, a memorandum is prepared and sent to the Office of Public Prosecutors, the Association being also notified thereof. Similarly, lawyers are not liable to criminal prosecution or precautionary detention in respect of such offences except by order of the State Counsel General or any of the advocates general acting on his behalf (arts. 49 and 50). A lawyer cannot be interrogated, nor can his office be searched, except by a member of the Office of Public Prosecutions and the law stipulates that, in such cases, the Association must be notified in good time before such action is taken (art.51). Under article 54, corresponding to article 98 of Act No. 61 of 1968, any person who attacks a lawyer by word, deed, gesture or threat during, or because of the discharge of his professional duties is liable to the same penalty as that imposed on any person who commits the same offence against a judge.

292. The qualifications and criteria applicable to entry into the legal profession are as follows: the candidate must hold Egyptian nationality; he must possess full civil eligibility; he must hold a degree in law from an Egyptian university or from a foreign university provided that, in the latter case, the said degree is legally recognized as equivalent; he must not have been convicted of an offence or misdemeanour prejudicial to honour, integrity or morality, unless he has subsequently been restored to good standing; he must be of commendable conduct, good reputation and worthy of the respect required by the profession; he must not have been convicted of criminal or disciplinary offences, dismissed from his post or expelled or dissociated from his profession for reasons prejudicial to honour, integrity or morality; he must not be an active member of any other professional association; he must pay the legally prescribed registration and annual subscription fees; he must not infringe the provision of article 14 of the Act which forbids combining the practice of law with any of the following activities: the Presidency of the People's Assembly or of the Consultative Council; the post of minister; public posts in the Government, public bodies or local administration; commerce; the post of chairman of the board of directors, managing director or full-time member of the board of directors of a joint stock company or the

post of manager of a limited or joint liability company or partnership; religious posts.

293. The legislative act regulating the practice of law in Egypt emphasizes the professional independence of lawyers and lays down various ethical and legal rules of conduct that lawyers must observe after they have taken the oath to preserve the confidentiality of the profession of lawyer as a prerequisite for entry into the profession. Article 62 of Act No. 17 of 1983 also stipulates that, in his professional and personal conduct, the lawyer is obliged to observe the principles of honour, probity and integrity and must fulfil all of the duties incumbent upon him under the Act, the statutes and regulations of the Association, and the customs and traditions of the profession. Article 66 of Act No. 17 of 1983 regulating the practice of law in Egypt stipulates that no person who leaves a public or private post in order to practise law may agree to act as legal counsel, in person or through a lawyer working in his office in any capacity whatsoever, in proceedings against his former employer within three years after the severance of his relationship with the said employer. This prohibition also applies to lawyers who have served as members of the People's Assembly, the Consultative Council or local councils in the event of proceedings being brought against such bodies. Article 64 of the Act provides: "The lawyer shall provide legal aid for citizens who are indigent or otherwise incapable of defending their rights in the circumstances specified in this Act. Any lawyer assigned to represent such persons shall do so with the same diligence that he would exercise on behalf of any other client". Article 93 of the Act regulates the provision of legal aid for indigent citizens through branch offices of the Association. Such branch offices assign a lawyer to represent any citizen exempted from the payment of fees on grounds of financial incapacity (art. 94).

294. Many restrictions were imposed on lawyers and their freedom by Act No. 61 of 1968, which was subsequently revoked. Lawyers have formed their own central Association which enjoys corporate personality and has established branch offices within the jurisdictional circuit of each primary court. General and branch councils of the Association of lawyers have been constituted directly under the legislation in force.

295. The rules of professional ethics and codes of conduct cover the three aspects of the lawyers conduct in relation to (a) his client, (b) his colleagues, and (c) the judiciary. The first aspect, namely the lawyer's conduct towards his client, is regulated by articles 77 to 92 of section III. For example, article 79 stipulates that the lawyer must preserve the confidential nature of information received from his client. Article 80 forbids the lawyer to give any assistance or advice to his client's adversary. Article 81 forbids the lawyer to purchase all or any part of the disputed rights. With regard to the second aspect, namely the lawyer's conduct towards his colleagues, article 68 stipulates that: "In his dealings with his colleagues, the lawyer shall observe the code of conduct and the traditions of the legal profession.

Except in urgent cases, he must request permission from the branch office of the Association to which he belongs if he wishes to bring a suit against one of his colleagues. Similarly, he shall not agree to act as legal counsel in any proceedings or claim brought against a colleague until he has obtained permission from the head of the branch office of the Association to which he belongs. With regard to the third aspect, namely the lawyer's conduct towards the court, article 67 stipulates that: "When addressing a court session, the lawyer shall show due respect and shall endeavour to ensure that his relations with members of judicial bodies are based on mutual co-operation and esteem.". Under article 70 of the new Act, the lawyer is forbidden to make statements or declarations concerning court cases in which he is acting as counsel for the defence. He is also forbidden to divulge matters likely to influence the course of the proceedings to the benefit of his client or against that of his adversary.

296. Under the Act regulating the legal profession, the Council of the Association has the right to reprimand or warn a lawyer who has violated the rules of professional ethics or standards of conduct. Other disciplinary sanctions such as censure, disbarment and final removal from the register fall within the jurisdiction of any disciplinary board consisting of the President and two chief justices of the Cairo Court of Appeal and two members of the Council of the Association, one of whom is chosen by the lawyer against whom the disciplinary proceedings have been brought.

297. A lawyer is free to decide at his own discretion, whether to agree or decline to act as legal counsel in any particular proceedings (art. 48). However, a lawyer may not refuse to defend a person accused of a criminal offence unless, due to the circumstances and complexities of the case, he feels unable to discharge these duties of counsel for the defence in a competent and reliable manner (art. 63). A lawyer assigned by the court or the Association cannot be released from his obligation to defend an accused person unless the court agree thereto. In such a case, he must continue to attend the court until he is released from his obligation through the assignment of another lawyer (art. 64, par. 2).

298. Under the Constitution, the Code of Criminal Procedure and the Act regulating the legal profession, a lawyer has the right to communicate with a client in custody. Such access cannot be denied except in cases involving the security of the State or subject to the provisions of the Emergency Act in which the Office of Public Prosecutions may deny the said right until completion of the investigation procedure. There is no restriction on the client's right to choose or dismiss his lawyer in accordance with the provisions of the law.

299. A lawyer is not liable in respect of the activities of his client. He is liable only to the extent of his mandate to act as his client's representative.

Lawyers are not insured in respect of their professional activities. Lawyers who take up unpopular causes professionally or who assist persons prosecuted or tried for crimes against the security of the State and/or subversive activities enjoy immunity only while in court.

300. In accordance with the provisions of the Act, fees are calculated on a basis of mutual agreement and consent between the client and his lawyer. The law intervenes only if there is no written agreement, in which case it stipulates that fees are to be calculated in the light of a number of considerations such as the value of the lawsuit, the amount of effort exerted, and the extent to which such effort was successful in achieving the desired result. The fees must not, however, be less than 5 per cent or more than 20 per cent of the value of the lawsuit. For purposes of the calculation of fees, the law does not distinguish between the different categories under which lawyers are registered, although it is customary for the said categories to be taken into account. Failing agreement, the fees are assessed by the branch office of the Association to which the lawyer belongs. In the case of amounts exceeding 500 Egyptian pounds, the assessment can be challenged only in a court of appeal, although lesser amounts may be challenged in the appeal chamber of a primary court.

301. In March 1983 there were 193 lawyers registered on the permanent list of lawyers authorized to plead before Kuwaiti courts. The qualifications required for entry into the legal profession is a degree in law from the Faculty of Law at Kuwait University or a diploma in Islamic canon law (Shari'a). Any person holding a general certificate of secondary education is able to enter either the Faculty of Law or the Faculty of Shari'a. Lawyers have a right of association. The Union of Kuwaiti Lawyers is a voluntary association of lawyers with its own statute defining the aims of the legal profession and duties of lawyers.

302. Disciplinary jurisdiction over lawyers is exercised under the law by a board composed of the President or Vice-President of the General Court, as Chairman, two General Court judges appointed on an annual basis by the General Assembly of the said Court, and two lawyers chosen by the Governing Council of the Union of Lawyers. The Disciplinary Board is empowered to impose sanctions or penalties.

303. Lawyers who fail to fulfil their duties or bring the legal profession into dishonour or disrepute as a result of their conduct in their professional or other activities. Any of the following penalties may be imposed: (a) a warning; (b) a reprimand; (c) suspension for a period of not more than three years; (d) disbarment. Act 42 of 1964 provides that a lawyer cannot practise law while holding (a) the Presidency of the National Assembly, or other public office; (b) any position or performing any activity incompatible with the dignity of the profession of lawyer. The acceptance or refusal of cases is

a matter left to the discretion of the lawyer who is not obliged to accept a case or provide any reasons for refusing it under the law. The lawyer shall receive fees from his client on the basis of the written agreement between them. The court which hears the case may however reduce the agreed fees, at the request of the client, if it deems them to be excessive in relation to the amount of effort required by the case or in relation to the benefit derived by the client. The fees shall not be reduced if they have been agreed upon after completion of the work. The lawyer shall under no circumstances be permitted to purchase all or part of the rights under dispute, nor shall he agree to take any part of the said rights in lieu of his fees or to base his remuneration on the amount or value of a legal claim or of a judgement delivered in proceedings relating thereto. He shall under no circumstances conclude an agreement concerning fees which would be likely to give him a vested interest in the case or in the work for which he is engaged. The relationship between client and lawyer shall not terminate, nor shall the lawyer be entitled to full payment of his fees, until the date of final execution of the judgement or order in the proceedings for which the lawyer was engaged, unless otherwise stipulated in the contract.

304. If there is no written agreement concerning fees, or if the written agreement is invalid, in the event of a dispute and at the request of the lawyer or his client, the court before which the proceedings were heard shall assess the lawyer's fees at an amount commensurate with his efforts and with the benefit derived by the client.

305. The client has the right to engage a lawyer of his own choosing. He also has the right to revoke the power of attorney. Article 22 of Act 42 of 1964 stipulates that: "The lawyer shall be responsible to his client for the discharge of the duties assigned to him in accordance with the provisions of the law and the terms of his power of attorney.". Article 34 of the Constitution stipulates that: "An accused person shall be presumed innocent until proved guilty during a legal hearing at which the necessary guarantees are provided for him to exercise the right of defence.". Article 27 of Act 42 of 1964 provides that if the Criminal Court appoints a lawyer to defend a person accused of a felony in accordance with article 120 of the Code of Criminal Procedure, the said lawyer must be present to defend the accused throughout the hearing provided that the lawyer thus appointed has been given an authentic copy of the relevant case file, free of charge, in sufficient time before the date set for the hearing of the case. If, without valid reason, he fails to discharge this duty, the Criminal Court may sentence him to a fine of not more than 100 dinars. There is no financial insurance against claims for damages relating to his professional activities.

306. The profession of law in Tunisia is recognised and regulated by a legislative enactment, Act 58-37 of March 15, 1958. According to article 9 a lawyer included in the roll for the first time shall take the following oath before the Court of Appeal: "I swear before God to discharge the duties of my profession with honour and integrity, to observe professional secrecy, to obey the laws, and never to deviate from the respect due to the Courts and the public authorities.". The practice of law is incompatible with any public office, with the exception of the office of professor or lecturer in the Faculty of Law, and certain offices for which payment of compensation is made from the funds of the State, local communities or public establishments. It is also incompatible with any kind of commercial activity. Any person invested with a parliamentary mandate is also placed under certain restrictions in respect of the practice of law during the term of the mandate.

307. The Bar Council is responsible for maintaining the principles of integrity, impartiality, moderation and confraternity on which the profession of law is based. It exercises such supervision as the honour and interests of the Bar may render necessary. It also acts as a disciplinary body for the legal profession, and deals with any question relating to the practice of the profession, the defence of the rights of lawyers, and the strict performance of their duties. Any lawyer who fails or falters in respect of professional duties and undermines the honour of the Bar is liable to disciplinary penalties. Warning, reprimand, temporary suspension for up to two years, disbarment for a period not exceeding three years, and permanent disbarment. In its disciplinary jurisdiction, the Bar Council may act on its own or at the request of the head of the Parquet General, or on the basis of complaints addressed to it.

308. In Belize, there are about 20 lawyers in private practice and 10 lawyers in government service. The legal profession is governed by a legislative enactment, Ordinance No. 8 of 1980. There are no restrictions on anyone taking up the study or profession of law but there are no local facilities in Belize to qualify in law. Those desirous of entering the legal profession may follow the LLB course of the University of West Indies and study law for two years at the Norman Manley School in Jamaica or study in England. The Bar Association is an incorporated body under section 40 of the Legal Profession Ordinance. All lawyers are members of the Bar Association, which admits them to the profession. The Bar Association is an autonomous body and regulates the legal profession. The standards of the English Bar are generally taken as the norms to be followed. There is a Bar Committee which deals with violation of any professional ethics. A lawyer may also be sued for negligence.

309. There are no restrictions on lawyers taking part in the political, social or cultural life of the country. There is no professional obligation on any

lawyer to accept any case. Communications between lawyers and clients are privileged. Persons in custody have access to their lawyers which is arranged through the prison officers. In any hearing of a case by a tribunal under emergency law any person detained is empowered to be represented by a legal practitioner of his own choice.

310. The legal profession in Colombia is numerically sizeable. There are about 30,000 lawyers in Colombia. The Colombian Constitution specifies that all persons are free to choose their profession or occupation. That freedom is, of course, subject to the requirements of admission to the Bar. The completion of the prescribed course of legal education in a university comprising a wide range of compulsory and optional subjects is a prerequisite to being permitted to practise as a probationer for two years on a limited basis. Titular lawyers are those who have obtained the full-fledged appropriate title recognised by the legal system.

311. There are numerous associations, councils and federations of lawyers organized and constituted in the form of voluntary bodies recognized by the Legal Office of the Ministry of Justice. The Colombian Association of Lawyers (CONALBOS) with its headquarters in Bogota is the most prominent and prestigious of them. Its aims cover rights and responsibilities of the legal profession for the benefit and protection of lawyers to enable them to practise with freedom and dignity and for upholding the rule of law and public interest through legal institutions. The national executive board of the Association is responsible for the application of sanctions to members who fail to observe their duties.

312. The Code of Ethics for the practice of the legal profession is embodied in a decree (No. Decree 196 of 1971). Disciplinary jurisdiction is exercised at the apex by the disciplinary tribunal established under article 217 of the Constitution which hears cases on appeal or review. The district high court has primary jurisdiction over offences committed by lawyers in the territory of its district. The district High Court exercises disciplinary jurisdiction through its criminal division.

313. The practice of law is incompatible, as in other countries, with government employment, active service in the armed forces, and certain elective public offices in cases of conflict of interest. Persons deprived of their freedom in consequence of an indictment are also disqualified. A lawyer may not act in any case with which he has dealt in the performance of a public office or with which he has been concerned in the exercise of official functions; nor may a lawyer act or take any steps to represent a client with the bodies for which he has worked, during a period of one year after leaving his post. A lawyer is free to accept or refuse a brief without assigning any reason but he is under a professional obligation to accept a case as attorney or defence counsel when so appointed by the examining official or by the judge.

314. The duties of a lawyer towards his client include that of observing professional secrecy and confidentiality of communications which he may break only to avoid the commission of a criminal offence. A lawyer would be failing in his duty if, for example, he does not express his frank and specific opinion on the case on which he is being consulted or which is being entrusted to him, or if he guarantees to the client that, in the event of being retained to deal with the case, he will obtain a favourable result, or if he advises or represents, persons having conflicting interests, except for their common benefit and with their consent, or if he obtains from the client the assignment of a share in the results of the case on a contingency basis, or if he demands or obtains a disproportionate remuneration, benefit or recompense for his work, or expenses, taking advantage of the need, ignorance or inexperience of a client.

315. In accordance with Colombia's prison regulations, the lawyer has access to persons under detention. Under the relevant provisions of criminal law, a person who is under arrest is entitled to appoint an attorney to assist him in all the subsequent steps. If he does not wish to do so or is unable to appoint an attorney, one is designated for him by a judicial decision. Lawyers incur disciplinary liability without prejudice to any civil or criminal proceedings which may arise in respect of their professional activities. Lawyers are not ordinarily insured financially against claims for damages relating to their professional activities.

316. The total number of lawyers in Costa Rica is 2,065. Members of the Bar Association are listed either as lawyers or as notaries. The legal profession occupies an important place in Costa Rican society. Both the Union of Costa Rican Lawyers, a guild-type association, and the Bar Association, highly prestigious bodies, play an important part in ensuring the independence of lawyers in the practice of their profession. The basic constitutional guarantee of freedom of association and the freedom of expression sustain the legal profession in maintaining its independence. Nationals of Costa Rica who have taken their law degree are entitled to apply for admission to the Bar.

317. Legal ethics, the Decalogues of the judge and the notary, and human rights form a part of the five-year legal education curriculum. "Legal clinics" providing legal aid to low income groups form part of the Law Faculty of the University of Costa Rica.

318. Membership of the Bar Association is a prerequisite to practise. The aims of the Bar Association are: (a) To further the advance of jurisprudence and legal counselling; (b) To co-operate with the University in the development of the study of law and related subjects; (c) To give its opinion on matters within its competence when consulted by any of the three branches of Government; (d) To maintain and foster a spirit of unity among practitioners of law; (e) To promote and foster the dignity and standing of the legal profession; (f) To protect the rights of members of the Association and to take

all necessary steps to facilitate and ensure their economic well-being;
(g) To organize or direct, whenever possible, such assistance as is deemed necessary for the protection of members in need. The Association regularly submits drafts and makes suggestions with a view to improving national legislation and is also often consulted in respect of law reforms. The main body of rules regulating the conduct of lawyers is the Code of Ethics: it provides that a practitioner of law must act with dignity and in a manner that is above reproach not only in the exercise of his profession, but also in his private life. He must never act in breach of the standards of honour and must show the consideration that mark all men of integrity. He must be loyal and true and must act in good faith; accordingly, he shall not counsel any fraudulent act, nor, in his written submissions, include any erroneous quotations.

319. The Code lays down that the justice of the cause he defends shall always come before the personal interest of the practitioner of law; that "he must safeguard his good name with all due circumspection and behave with the utmost moral integrity"; that "he must respect the law and the legally constituted public authorities and must see that they are respected"; that "he must not hold private conversation with judges on a matter in which a decision is pending"; that he must show respect for the opinion expressed by judges in their decisions and the arguments of his opponents even when he is not in agreement with them"; that "he must show respect and courtesy to those who administer justice, and must assist the judiciary but that does not mean a lawyer's subordination to, or dependence on, the judiciary", he must show respect for the dignity of his legal brethren and should display courtesy, loyalty and trust towards them. "He must not advertise in an excessive or unseemly manner for his own benefit"; that "he must comply with the legal provisions that specify the grounds of incompatibility with the practice of Law"; A practitioner of law is liable to censure if he involves in discussions on matters which are sub judice.

320. Professional secrecy is both a duty and a right for a practitioner of Law. In regard to clients, it is a duty from which he cannot be excused even by the client himself; in relation to judges, it is a right since he would not be able to listen to confidential statements if it were known that he might be obliged to reveal them. Furthermore, if a practitioner of law is summoned to appear as a witness, he must answer the summons but in the course of the proceedings he must refuse to reply to questions which, in his own absolutely independent judgement, might be likely to result in a breach of professional secrecy. The obligation to maintain professional secrecy ceases if the client initiates proceedings against the lawyer. In such a case he may reveal what is essential for his defence and, for the same purpose, may produce documents entrusted to him by his client. A lawyer in Costa Rica is

free to accept or refuse cases in which he is asked to act. However, once a case has been accepted, a practitioner of law cannot go back on his decision in order to act for the opponent of his client. Any breach of ethics is dealt with by the Governing Body of the Bar Association and its Professional Conduct Committee are empowered to impose sanctions.

321. A lawyer may also be suspended from practice by the full court (a) if he is finally committed to trial for an offence which carries the penalty of disqualification, from holding public employment or office or exercising one of the professions, or if the person concerned is serving such a sentence or has been suspended from public office or employment or from the exercise of his profession; (b) if he refuses to render appropriate account to his clients, without reason; (c) if it appears that he has been guilty of misappropriation, embezzlement, extortion or the improper use of funds to the detriment of his clients; (d) if he is found to have certified a false signature or allows persons unauthorized by law to litigate through him; (e) if he is guilty of notorious misconduct as a result of scandalous or frequent drunkenness; and (f) if in general he is guilty of any misconduct, lack of integrity or honour in the practice of his profession.

322. Generally speaking, there is no incompatibility if a lawyer engages in another activity, trade or profession. Lawyers working in the executive and the judiciary are prohibited from engaging in private practice. Lawyers of the office of the Controller General of the Republic are in a similar situation. Lawyers are free to participate in the political, social and cultural life of the country.

323. A lawyer is free to accept or to refuse cases. It is considered quite normal for him to refrain from defending a case that is contrary to his political, social or religious convictions. However, once he accepts a case, he must discharge his duty faithfully until its conclusion. A lawyer is under a duty on pain of penalty of disqualification from practice for six months to two years to observe professional secrecy and not even his clients can excuse him from this duty. If he is called as a witness, a lawyer may refuse to reply to questions which, in his own absolute independent judgement, might be likely to result in a breach of professional secrecy. Legal professional privilege also extends to communications made to the lawyer by third parties. Professional secrecy is waived only if the lawyer is himself the target of attack by his client, in which case he may reveal what is essential for his defence.

324. The right of lawyers and their clients to have access to each other is protected under article 44 of the Constitution, which stipulates that a person may not be held incommunicado for more than 10 days. If the person concerned

is under a disability or a minor, he has complete freedom to choose his lawyer. The accused has a right to be defended by a lawyer of his choice or a public defence counsel.

325. A lawyer may be brought before the civil courts and may be criminally liable for any activities that are prejudicial to his clients, by reason of some negligent practice, or if they constitute an offence. A lawyer is expected always to act in compliance with the law and must always so conduct the cases in which he acts. There is financial insurance called the Fidelity Policy which has to be taken out by attorneys. Lawyers acting as notaries are protected from the criminal implications of any negligent culpable acts for which they may be liable solely in their capacity as notaries. Lawyers' fees are governed by the Code of Civil Procedure which provides an ad valorem percentage to be received by the lawyer. The work of a lawyer and a notary are remunerated separately. The parties may, by joint agreement, leave it to the judge to tax the legal fees. They may also settle the fee by private contract.

326. In Venezuela, there are approximately 20,200 lawyers. A lawyer on the roster of a Bar Association is entitled to practice throughout the territory of the Republic. He must however join the Bar Association within the jurisdiction of which he normally practises. To be admitted to a course of legal education, it is necessary to hold a baccalaureate certificate in the appropriate subjects, or to pass an entrance examination. For entrance into the legal profession, a law degree and registration in a Bar Association and in the lawyers' social insurance institute are necessary. No discrimination or preference based on race, sex, creed or social condition is permitted. The subject of Legal Ethics and the theme of the social role and responsibilities of lawyers are taught in the faculties of law. Lawyers are regarded as auxiliaries of justice.

327. The Federation of Bar Associations of Venezuela, which is the highest body, regulates and protects the independent practice of the legal profession, and consists of all the existing Bar associations. It is a body of an exclusively professional character, having its own distinct legal personality. The standards of conduct for lawyers are laid down in the Code of Professional Ethics. The independence of lawyers is implicit in the system of administration of justice and the remedial rights of citizens. Everyone has a right to be represented by a lawyer of his choice or by a lawyer appointed by the judge in the case.

328. Disciplinary penalties in case of breach of rules of professional ethics may range from private admonition to pecuniary fine, suspension, or imprisonment. Ministers of religion, members of the armed forces in active service and public officials are debarred from the practice of the legal profession. Exclusion from law practice on the basis of conflict of interest, or incompatibility, or impropriety, is a part of professional ethics. Practising lawyers are free to participate in the political, social and cultural life of the country.

329. A practising lawyer is under a duty to defend an accused if appointed by the court to do so. Lawyers have a duty to defend persons declared poor by the court without any compensation. Lawyers must observe the rule of professional confidentiality. This fundamental duty continues in full measure even after a lawyer has ceased to serve his client. A lawyer is entitled to refuse to testify against his client and may abstain from replying to any question which would involve violating the confidence of his client. A lawyer who is sued by his client is, however, dispensed from the obligation of professional secrecy to the extent necessary and essential for his own defence. If the client informs his lawyer of his intention to commit an offence, the lawyer may, as his conscience dictates, make the necessary disclosures for the purpose of avoiding the commission of the offence and preventing the moral or material damage which might result from its perpetration.

330. Lawyers and attorneys may not, either by themselves or through other persons, enter into any pact or contract with the clients for the sale, gift, exchange or other similar transactions relating to property or other items in dispute in a case in which they are acting professionally. The Venezuelan legal system looks down upon the practice of contingent fee arrangements or pactum de quota litis and regards it as unethical and impermissible.

331. Lawyers have a right to communicate with their clients. The Public Prosecution Department and its officers are under a duty to ensure that every person in preventive custody held by the police authorities is informed of his constitutional rights to communicate with his lawyer. A lawyer must act scrupulously, avoid conflicts of interest or any incompatible obligations or engagements. Lawyers are liable in respect of their professional activities on behalf of a client, since they are entrusted with a mandate which they have to fulfil; should they fail to do so, the disciplinary tribunal of the respective Bar association deals at the first level of jurisdiction with offences against the standards of professional ethics such as manifest negligence, violation of the rule of professional secrecy, and any other professional misconduct or misdemeanour. A lawyer is also liable in damages in certain cases. There is no system of professional risk insurance. There are national regulations on minimum fees which lay down the scale of fees to be charged by lawyers. Ordinarily, however, fees are settled by private negotiation and contract.

332. In Madagascar there is only one Bar known as the "Barreau de la Cour d'Appel d'Antananarive". The members of the Bar may plead before the Supreme Court, the Court of Appeal, the Courts of First Instance and their division, and before all courts provided for in the system of court organization. They are also entitled to plead before all disciplinary boards for State employees and officials. There is only one category of lawyers in Madagascar. The independence of lawyers is not mentioned in the Constitution but implicitly recognized in the law reorganizing the Bar association. The Bar has its own

ethics and code of conduct which its members absorb by observing its traditions. In Madagascar the institution of the Bar has existed only since the period of colonization, but the French members who practised at the Antananarivo Bar adhered to these traditions and the Malagasy members, who now constitute the majority of its members have striven to adhere to the path of their precursors in this respect.

333. The right to practise as a member of the Bar in Madagascar is broadly regulated on the same conditions as in France. An investigation of the applicant's character is made by the Council of the Bar Association. Before being accepted as trainee lawyers, applicants must be introduced by the President of the Bar Association and take the prescribed oath. A trainee is expected to attend the classes for trainee lawyers and to attend court hearings. A pupil must also work for a period of at least one year in a lawyer's or a notary's office or in the parquet of the Court of Appeal or a court of first instance. Lawyers enjoy freedom of association. The Bar Association is meant to be autonomous in its functioning.

334. Rwanda has no practising lawyers. It has a judiciary and it has law officers but the practice of law is not in vogue. There are some other parts of the world also where lawyers do not exist as a professional class to represent litigants. In many societies, there are simpler conventional mechanisms of dispute resolution which do not require the intervention of lawyers. There are several jurisdictions where the number of lawyers is very small, available educated manpower resources are limited and are deployed in other activities, facilities of legal education are not available, and there is lack of legal literature and law reports.

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

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

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

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

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

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

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

340. A lawyer has obligations to his client as well as to the society. His obligations to the society include his obligation to his profession as well as to his fellow human beings. It is in this context that the legal profession may be defined as a group of men and women pursuing a "learned art as a common calling in the spirit of public service - no less a public service because incidentally it may be a means of livelihood" 17/. There is a great deal more than traditional dignity and convivial fellowship in the idea of a profession. There is intellectual and moral striving which is characteristic of the legal profession. There is the spirit of public service, the quest for justice and fair play, and the commitment to certain values which have earned them the appellation of a noble profession. The independence of the legal profession is vital not for the sake of lawyers but because they serve the fundamental cause of the rights of human beings and those of the society.

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17/ Roscoe Pound, Jurisprudence, Vol.5 Part (The System of Law, 1959, p.676).

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

341. The profession and its own role perception bears testimony to its sense of tradition and its awareness of social purpose and accountability. Role perception by the profession is an assurance that the goals and ideals of the profession are not relegated to oblivion, that the acknowledged expectations which form that role perception constitute a kind of social contract and an earnest of role performance. The profession's own understanding of its role leads to rules and conventions of ethics and etiquette, some of them written and many of them unwritten. These rules and conventions are sensitive to social pressure, needs and demands, and are subject to change from within and sometimes by legislative or judicial intervention. They help in the constant process of the socialization of the profession. The ideals of the legal profession are in a fundamental sense universal without being uniform. Their universality provides the basis of shared values and common principles applicable to the legal profession on a world-wide basis. These ideals cannot be achieved unless the independence of the legal profession as an intrinsic institutional and functional condition is guaranteed 18/.

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

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

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

344. In most countries of the world there is a clearcut shift from professional apprenticeship to universities for imparting legal education. In many countries, a first university degree followed by another university degree in law is necessary for admission to the Bar. In a study first published in 1922, Max Weber correlated the system of apprenticeship and the pragmatic responsiveness of the common law and contrasted it with the more intellectual and formalistic treatment of the law arising from university education in Europe. From the point of view of the independence of the legal profession, it is necessary to transmit the ethos of the profession and the basic value of its independence both through university education and professional training, both as a part of intellectual equipment and as a matter of pragmatic approach. The objectives of legal education and training throughout the world should be to equip the student with (a) technical professional competence and liberal and contextual understanding of law, its evolution and its role; and (b) an awareness of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms, and a sense of social responsibility and concern for those who are disadvantaged or neglected. In this context, and in order to emphasize the new dimension of the second (not secondary objective), Lord Wilberforce spoke in Manila a few years ago of the need for a new breed of lawyers sensitive to the social obligations of the legal profession and Mr. Justice P. N. Bhagwati has advocated the idea of "barefoot" neighbourhood lawyers in the third world countries to highlight the new challenges to which the legal profession must respond 19/.

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

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

346. In the Republic of Korea, admission to the Bar is through a very difficult examination after the completion of legal education in the university. In Japan a person has to complete the course of a legal apprentice after his legal education to be qualified to be a practising attorney 20/. Intensive practice courses are also given by the bodies of the Bar in different countries. The main idea is to ensure professional competence, but what is needed equally is that human rights content of legal education and the emphasis on the independence of the Bar as a professional institution should be substantially augmented. Access to legal education and law careers is obviously an important determinant of the role which law and the legal profession play in society. If there is indirect discrimination or systematic exclusion in the matter of legal education or entry into the legal profession, it is bound to have certain repercussions on the way the legal profession would function. There may not be overt discrimination and yet it is quite possible that for one reason or the other a segment of the population is excluded from legal education or the legal profession. From the point of view of avoiding the detrimental consequences of class bias and affiliation and of ensuring the independence of the legal profession, access to legal education should be open, equal, uniform and without any discrimination. In some jurisdictions, it is constitutionally permissible and socially desirable to resort to a moderate measure of affirmative action to secure wider accessibility and to correct imbalances. Wider accessibility is likely to bring an enlargement of perceptions and a more representative responsiveness which democratizes and socialises the legal profession and prevents it from becoming exclusive and elitist. Such wider accessibility may often diminish the conventional social homogeneity and lower the quality and standards of the profession. It would call for a strategy to ensure that members of educationally backward or socially deprived sections of the community have full opportunities to come up to the level of others before they actually enter the profession or soon thereafter so that standards of the profession as a whole do not

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20/ See Law No. 205 of 1949.

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

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

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

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

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

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

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

351. Confidentiality of lawyer-client communications is an important condition for the discharge of his duties by a lawyer in an independent, fair and credible manner. In most countries, communications between the lawyer and the client are regarded as privileged. When a lawyer is engaged to defend a client accused of crime, the lawyer is entitled to present every defence that the law permits by all fair and honourable means. If a lawyer defending his client were to disclose the information received by him from his client or if the State were to interrogate the lawyer with regard to what his client told him, or pry into a lawyer's papers to discover what an accused person might have told his lawyer or what document he might have handed over to him, the prosecution may not need to have witnesses and the lawyer would be reduced to the position of a prosecution witness. The privileged confidentiality of a communication does not, however, extend beyond the case in which a lawyer is engaged. If a crime is about to be committed by his client, the lawyer is free to inform the police. Indeed it may be his duty to do so. An attorney whose client has fled the jurisdiction of the court while out on bail, must reveal the whereabouts of his client, even if received in confidence from the client 22/. Information that a client has violated the terms of his parole is not privileged 23/. According to an informal unpublished opinion, the lawyer of a fugitive from justice may not properly advise him not to surrender because he believes that public hysteria would prevent his getting a fair trial 24/.

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

23/ Ibid., Formal opinion No. 156.

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

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

353. The lawyer owes a duty to show proper respect towards the judiciary and to defend and uphold its dignity. In all the legal systems a lawyer may or may not be regarded as an officer of the court, but he is an important limb of the law and the independence of the judiciary is vital to the independence of the legal profession and vice versa. Judges, not being wholly free to defend themselves, are particularly entitled to receive the support of the Bar against unjust criticism and clamour 25/. That, however, does not mean that a lawyer is in any way subordinate to the judge. He has the right, in an appropriate case, to object to the participation of a judge or to the conduct of a trial or hearing. He may ask for the transfer of a case from a particular judge or a jurisdiction. He may report any misbehaviour or interference by a judge in the legitimate and fearless discharge of his duties to his colleagues and the Bar association and the Bar association may, in an appropriate case, express its disapproval of the conduct of the judge.

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

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25/ Ibid., p.16.

in certain jurisdictions, a judge may himself be held in contempt of court if he were to misbehave with a lawyer or use abusive or intemperate language. Nor should the judge who is apprised of his own contempt by a lawyer initiate proceedings to impose sanctions against the lawyer. A lawyer must enjoy civil and criminal immunity for statements made in good faith in written pleadings or oral arguments or in his professional work before a court, tribunal or other legal or administrative authority. In certain countries the Bar plays a part in the selection of judges. In those countries, the Bar should give due importance to judicial fitness in the selection process because it has the expertise to evaluate prospective candidates or nominees 26/. Lawyers must scrupulously refrain from exerting any personal influence on a judge and from interfering in the due administration of justice. Relations between judges and lawyers must not be open to "misconstruction of motive" and must not appear to mark a lawyer as particularly favoured. As an American canon puts it: "A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy and respect due to the judge's station, is the only proper foundation for cordial personal and official relations between Bench and the Bar" 27/.

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

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26/ Ibid., p.17.

27/ Ibid., p.18.

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

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

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

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

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

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

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

361. In the United States of America, in 1919, Reginald Heber Smith wrote his pioneering book, Justice and the Poor: A Study of the Present Denial of Justice to the Poor 28/. When the same author wrote with John S. Bradway Growth of Legal Aid Work in the United States 29/ in 1936, the situation had changed considerably, but not sufficiently. In later years, the Supreme Court of the United States of America laid down in the well known Gideon case that legal aid was a mandatory condition of a fair trial in criminal cases. The Office of Economic Opportunity in the United States of America funded neighbourhood legal-aid offices and other legal-aid schemes on an extensive basis and an independent legal-aid corporation was entrusted with monitoring their operation. During the last three decades there has been a virtual worldwide legal aid revolution. The legal-aid scheme in the United Kingdom is funded by the Government and is administered by the Law Society. The Ontario Legal Aid Plan was based on the close co-operation of the profession but its administration was autonomous from the outset.

362. In India, during the years 1970-1975, following the National Legal Aid Conference, there were many reports 30/ and blueprints advocating legal-aid programmes with substantial State funding. The foremost question in all legal systems is how far and in what way would legal aid funds provided by the State affect the independence of the legal profession and how means and merit tests may be applied 31/. In no country can full-fledged legal aid

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28/ Published in 1919 (New York: Carnegie Foundation for the Advancement of Teaching).

29/ Published in 1936. (US Department of Labor, Bureau of Labor Statistics, Bulletin No. 607).

30/ See for instance "Processual Justice", 1973; see also Reports of Gujaral, Tamilnadu, Rajasthan, Madhya Pradesh Committees on Legal Aid. Also report of Review and implementation Committee, headed by Mr. Justice P. N. Bhagwabi.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(h) Indirect and/or selective executive patronage.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(l) Politicisation of the profession.

(m) Loss of professional identity.

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

(o) Division and dissension among the members of the profession; lack of unity and solidarity.

(p) Lack of adequate incomes.

(q) Insecurity in case of early death or disability or after retirement.

(r) Absence of legal education of an acceptable standard.

(s) Lack of professional training opportunities and lack of attention to training in professional ethics.

(t) Elitist class composition of the Bar; lack of access to legal education for all sections of society and the insensitivity of the leaders of the Bar to the problems of new entrants.

(u) Lack of public credibility of the profession.

(v) Sharp practices and unethical conduct on the part of lawyers.

(w) Weakness in the exercise of disciplinary jurisdiction by the profession itself.

(x) Lack of access to the legal system by the common man, and absence of effective legal systems.

(y) Absence of proper relationship with the judiciary; excessive or unwanted use of the contempt of court powers; subservience to the judiciary.

(z) Absence of fair trial procedures, ouster of jurisdictions or denial of the right of representation to lawyers.

376. One could multiply instances and categories of factors and situations. For the purpose of arriving at meaningful analytical typologies of deviance it is sufficient to identify the main situation. From the point of view of the source or the direction from which the threat to and assaults upon the independence of justice are unleashed, it is possible to identify the following main types:

(a) interference by the executive in a variety of ways ranging from official amiability to animosity and from ordinary hospitality to sharp hostility. Official displeasure is known to have taken forbidding and brutal forms in certain countries;

(b) interference by powerful groups and interests in the society.

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

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

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

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

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

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

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

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

381. Many centuries ago when King James intervened in person on behalf of one of the parties in a pending case (Bruce v. Hamilton), "the Lord of Newbottle (Newbattle) then also stood up and said to the King that it was said in the town to his slander and theirs that they durst not do justice but as the King commanded them; which he said should be seen to the contrary, for they would vote against him in the right in his own presence". The Lords then so voted,"whereat the King raged marvellously and is in great anger with the Lords of Session. The King swears he will have Mr. Robert Bruce's case reversed, which the President understanding, says he will pen in Latin, French and Greek to be sent to all the judges of the world to be approved, and that by his vote it shall never be reversed. And so say the whole session" 1/. (emphasis added). There is in these assertions, not only the principle of independence and impartiality but also an incipient articulation of the universality of that principle and of the principle of international accountability for a gross violation. The unity of the judiciary on a matter of principle and the appeal of the Scottish judge to the international solidarity of the judiciary and to its collective conscience rings across the centuries and carries a message for fighting the chronic phenomena of deviance from the norms of the independence of justice.

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1/ T. B. Smith, British Justice: The Scottish Contribution, Hamlay Lectures, 1961.