WORLD BAR CONFERENCE

27- 29 JUNE 2002

THE INDEPENDENT BAR AND THE STATE

THE HONOURABLE LORD REED

Inside Parliament House, hanging on the staircase of the Advocates Library, is a document which counsel pass every day on their way up and down the stairs. I suspect that many of them may be unaware of its history and significance. It is a copy of a Royal Proclamation, displayed as a symbol of the independence of the Bar in Scotland and of the historical struggle by which that independence was won. The episode which it commemorates is worth recollecting, as a reminder of how recently our society has accepted the concept of an independent Bar.

The episode[1] occurred in 1674, during the reign of Charles II, and has to be set in the context of the period between the restoration of the monarchy and the revolution of 1688, when the Bar, like the rest of Scottish landed society and indeed the Bench, was highly politicised. Scotland was effectively governed at that time by the Earl of Lauderdale, one of the members of the Cabal that had governed England. The leader of the Opposition in Scotland was the Duke of Hamilton. That year there was a *cause celebre* in the Court of Session between Lord Almond and the Earl of Dunfermline. Almond was the Duke of Hamilton's son-in-law, and he was represented by counsel who were active in Opposition politics. Dunfermline was Lauderdale's uncle. Almond was unsuccessful in the Court of Session, and his counsel advised him to appeal to the Scottish Parliament. Lauderdale had had so many problems with the Parliament that he had dissolved it earlier that year. The decision to appeal was apparently based on the expectation that the Parliament would favour Almond because he was the Duke of Hamilton's son-in-law. The Court was concerned about the appeal to Parliament, which was not regarded as appropriate unless there had been an excess of jurisdiction, and wrote to the King about the matter. The King in turn issued a condemnation of all appeals to Parliament, and ordered that any advocates not prepared to disown them were to be disbarred. When Almond's two leading counsel (one of whom was the Dean of Faculty) continued to stand their ground, they were disbarred, and about 50 other members of the Faculty - probably about a third of the Bar - left with them and retired to Haddington and Linlithgow, towns not far from Edinburgh. According to one of Almond's counsel, Sir George Mackenzie, this solidarity was motivated by reasons of self-interest rather than principle. The dispute gradually intensified. The rump of the Bar elected a new Dean. Further counsel were disbarred for failing to satisfy the Court on the matter of appeals to Parliament, and at the end of 1674 the King ordered the disbarred advocates to petition for re-admission, prior to a deadline, or be perpetually disbarred. That is the proclamation which is exhibited in the Advocates' Library. Some advocates then submitted and were re-admitted. The others sought a compromise, but were indicted by the Lord Advocate for sedition. By January 1676 all the advocates had submitted

[1] *Simpson, "The Advocates as Scottish Trade Union pioneers" in Barrow, ed.,* The Scottish Tradition *(1974).*

and were re-admitted. In the long run, however, the right to appeal from the Court of Session to Parliament was upheld, being declared in the Claim of Right of 1688; and it forms today the basis of appeals to the House of Lords.

It would probably be mistaken, indeed an anachronism, to portray the disbarred advocates as campaigners, let alone martyrs, for the cause of an independent Bar; but the episode is one of the more dramatic steps on the long road which ultimately led to the establishment of an independent Bar in Scotland. It is also a reminder that the independence of the Bar, like the independence of the Judiciary, was only established in our society in relatively modern times, when society attained a level of stability which allowed such independence to be tolerated. One has only to visit the conferences of the International Bar Association or the Union Internationale des Avocats to realise that there many societies which do not, in practice at least, respect the institution of an independent Bar. Indeed, popular opinion, even in our own society, displays in some respects a degree of scepticism about the value of an independent Bar, whereas the value of the independence of the Judiciary is on the whole better understood.

What exactly is meant by the independence of the Bar? The classic formulation in Scotland was stated by Lord President Inglis in 1876. He said:

> "The nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client".[2]

By "the nature of the advocate's office" the Lord President meant that the advocate "takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the court, to the members of his own profession, and to the public."[3] In the Scotland of 1876 various consequences were regarded as following from this: the absence of a contract between the advocate and his client; the "cab rank" rule; and the advocate's immunity from suit. As the House of Lords made clear however in *Arthur J. s. Hall & Co v Symons*[4], however, these cannot now be regarded as essential to independence: the solicitor-advocate has a contract; the cab rank rule is of limited significance in modern practice; and the immunity has been lost, at least in civil proceedings in England and Wales, so far as liability in negligence is concerned. Even the nature of the advocate's duty to the court is something which varies from one legal system to another: for example, the duty appears to be regarded as more extensive in common law systems, where the judge is traditionally expected to be a largely passive recipient of material provided to him by counsel, than in civilian systems, where the judge is presumed to know the law and is expected to perform a more active role. The core of the concept of independence, which is common to different legal systems, appears to be the ability of the advocate to present his client's case free from external pressures. That is not of course to say that the independence of the Bar entails the licence of the advocate to present a case entirely as he pleases: he can properly be

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[2] *Batchelor v Pattison & Mackersy (1876) 3R. 914, 918*

[3] *Ibid.*

[4] *[2000] 3 WLR 543*

restrained by his own profession's disciplinary rules, or by the court's power to regulate procedure (e.g. by controlling the length of hearings, or by punishing contempt of court, or by imposing wasted cost orders) or by legislation (e.g. to prevent inappropriate questioning of vulnerable witnesses). Such restraints are as essential to the proper administration of justice as the independence of the Bar itself. In other words, to the extent that the administration of justice depends on counsel presenting a case with integrity, with reasonable economy, and without abusing vulnerable witnesses - to give only three examples of the necessary qualities - it is justifiable and necessary to have mechanisms in place to ensure that those requirements are observed.

If limits have to be set to what the advocate is entitled to say or do, where and how are the boundaries to be drawn? This is a difficult question at any time, and it exposes the age-old conflict between the professional and the lay approach to the ethics of advocacy. Advocates in our society are regarded with a degree of suspicion by much of the public at large: advocacy is sometimes regarded, at best, as morally dubious. The layman may well find Dr Johnson's well-known defence of advocacy unconvincing. What the public need to understand is that the absence of independent advocates, representing clients to the best of their ability regardless of the merit of their causes, is incompatible with the rule of law: in other words, a system in which a person's rights and duties are determined by the impartial application of general rules laid down in advance, after hearing any points that can be made on his behalf. Independent advocacy ensures that the court takes account of whatever can be said on a person's behalf before it delivers a judgment affecting his interests. Willingness to consider dispassionately the arguments for both sides is fundamental to reasoned debate, the commitment to which is a basic value of western society. That a person should have independent legal representation in court is equally central to equality under the law, which again is a basic value of western society. Independent advocacy is thus essential to our conception of a just society, and the undesirable outcomes which advocacy can promote in individual cases is the inevitable price of the maintenance of the rule of law in a just society.

This moral defence of advocacy has important implications. It means in the first place that it is an essential aspect of a fair hearing that the case for each side is indeed presented by an independent and competent advocate. This places a responsibility on a number of institutions, including a responsibility on the State to ensure that access to legal representation is available to all sectors of society, and also a responsibility on the State to ensure that arrangements are in place to ensure so far as possible that only competent advocates are allowed to offer their services to the public. These are both important responsibilities: the administration of justice to its citizens deserves to be given a high priority by any government.

The independence of advocates has not in the past been the object of express legal protection in our society: it has in practice been guaranteed by a culture and institutional arrangements in which interference with the independence of advocates has, in modern times, been unthinkable. It is only in the world of television drama that a government minister might try to induce Kavanagh Q.C. to withdraw from a case by offering him a seat on the Bench. International law, however, does to some extent address the independence of lawyers expressly; and, if it were ever

in doubt, the position under international law would now be relevant to our domestic law, including the guarantee of a fair trial under the Human Rights Act 1998 and Article 6 of the European Convention on Human Rights. Article 6.3 of the ECHR, like Article 14.3 of the International Covenant on Civil and Political Rights, guarantees the right of everyone charged with a criminal offence to defend himself through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. The European Court of Human Rights has interpreted Article 6.1 as containing an analogous right in respect of civil proceedings, and it has also interpreted Article 6 as requiring the legal assistance to be effective, in the sense that it is in particular competent. The advocate must equally be independent.

Other UN instruments spell matters out in greater detail. In 1990 the General Assembly passed a resolution which welcomed the Basic Principles on the Role of Lawyers[5] adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, and invited governments to respect them and to take them into account within the framework of their national legislation and practice. The preamble to the Basic Principles makes it clear that the role of lawyers is to be seen in the context of the rights of due process and access to legal representation included in the ICCPR and other sets of standards adopted by the UN, and states in particular that:

> "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession."

The Basic Principles include standards for the provision of legal representation, the qualification and training of lawyers, professional immunity, freedom of expression and association, the need for an association of lawyers and guidelines for the imposition of disciplinary measures. Numerous detailed obligations are placed on governments in relation to these matters.

In relation to independence, Principles 16 to 22 of the Basic Principles provide in particular:

> "16. Governments shall ensure that lawyers
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> (a) are able to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference;
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> (b) are able to travel and to consult with their clients freely both within their own country and abroad; and
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> (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.
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> 17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
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> 18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
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> 19. No court or administrative authority before whom the right to counsel is recognised shall refuse to recognise the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

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[5] *UN Doc.A/*CONF. *144/28/Rev. 1 at 118 (resolution* 45/21 *of 14 December 1990).*

> 20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
> 21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
> 22. Governments shall recognise and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential."

The Basic Principles also cover, as I have mentioned, professional organisation and discipline, among other matters.

The General Assembly also adopted in 1990 the Guidelines on the Role of Prosecutors.[6] These follow on from the Basic Principles on the Role of Lawyers in both format and content, and set out standards to promote the effectiveness, impartiality and fairness of prosecutors in criminal proceedings. They include freedom from improper interference.

Continuing work on the independence of lawyers throughout the world is carried out by or on behalf of several international organisations. Of particular importance is the UN Commission on Human Rights. In 1994 the Commission appointed a Special Rapporteur, Mr Param Cumaraswamy, to identify attacks on the independence of the judiciary, lawyers and court officials and ways of protecting their independence.[7] The Special Rapporteur's mandate, originally for a period of three years, has subsequently been extended. He has submitted a number of valuable reports. They are relevant to possible developments in the United Kjngdom and other developed countries, as they discuss not only the obvious and appalling threats to independence which are notorious in many parts of the world, but also the less obvious and perhaps more insidious dangers which have been identified as arising, for example, from the commercialisation of the legal profession and from regulation of the profession in accordance with competition policy. Time and again the Special Rapporteur has criticised as fundamentally misguided the tendency, whether by governments or by lawyers themselves, to treat the provision of legal services as a commercial activity like any other.

His approach to the concept of independence is similar to the one which I suggested above. In his first report[8] he adopted the following approach:

> "The duties of ... a lawyer are quite different [from those of a judge] but their independence equally implies freedom *from* interference by the Executive or Legislature or even by the judiciary as well as by others in the fearless and conscientious discharge of their duties in the exercise of their functions. A lawyer, however, is

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[6] *UN Doc. AlCONF. 144/28/Rev. 1 at 189 (resolution 45/166 of 18 December 1990).*
[7] *. Resolution 1994/41*

> not expected to be impartial in the manner of a judge, juror or assessor, but he has to be free from external pressures and interference. His duty is to represent his clients and their cases, and to defend their rights and legitimate interests, and in the performance of that duty, he has to be independent in order that litigants may have trust and confidence in lawyers representing them and lawyers as a class may have the capacity to withstand pressure and interference".[9]

One area which the Special Rapporteur has identified as being particularly sensitive *for* the relationship between the judiciary and the Bar on the one hand, and the executive arm of the State on the other, is that of judicial review. In his first report[10] he said:

> "Early in the implementation of his mandate, the Special Rapporteur has already observed a considerable misunderstanding on the part of governmental authorities and even parliamentarians. The misconception seems to be that judicial review is a matter of substituting the opinions of judges for the determinations or acts of the competent authorities within or under the executive or legislative branches of government. The often heard argument is: 'How could judges, who are merely appointed, set aside the decisions of the elected representatives of the people and substitute their own decision?' This misunderstanding tends also to cause the executive or legislative branches to seek to limit, or even suspend, the power of judicial review, i.e. to interfere with judicial independence. Of course, the function of judicial review serves only to ensure that the executive and legislative branches carry out their responsibilities according to law, and that their determinations or acts do not exceed their accorded powers. The process of judicial review serves to check executive and legislative excesses by upholding the rule of law; it is in no sense a matter of substitution. However, because of the seemingly widespread misunderstanding of the power of judicial review (which is so vital for the protection of the rule of law) the Special Rapporteur will devote some effort to addressing the problem, especially in the context of countries undergoing transition to democracy."[11]

The Special Rapporteur returned to this topic in his second report[12], in a context which made it clear that the problem was not confined to countries undergoing transition to democracy. In fact it was in the context of the United Kingdom that the Special Rapporteur raised the issue again. This followed a number of successful applications for judicial review of decisions of the then Home Secretary, Mr Michael Howard. The Special Rapporteur said:

> "The Special Rapporteur notes with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the judges did not exercise

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[8] *E/CN.4/1995/39, dated 6 February 1995*
[9] *Para,. 34*
[10] E/CN.4/1995/39, *dated 6 February 1995*
[11] *Para 56*
[12] *E/CN4/1996/37, dated 1 March 1996*

> self restraint, 'it is inevitable that we shall statutorily have to restrict judicial review'. The controversy continued and reportedly prompted the former Master of the Rolls, Lord Donaldson, who was said to have accused the government of launching a concerted attack on the independence of the judiciary, to have said 'any government which seeks to make itself immune to an independent review of whether its actions are lawful or unlawful is potentially despotic'.
> The Special Rapporteur will be monitoring developments in the United Kingdom concerning this controversy. That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe."[13]

In the light of his concerns, the Special Rapporteur then attended a debate in the House of Lords initiated by the then Shadow Lord Chancellor, Lord Irvine of Lairg, and had a meeting with the then Lord Chief Justice, Lord Bingham, and in his third report[14] was able to express his confidence that any attempt to restrict judicial review would be strongly resisted, at least in the House of Lords.

The United Kingdom has not been the only developed country in the common law world to be the subject of inquiry by the Special Rapporteur in connection with judicial review. He has, for example, investigated the case of an asylum seeker in Australia, where there was a suggestion that steps had been taken by the Government which had the effect of making it more difficult for the asylum seeker's lawyers to challenge his possible deportation.[15]

In a report in 2001, the Special Rapporteur said this:

> "The Government of the United Kingdom of Great Britain and Northern Ireland must be seen as a role model for accountability and transparency in the administration of justice".[16]

In the context of the world as a whole, where the administration of justice is at risk in almost every corner of the globe, it is indeed natural to feel that if the British Government cannot set an example, then who can? And indeed, it is precisely because the British Government does generally set such an example that it can reasonably be expected to act as a role model to other administrations.

Nevertheless, there is no room for complacency. In recent times, for example, remarks made by the present Home Secretary about judicial review, in the context of cases concerned with immigration and asylum, have been criticised in the broadsheet press in England as betraying a misunderstanding of the constitution and the part played in it by the judiciary. The tabloid press, on the other hand, has been less critical. That simply highlights the obvious tension between the demands of the executive and legislative arms of the State, driven as they are by politics, and respect for

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[13] *Paras. 226 - 227*
[14] *E/CN.4/1997/32, dated 18 February 1997*
[15] *E/CN.4/2000/61, dated 21 February 2000, para 43.*

the independence of the judiciary. The independence of the legal profession can equally come into conflict with political pressures. There are some areas of course where politicians are perfectly entitled to intervene in the way in which the legal profession behaves. It is a perfectly proper matter of public concern that there should be appropriate systems in place, for example, to regulate admission to the legal profession and to regulate the exercise of disciplinary functions over members of the legal profession. On the other hand, it is entirely wrong that the executive or legislative branches of the State should be in a position to place pressure on lawyers because they may represent unpopular clients or unpopular causes.

It is perhaps especially at a time of constitutional change, such as we have recently experienced in Scotland, that respect for the principle of the independence of the legal profession cannot be regarded as guaranteed. That is perhaps illustrated by the events of 1674 with which I began this paper. Less dramatically, it cannot be taken for granted at present that those who are involved in central government for the first time and in a novel context will all necessarily be familiar with the constitutional principles which concern the relationship between the legislature, the executive and the courts. Equally, the Scottish press has not in the past required often to deal with issues of that nature. Public understanding of the Bar in the United Kingdom, both north and south of the Border, is largely dominated by stereotypes which are calculated to undermine public confidence. Advocates have a strong case in defence of the independence of their profession; but it has not been put across persuasively in the past, and it may be difficult now for the Bar to obtain a sympathetic hearing. In that situation, if the legislature or the executive were to seek to intervene in the way in which justice is administered in order to respond to public pressure, it might be important to be able to point to the international standards which are to be found in the various materials I have mentioned in this paper. The European Convention on Human Rights and its jurisprudence is one source of principles guaranteeing the independence of lawyers. More specific guidance is to be found in the UN Basic Principles on the Role of Lawyers, and the UN Guidelines on the Role of Prosecutors, which I have already described in some detail. Further guidelines and standards are in the course of being developed by the UN Special Rapporteur, and his reports offer assistance by addressing, on a case by case basis, a wide range of problems, including the type of problems which may affect us. For example, a proposal recently in South Africa to create a statutory council, dominated by lay persons, which would take over the functions of the Law Society and the General Council of the Bar, so as to bring the legal profession into line with other professions, was an initiative of a kind which might conceivably attract public support in this jurisdiction also, but to which the Special Rapporteur responded with a reminder of the need to respect the special nature of the legal profession and not to compromise its independence.[17]

What perhaps emerges from this paper, and indeed from this Conference as a whole, is that the independence of lawyers has an international dimension, and one which is not confined to the World Trade Organisation. Whether the threat to the independence of lawyers comes from those who regard independent lawyers as an affront to the authority of the government, or from those who refuse to accept that lawyers are anything more than providers of consumer services, lawyers can find support in the norms and practices being developed by international

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[16] *E/CN.4/2001/65, para. 228.*

organisations such as the United Nations and the Council of Europe. That international dimension is important In its own right, and also has to be borne in mind when the issue is being considered at the national level.

[17] *E/CN.4/2001/65, paras 197-201; E/CN.4/2002/72, paras 148-156*