INAUGURAL WORLD CONFERENCE OF BARRISTERS AND ADVOCATES

27 – 29 JUNE 2002

The Independent Bar and the State

PREPARED BY
THE INTERNATIONAL BAR ASSOCIATION & CLAIRE MISKIN

PRESENTED BY DIANNA KEMPE
PRESIDENT, INTERNATIONAL BAR ASSOCIATION

Introduction

The independence of the judiciary and legal profession are basic requirements without which the rule of law cannot be maintained. As Fali Nariman has said 'if an independent judiciary is the backbone of the rule of law, as it has been often described, then an independent legal profession is the catalyst that helps achieve it.'

The independence of the legal profession is recognised as one of the key elements in the protection of the rule of law and a free and open society. A just rule of law is secured by an independent judiciary and protected by an independent bar committed to the rule of law. Independence 'is not a simple attribute of justice, it is the constitutional characteristic of the judicial function and the cardinal axis of the mission assigned to the judicial operators (judges, lawyers).'[1] The lawyer must fulfil his/her duties with absolute independence, free from any pressure, particularly from the State or from external influences and especially from his/her own interests. The lawyer must not compromise to please the client, the court or third parties. It is the responsibility of governments to ensure that lawyers are able to perform all their professional functions without intimidation, harassment or improper interference.

Mario Puzo says in *The Godfather*:

> "a lawyer with his briefcase can steal more than a hundred men with guns."

This is a common expression of society's cynical view of lawyers. We are all aware that the nature of lawyering has changed radically in the last ten years. This is due to a number of factors, including the growth of enormous state corporate bodies, the revolution in information technology and globalisation. Increasingly law is merging into business. Competition among lawyers increases with the expansion of cross-border practice, which in turn leads to ever larger legal firms, cabinets and sets of chambers. Lawyers are increasingly called on to pledge their undying allegiance to particular corporations, bodies and individuals, including state entities if they wish to continue to handle their work.

---

[1] Ramon Mullerat, Independence of the Legal Profession in the Third Millennium. HRI newsletter May 1999.

Huge financial rewards are at stake.

All of these external pressures conspire to undermine the concept of an independent Bar, as well as the independence of those who practise as members of such a Bar.

The situation I describe is current in democratic States.

In undemocratic States, the local bar is either officially under the control of the state, or persecution of individual members of the bar who challenge the state is commonplace. Unhappily the IBA has in recent times had to deal with a number of cases in the latter category, and there is no reason to suppose it will not be the same in the future.

What is Independence?

Professional organisations responsible for the ethics of lawyers such as Bar Associations and Law Societies consistently stress the importance of independence in the legal profession. Examples include:

- The CCBE, the European Union's officially recognised organisation for the legal profession, adopted a Common Code of Conduct in 1988, which said in Article 2.1.1

  > The many duties to which a lawyer is subject require his absolute independence free from all other influence, especially such as may arise from his personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his independence and be careful not to compromise his professional standards in order to please his client, the court or third parties.

- The Règlement Intérieur de l'Ordre des Avocats à la Cour de Paris (art. 1.3) says:

> La profession d'avocat est une profession libérale et indépendante… L'essence de la profession à titre libéral, … la dignité, la conscience, l'indépendance, … sont d'impérieux devoirs pour l'avocat et constituent ensemble les Principes Essentiels de la profession d'avocat.[2]

- The Spanish Lawyers General Statute (arts. 8 and 42) says:

> La abogacía es una profesión libre e independiente …El abogado, en cumplimiento de su misión, actuará con toda libertad e independencia[3]

- The Guide to the Professional Conduct of Solicitors of the Law Society of England and Wales (Practice Rule 1):

> A solicitor shall not do anything in the course of practising as a solicitor … which compromises or impairs… any of the following: the solicitor's independence or integrity; …

- The Code of Conduct of the Bar of England and Wales (under the heading "Fundamental Principles") provides among other things as follows:

> "A barrister must not
>
> permit his absolute independence and freedom from external pressures to be compromised" (para 307)
>
> and

[2] "The legal profession is a free and independent profession…The essence of the profession is to be free, dignity, conscience, independence, are the most important things for the lawyer and constitute the Essential Principles of the legal profession."

[3] "The Law is a free and independent profession…. The lawyer, while performing his duties or practice, should act with total liberty and independence."

> "A barrister must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or any other person." (para 303).

Instruments promoted by International Lawyers' Federations

As well as the code of ethics for lawyers in individual countries there are standards set by international lawyers Associations. Examples are:

- The IBA International Code of Ethics (adopted in 1956)
- The IBA Standards on the Independence of the Legal Profession (1990)
- The IBA Statement of General Principles for Ethics of Lawyers (1995)
- Union Internationale des Advocats: the International Charter of Legal defense Rights
- The Draft principles on the Independence of the Legal Profession (Noto Principles – promoted by the ICJ)

International Standards

International law was quite late in addressing the need for the independence of lawyers. The main standard setting treaties whilst stressing the need for the protection of the rule of law and the need for an impartial, independent and competent judiciary, did not provide for the independence of the legal profession. However in 1990 the UN adopted the Basic Principles on the Role of Lawyers and the Basic Principles on the Role of Prosecutors. Whilst these principles are not legally binding they help set standards by which all UN member states are expected to comply. The international standards on the independence of the legal profession are:

- The UN Basic Principles on the Role of Prosecutors
- The UN Basic Principles on the Role of Lawyers
- The UN Draft Declaration on the Independence of Justice (Singhvi Declaration) Articles 73 to 106

Basic Principles on the Role of Lawyers

The preamble to the Basic Principles makes it clear that the role of lawyers should be seen in the context of the rights of due process and access to legal representation as set out in Article 14 of the International Covenant on Civil and Political Rights. 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 and guidelines for the imposition of disciplinary measures.

A significant number of principles assert the right of persons to have access to lawyers and the responsibility of Governments to ensure this (Principles 1 – 6 inclusive). Similarly the Principles require that a Government guarantee a defendant shall be provided with prompt access to a lawyer and adequate time with a lawyer to prepare a defence (Principles 6 and 7). Like Principle 3 of the Basic Principles on the Role of Prosecutors, lawyers are required to be agents of the administration of justice (Principle 12). However, they are simultaneously required to 'loyally respect the interests of their clients' (Principle 15). The Basic Principles are silent on the course of action where these two Principles are in competition.

Governments are given a number of obligations including:

- Protect the safety of lawyers;
- Ensure lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
- Provide adequate safeguards where lawyers are threatened;
- Ensure access to appropriate information, files and documents in the hands of a competent authority;
- Respect the confidentiality of the professional relationship between lawyers and their clients.

In their turn lawyers are required to uphold human rights and fundamental freedoms, and protect the honour and dignity of the legal profession.

By right, under Principle 24, lawyers are entitled to form and join self-governing professional associations. The executive bodies of the professional associations are required to be elected by its members and must exercise its functions without external interference.

The State

The State is defined by the Oxford English dictionary as “an organised political community under one government”.

To govern effectively, the state needs power. But to safeguard democracy, that power must be subject to challenge. One is reminded of the old adage that “the price of democracy is eternal vigilance”.

There are a number of methods of challenge available. The press and the courts being two of the most effective.

The necessity of challenging the State in court has long been recognised in a number of countries. Following the French Revolution it was felt necessary for France to set up a hierarchy of administrative courts which were completely independent, including independent of the main court system.

The distinguished jurist Professor Dicey has expressed the view that if England had had such a revolution at the same time, she would have gone down the same route. As it was, the English system of Administrative Law did not really get going until after the Second World War. The growth of this system was prompted by the mushrooming of state corporations and quangos.

Probably the biggest recent challenge to Parliament’s authority in recent times in English Law was the case of the Spanish Fishermen, Factortame. As I am sure you all know this concerned an amendment to the Merchant Shipping Act, which prohibited boats from fishing in English Waters unless they were wholly or substantially British owned (ie by British Nationals). The hardest hit group were the Spanish fishermen.

Indeed, the legislation was mainly aimed at them. They brought an action in the English Courts initially for an injunction to suspend the operation of the Act, and ultimately for a declaration that its terms were unlawful under European Law, because among other things they discriminated on the grounds of nationality. After extensive litigation the European Court declared the Act unlawful under EC law, and the Spanish fishermen received an award of substantial damages.

What is interesting is that from first to last they were represented by members of the English Bar.

A further and more sinister example was that of the Matrix Churchill Case, in which a number of companies were prosecuted for unlawfully exporting arms to Iraq. To do this they had to get export licences. The case against them was that they had misled the relevant government department as to the use to which the machinery parts were to be put. The fact was the Government did know and turned a blind eye. The sinister aspect of it was the way the state resisted to the death the Defence's right to see highly relevant documents in their possession by claiming public interest immunity for them. In the event the case was withdrawn by the prosecution at the end of their case because disclosure of the documents and the evidence of the responsible minister, the late Alan Clarke, revealed that there was no case.

If the documents had not been disclosed, the Defendants would have been convicted and sent to prison for offences of which they were wholly innocent.

Credit for not allowing this to happen goes not only to those members of the Bar who were defending but also to Alan Moses QC who was prosecuting, who, despite considerable opposition from those he represented, refused to continue with the prosecution because the evidence did not support it.

These are some examples of what happens in a reasonably just democracy.

No Respect for the Rule of Law

In states where there is no or little respect for the rule of law, it is often the local bar and its members which stands between the citizen and the arbitrary and unjust state. To do this they risk their livelihood, their liberty, their physical safety and, in the worst cases, their lives. Such people represent the ultimate expression of courage and independence at the Bar. We have many such people among our IBA members. I cannot mention them all, but one such example is Desmond Fernando SC, former President of the IBA, who was at the time leader of the Sri Lankan Bar. He called the whole national bar out on strike to attend the funeral of a young lawyer who had been murdered by government agents for taking on the representation of government opponents.

Desmond and some of his senior colleagues then undertook the representation themselves. This meant they had to have protection from an international group of bodyguards and for six months they were unable to leave their homes or to answer the door themselves.

The IBA created a Human Rights Institute in 1994. The Institute has focused its work on protecting the independence of lawyers and Judges who are at risk. In the past 3 years we have written letters of intervention and complaint to the leaders of 47 countries. We have been involved in 112 separate cases where lawyers or Judges have been threatened, imprisoned, disappeared or killed in circumstances where there is a reasonable belief that the perpetrators of the threats etc were supporters or agents of a Government. In each instance we request either to gain knowledge of the individual or that there be a proper criminal investigation in the crime committed or that the lawyer concerned be protected by the Government (when their have been death threats against that lawyer). Regrettably our success rate is very low.

There have been 5 instances where the Government in a particular country has threatened either to dissolve the Bar or take over the control of the legal profession. Again, we have voiced complaints against this type of conduct and perhaps with one or two exceptions our letters of complaint have been ignored. Before we write the types of letters mentioned above, we make as full an investigation as possible to

ensure that the information we have received is accurate. We also try to involve our national Bar Association members by copying them with the letters so that they too, if they think it is appropriate, can add their voice in support along with our own.

In certain countries we have received requests from the national Bar and occasionally the Government to come into the country in question by way of a mission to investigate issues of independence, particularly with respect to the judiciary. If the report that is submitted after the mission substantiates the view that there are independence issues, then we try to create a continuing legal education project where rule of law issues are the topic of training for members of the profession and Judges. Generally these seminars are done on a low-key basis in the hope that education will assist the problem and not be considered confrontational.

The Maintenance of Independence

The challenges to independence are many. I have mentioned some. There are others which are on a smaller scale, but vital nonetheless. In particular, it is easy to forget the considerable personal courage required of members of the bar to undertake challenges to the state. We all know what happened to David but it does not make it any easier to tackle the Goliath of government. It is much easier to do if you are surrounded by colleagues of like mind with a similar ethos.

The Codes of Conduct refer to "anything which might compromise a lawyer's independence". What might this be? The list is long. For example, there are the threats and inducements. The implication that if you do this case, you will never be given preferment. The "this won't do your career any good" approach. Putting it another way, the suggestion often floated to members of the Bar by state agencies that if they "keep their noses clean" there will be something in it for them. The crudest of all is the state agency which says they will stop sending their lucrative work to a particular lawyer, if he or she offends them, and then proceeds to do just that.

There are some large firms of solicitors who try to extract promises from members of the Bar they instruct that they will never in the future act against them. Finally there is the straightforward bribe.

The Future of the Independent Bar

The experience of the IBA, along, amply demonstrates the need for independent Bars and members of bars to defend the citizen against the excesses of state power. Such independence does not however grow full-fledged from the head of Zeus. Like everything it has to be learned, practised and repeatedly scrutinised from the moment the lawyer is admitted to his Bar, and throughout his or her practising life. I think that the foundations of this independence rest on Bar Associations which are independent of the State and a Code of Conduct which is rigorously and even-handedly enforced.

The last word goes to Polonius in Hamlet:

> "To thine own self be true, then follows as the night the day,
> thou canst not then be false to any man."