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**Are lawyers still independent today?**

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**Is the lawyer still independent**  
**Michael Cosgrave**

In this initial introduction I will not deal with the specific rules relating to independence of the lawyer in the proper exercise of his or her function but will allow my colleagues to deal with that starting with President Rod Mole who will treat the situation in England and Wales.

I would like to discuss the situation in general terms firstly in relation to law in society.

As we have seen in earlier discussions irrespective of the society most are regulated by rules/laws which are administered by the state which generally created the rules and the relationship between the individuals in that state and the administration or between the individuals themselves is generally preserved by the lawyers in the proper exercise of their function. In that way lawyers regard themselves as pivotal in the rule of law in any society and to operate effectively they consider they must be independent.

What is that independence?

The laws are created by the state, and generally are in accordance with some recognised norms of societies – perhaps with a religious or humanitarian or purely secular basis but dealing with the rights and sometimes the duties of members of the state to the state or between the members themselves. The laws might concern personal conduct – family life, birth, marriage, death, criminal matters, commercial matters, property matters – but they

are all dealing with regulation in a complex modern society and often conform to rules within an international group – EU, EFTA, African States, American States, Eastern States or the international rules of for example Human Rights conventions. I recognise that the principles which govern the ways in which these rules treat the individuals can be the subject of debate – particularly as to whether a person has rights simply as a person or as a creature participating in some higher order but this paper is not to deal with such debate but to recognise that for all practical purposes it is the state which creates the rules which the lawyers confront. In order to do that they need to be independent of the administration of the state.

In seeking to determine whether the lawyers have that independence we should perhaps examine the Court systems.

I cannot speak about Roman law suffice to say that I do know that in the time of Cicero advocates would plead before the tribunal either to prosecute or defend and they clearly had defined roles and therefore some understanding of the independent role.

It is interesting at this point to refer to Magna Carta signed in England on 15th June 1215.

One part states:-

“In future no official shall put anyone to trial merely on his own testimony without reliable witnesses produced for this purpose. No free man shall be arrested or imprisoned or deprived of his freehold or outlawed or banished or in any way ruined nor shall we take or



order action against him except by the lawful judgment of his equals and according to the law of the land. To no one will we sell, to no one will we refuse or delay right or justice.”

“And we will procure nothing from any one either personally or by another by which any of these concessions and rights shall be revoked or diminished; and if any such thing be procured let it be invalid and void, and we will never use it personally or through another.”

The importance of this is that it recognises at least the importance of the independence of the tribunal dealing with the case.

In the terms of Human Rights such independence has been reflected by Magna Carta (1215) the Petition of Rights (1628) the Bill of Rights (1689) the American Declaration of Independence (1776) and Constitution (1787) and the French Declaration of the Rights of Man and of the Citizen (1789) and the European Convention (1950) which in particular in Article 6(3)(c) provides:- “Everyone charged with a criminal offence has the following minimum rights: ...to defend himself in person or 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 Convention indicates the role of the advocate and in most states at least since the early 19<sup>th</sup> century this role has been part of the administration of justice and enshrined by statute in creation of bars/law societies. The danger of statute creating the bar is that it can also by the same statutory process disband the bar and in that act destroy the role of the advocate and his independence.

I would like to suggest that the indication at least at the moment is that the understanding in most societies is that the peaceful conduct of the business of society requires an independent court, an independent judiciary and an independent bar. When such appear threatened (eg Istanbul/Belarus) the action taken by lawyers in particular in other countries preserves the independence. The position is not without its dangers though because if as in England and Wales a serious fraud trial does not proceed because barristers refuse to take the case on the basis the fee is inadequate for the work required then the reaction of those involved or interested in the administration of justice must be disturbing. It is also interesting that some of the states emerging from the former Soviet Union block are establishing democratic systems and seeking to incorporate in them protections for the court, the judiciary and the advocate in ways which will ensure that they continue.

The independence of the lawyer from commercial pressure is a separate issue and derives from his own organisation. His conduct or ethical rules may prevent a conflict of interest between different commercial interests but if those rules were not observed then the lawyer himself or herself is likely to lose clients if information obtained from the business of one is used in the business of another or if the lawyers own financial interest is in conflict with that of his client as in contingency fees or pactum de quota litis. These conflicts are more possibly theoretical in jurisdictions which might permit the form of Alternative Business Structures (ABS) which is permitted in England and Wales but whether the reality is the same as the theory is something which I will allow the remaining contributors to develop.

