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Abstract

Speech given at Session 4: The Legal Profession and Human Rights. Adama Dieng discusses the rule of law, the threats arrayed against independent judicial branches, and, finally, how to guard the protection of lawyers and the independence of the judiciary as a condition for a rule of law.

ROLE OF JUDGES AND LAWYERS IN DEFENDING THE RULE OF LAW

*Adama Dieng**

I would say, first of all, that I feel deeply honored to have been invited to participate in the Fiftieth Anniversary celebration of the International Bar Association.

Almost five decades have passed since the United Nations adopted the Universal Declaration of Human Rights¹ as a common standard of achievement for all peoples and nations. The IBA Human Rights Institute Initiative, in bringing together jurists from all parts of the world, must be commended. The present meeting taking place in this U.N. building at the dawn of the Fiftieth Anniversary of the Universal Declaration of Human Rights is an appropriate occasion to look into the role of judges and lawyers in defending the rule of law.

Would judges and lawyers be able to achieve such a goal if they were not protected against interference from executive or legislative pressure or pressure from financial or religious powers? Fali Nariman stated two years ago, that 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.

One may wonder, why address a group of lawyers about guarding the protection of lawyers and the independence of the judiciary as a condition for a rule of law. I am not a priest trying to convince anyone. I think you are all convinced, and that the reason why you came from all parts of the world, jet-lagging some of you, was to come here and to exchange views. But it is because, in many parts of the world today, the rule of law is under threat. The rule of law is under threat because the judiciary, like the legal profession, is also under threat. I will comment on those aspects in a few moments.

Before all that, let us just recall what we mean by the rule of law. As you know, this concept has been built from various aspects of all legal systems. In France they will talk about *l'état de*

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1. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess., U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

droit, in Germany they will talk about *rechts staat*, in Italy they will talk about *stati di diritto*. But all these are variations of what we call the rule of law, and they are aimed at achieving the same objective—the establishment of individual freedoms and the protection against any manifestation of arbitrary power by the public authorities.

The experiences of many generations of jurists from highly diverse nationalities have enabled certain basic conditions and principles to be elaborated without which the rule of law cannot be sustained. These conditions and principles are: the separation of powers, judges' independence, respect for individual fundamental rights and freedoms, the legality of administrative action, control of legislation and administration by independent judges, and, most importantly, the need for a bar which maintains its independence from the authorities and which is devoted to defending the notion of the rule of law.

This notion is, therefore, intended to submit the administration to respect of the law. Legislation passed by the parliament, which represents the electorate, is the instrument through which the people's sovereignty is imposed on the administration, preventing the administration from becoming an autocracy.

What we witnessed recently in Africa in the case of the former Zaire, which has become the Democratic Republic of Congo, is an illustration of what may happen if the rule of law is not observed. As rightly stated in the Preamble of the Universal Declaration, "[h]uman rights have to be protected by the rule of law, and where the rule of law is not observed, finally people may resort to rebellion against tyranny and oppression."²

That is why, commenting recently on the excesses of Cabilla and the Alliance forces in the former Zaire, I think they have finally resorted to rebellion; the rule of law was not at all observed. One reason it was not observed was because the judiciary was constantly under threat, to say the least.

But, what is also important is that by imposing respect for stable norms on stable government bodies, the concept of the rule of law reduces the risk of arbitrary initiatives. This does not mean, however, that the rule of law is a static notion. On the contrary, in a modern and democratic society. The objective of the rule of law should not be simply to maintain peace in a fro-

2. Universal Declaration, *supra* note 1, pmbl.

zen or paralyzed state. Rather, the rule of law should have the dynamism of life itself, and it should adapt itself to the constant process of transformation which characterizes all living organisms.

Law is a fact of transformation and growth of human society, and is intended to ensure that this process takes place in an orderly, non-violent, and peaceful fashion, while at the same time contributing towards greater justice. That is to say that, once again, the rule of law is only conceivable and workable where human rights are fully recognized and respected.

However, to get human rights to be respected, you need to have an independent judiciary and an independent legal profession. Ultimately, it depends on the existence of such enlightened independent bodies to take the task upon themselves of promoting and protecting human rights.

But, when we say an "independent judiciary," what do we mean by that? According to the definition drawn up by the International Commission of Jurists ("ICJ") in 1981, independence of the judiciary means that "every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law without any improper influences, inducements, or pressures, direct or indirect, from any quarter or for whatever reasons."³

Shimon Peres once correctly pointed out that the modern concept of judicial independence could not be limited to individual judges and their substantive and personal independence, but also had to incorporate the collective independence of the judiciary as an institution. In other words, the independence of the judiciary comprises two basic components—the independence of the judiciary as an institution, and the independence of individual judges.

Referring to the 1985 Basic Principles of the Independence of Judges and Lawyers⁴ and the 1989 Declaration, these two important documents outline several principles which provide for the collective independence of the judiciary. These principles

3. Study on the Independence of the Judiciary, Jurors, and Assessors and the Independence of Lawyers, U.N. Commission on Human Rights, U.N. ESCOR, 34th Sess., Annex, UN Doc. E/CN.4/sub.2/481 (1981).

4. Basic Principles of the Independence of Judges and Lawyers, G.A. Res. 32, U.N. GAOR 40th Sess., Supp. No. 53, at 205, U.N. Doc. A/40/53 (1985).

include the concept of noninterference, jurisdictional monopoly, transfers of jurisdiction, and control over judicial administration.

But when we look into the notion of personal independence, we note that these principles deal with judges' freedom of expression and association; their qualification, selection, and training; conditions of service and length of their mandate; professional secrecy and immunity; suspension and removal; and disciplinary measures. Therefore, it is provided that there should be mechanisms to protect judges' personal independence, and it should include the security of tenure, the protection from arbitrary removal from office, the impartial selection process, the guarantee of adequate salaries, and the prohibition of punitive transfer of judges. We note that while a gap still exists between the vision informing these standards and the actual situation, it is important to emphasize that the acceptance of these standards as international norms is a great step forward.

Today, more than ever, this acceptance must be put into practice through the active commitment of those most directly concerned, the judges, as well as through the solidarity of lawyers and the public's awareness of the importance of an independent judiciary.

But, referring to the protection of lawyers to whom we go for such solidarity, allow me to mention what the former President of the Organization of Commonwealth Caribbean Bar Association, Mr. Lloyd Barnett, once stated at a meeting organized by the ICJ in 1988. He explained that a legal profession which is controlled or manipulated or intimidated by politicians cannot effectively carry out its duty of sustaining the independence of the administration of justice. As a corollary, he continued to explain that despotic government usually commences with the separation of the legal profession.

Where human rights are violated and democracy destroyed, lawyers are detained, harassed, and persecuted. The Annual Report of the Centre for the Independence of Judges and Lawyers of the ICJ ("CIJL"), published under the title "Attacks on Justice," contains alarming examples of these attacks on the bar.⁵

For instance, in 1996 the CIJL found that at least 462 jurists,

5. Centre for the Independence of Judges and Lawyers, *Attacks on Justice: The Harassment and Persecution of Judges and Lawyers* (1996).

about 300 of whom were lawyers, were victims of reprisal in fifty-two countries for carrying out their professional duties. Of these, 25 were killed; 2 disappeared; 116 were prosecuted, arrested, detained, or even tortured; 22 were physically attacked; 65 were verbally threatened; and 230 were professionally obstructed and/or sanctioned. This represents a twenty-five percent increase over the number of cases which were reported by the CIJL for the year 1995. It should be noted that the CIJL also received reports of an additional 349 jurists who suffered reprisals in 1996, but was unable to conclusively confirm those reports.

A few years ago, Mr. Louis Joinette, United Nations reporter on the independence of the judiciary and the protection of lawyers explained that an important factor in ensuring the independence of the legal profession is its sense of solidarity. Mr. Joinette also explained that when the independence of the legal profession is besieged within a country and internal practices 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 important factors.

That is why some concrete form of solidarity promoted by the CIJL and aimed at the protection of lawyers includes intervening in individual cases, sending observers to trials against lawyers, and facilitating bar-to-bar cooperation.

The issue of the protection of lawyers has been central to the work of the ICJ. Indeed, its First International Congress, held in Athens in 1995, declared, *inter alia*, that the lawyers of the world should preserve the independence of their profession, assert the right of the individual under the rule of law, and insist that every accused is accorded a fair trial.

Allow me to pause here a second to express concern about a recent case which is still pending in Egypt. This is the case of a lawyer named Fareed el-Deeb. Fareed decided to defend a man named Azam Azam, who has been charged with economic spying for Israel. What happened is that Fareed was harassed by some of his colleagues, and now there is a disciplinary case against him. His sole crime was to have accepted to take a case which might be unpopular in a situation like the one in Egypt, in a case where someone is suspected of spying.

But that is to say that we have to look even into ourselves as

lawyers, and we found it unacceptable that the bar in Egypt had decided to bring such a disciplinary proceeding against him. We have decided to send an observer from Scotland to look into the issue, both the trial of Azam Azam, who might face a death penalty sentence, and also to look into the case of our colleague Fareed el-Deeb. That is to say that it is very important that we strengthen, Mr. Chairman, the relationship between the International Commission of Jurists and the International Bar Association in such cases.

But, when we talk about the rule of law, there is an important aspect we should not forget about. That is one important element which was added to the definition of the rule of law, and that was in 1959 at the Congress held by the ICJ in New Delhi. There it was acknowledged that the rule of law also has an important added component which relates to the economic and social rights. You will not be surprised to know that today before the Supreme Court of India you have many cases relating to economic and social rights issues, and right to the environment issues.

Mr. Chairman, I will try to conclude, but, before that, I will just mention that it has been also the contribution of the lawyers which helped the adoption of the United Nations Basic Principles on the Role of Lawyers.⁶ Finally given international endorsement in 1990, the Basic Principles are comprehensive and contain twenty-nine principles on the following issues which, for instance, contain a provision for effective access to legal assistance for all groups within society.

Later our colleague, Jerome Shestack,⁷ will deal with the issue of legal services. But I should say that there are cases, for instance in Africa, where lawyers have been involved in a program entitled Legal Services in Rural Areas, inherited from experiences built in Asian countries.

I think it is also very important to highlight an important principle, that guarantees the functioning of lawyers, which includes the right to undertake the representation of clients or causes without fear of repression or persecution. The case that I referred to earlier is an illustration.

6. See *supra* note 4.

7. See Jerome J. Shestack, *Globalization of Human Rights Law*, 21 *FORDHAM INT'L L.J.* 558 (1997).

But, there are specific problems affecting the independence of the judiciary, for instance, the selection process of the judiciary. As you know, this question has to be posed with regard to the independence of the judiciary. Can there be independence when the power to nominate judges or to grant them promotion is left entirely in the hands of the executive? Of course, *a priori*, the reply is negative. One may wonder with regard to democratic countries, however, whether this must be somewhat clarified, because the executive is at least accountable to the people for its action via the parliament. But even in enlightened democracies today, this issue is also on the table. I should say that there has been a lot of debate in a country like France, to the extent that President Chirac recently appointed a body to look into that issue.

To conclude, I would remind you that as lawyers we have not merely a professional responsibility, but we have a very definite social and ethical duty to society and to the individual. Just as a doctor has the sacred duty to preserve and prolong life, so has the lawyer the sacred duty to protect the physical, moral, and intellectual integrity of the individual. The protection of the individual from either the State or other individuals must be reconciled with the essential requirement of modern society.

However, it is the lawyer's duty to ensure that this process of reconciliation never involves a derogation from the fundamental personal rights of the individual. Lawyers must be and remain crusaders in the field of the rule of law and human rights. The struggle for respect for the law is endless because, as Jose Ortega y Gasset attests, the authorities are never in any country inclined to abide by any restriction, whether imposed by an individual or by oath, and, as with all of civilizations or their conquests, the supremacy of law is forever and a threat. Hans Kelkapski has drawn the comparison with medieval fortified towns, with their walls, moats, towers, and drawbridges, which guaranteed the security required by any social organization to the people living within their boundaries. Jurists must take up their position at the ramparts and watch over the town and defend it against any threat.

I think this applies also at the international level. That is

why the concern expressed by our colleague, Hans Corell,⁸ regarding the failure by some States to apply the obligations imposed upon them under international law should also be our concern as lawyers, and we should do whatever we can to support that call which was made by our colleague.

While the world has changed in the last fifty years since the establishment of organizations such as ours, our mission and conviction, to promote the rule of law and the legal protection of human rights, has not, and must not, change. As walls which keep people in are replaced by walls which keep people out; as the rivalry between east and west is replaced by tension between north and south, and internal conflict as well, our role becomes even more vital.

In fifty years, the idea has gone through many phases and accomplished many things of which we all can be proud. Yet, we cannot rest on our laurels. As we look around this complex world and towards the next millennium, we realize the undoubted challenges that the legal profession has to overcome. For us to live up to our social responsibilities, there is a need for continuous reflection, evaluation of action, and strategies. The IBA, as the organization with the largest gathering of lawyers in the world, has to take the lead in this regard.

The ICJ welcomes the establishment of the Human Rights Institute and hopes that it will employ a more pragmatic and radical approach towards the protection of human rights and the protection of our most noble profession. Be sure that you can always count on our support.

Thank you very much.

8. See Hans Corell, *The United Nations and the Legal Community in Promotion of Human Rights Law*, 21 *FORDHAM INT'L L.J.* 519 (1997).