Introductory Report to the Third Committee


by

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HERBERT W. CHITI PO
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INTRODUCTION

This African Conference on the Rule of Law is held at a time when the African Continent is on the brink of what may be called the Age of Africa. In World Affairs, Africa has already begun to play an important role. This Continent which, for many years, was cut up by Imperial powers in Europe is emerging into independence. Of the 24 countries represented at this Conference, all but a small proportion are independent in the legal sense, that is to say, are sovereign states. The remainder will be independent within a very short period of time.

The concept of National independence has, everywhere in Africa, carried with it the concept of democratic rules, i.e., the establishment of government on the basis of the consent of the majority obtained at a general election in which the majority of the people participate. Unhappily, there are countries in inter-tropical Africa which in international law, are independent sovereign states, but whose governments are not based on the consent of the majority, but on a small racial oligarchy. But, even then, changes are bound to come which will establish democracy as a corollary of national independence.

The arrival of the "Age of Africa" happens to coincide with the spread of the doctrine of the sovereignty of the people and the omnipotence of their duly elected representatives to legislate in order to express the will of the people. This may conflict with the lawyer's ideal of national sovereignty, legislation and the maintenance of the Rule of Law.

The working paper for the Delhi Congress on the Rule of Law said:
"The power of the legislature to make laws, whether or not subject to formal constitutional limits is in a free society exercised on the assumption that the fundamental liberties of the people as a whole will not be violated".

In this one sentence was expressed the eternal conflict between Government and liberty. Every form of social organization involves a modicum of "government" or "regulation". Every such regulation involves a restraint of the freedom of the individual, but it is justified on the ground that it is for the general good of all, and this indirectly for the particular good of the individual himself.

It is on this basis that the concept of the Rule of Law has been evolved, that is, as an attempt to balance the needs of legislation and administration for social organization with the needs of maintaining the greatest possible degree of individual liberty consistent with social organization. The need for this arises out of what has come tacitly to be accepted by all modern states, viz., that the freedom of the individual is one of the most important possessions of any man; without it, man is not truly man, he is something less than man. In fact, there is a sense in which it can be said that the maintenance of the freedom of the individual is the raison d'être of the existence of government or social organization.

In working out the concept of the Rule of Law, or the machinery for maintaining a proper balance between the needs of social organization or government and those of maintaining individual liberty, political philosophers, religious philosophers and jurists have all played a part, but, in working out practical methods of achieving this balance, perhaps the lawyer has played the greatest part. It is for this reason that in both the two Congresses of the International Commission of Jurists – the one at Delhi and this one – a special committee has been set up to study and consider the lawyer's function in maintaining the Rule of Law, and the methods by which he can achieve this.

In an age such as ours, when social organization has become a skilled government function, when the Government, in order to achieve the objects of an advanced concept of social security and economic progress, seems to want more and more power to legislate for these ends, the threat to the liberty of the subject may well come from this source.

In Africa, in particular, the new states will need to make quick economic and educational progress. The new governments may well demand powers to legislate by regulation, as well as power to legislate for achieving economic social and educational progress, by state direction. It is in this field that the lawyer wishing to maintain the liberty of the subject, may have to keep a careful watch.

In Europe the age of government social and economic planning, which involves a potential danger to individual liberty, occurred after a period of laissez-faire, in which the individual's freedom,
particularly in the economic field, was virtually unlimited. When government planning came, the people has come to value greatly economic freedom, and freedom generally. Africa has known ages of freedom from government regulation or dictatorship, though many parts have also known the reverse. But, it is fair to say, that the African masses of the “Age of Africa”, while they know Imperial regulation, may not be so ready to see the threat to their liberties in the pursuit by the new governments of speedy wealth, education and social development.

All this tends to suggest that the lawyer, in the “Age of Africa”, may have to play a more vital part in the protection and defence of the Rule of Law, than in the past. In this age of special skills he will have to develop great skill and understanding in order to perform this task.

The International Commission of Jurists, dedicated to the preservation and extension of the Rule of Law throughout the World, at the Delhi Congress appreciated this, for the Congress specially requested the Commission to give special attention and assistance to countries now in the process of establishing, re-organizing or consolidating their political and legal institutions.

HISTORICAL HERITAGE

Practically every state in Africa has had connection with some part of Europe. The legal institutions reflect this historical fact which has had two influences on the legal systems:

a) a juxtaposition of an indigenous and a European law of persons or civil law as contrasted with the criminal law.

b) a judicial or legal system which is similar to, or based upon, some system in Europe.

The juxtaposition of rules derived from indigenous African civil law, and an imported jurisprudence may raise important questions, requiring skill and wisdom on the part of the lawyers in Africa, in order to weld the two together, but this is hardly relevant to the Rule of Law as understood by lawyers.

More important is the fact that the general legal system is based on systems used in some country or other in Europe. One effect of this is that some European legal systems have tended to influence and direct the methods adopted in the various countries to secure the Rule of Law in the African States.
The legal profession consists of judges, practitioners and teachers of law. It is to these persons that the protection and defence of the Rule of Law is entrusted. Among the judges are included every judicial officer from the lowest equivalent of the Justice of the Peace in England to the Law Lords in the House of Lords, from the lowest Magistrate to the Judge of Appeal in most African countries.

All must be, as far as possible, free from both executive and social pressures. For a law teacher who is not free to follow the reasoning of a free mind, is not imparting a free education. A judge who gives judgment designed to meet the pressures of the Executive, or of a particular litigant, or of a section of the community, is not acting reasonably. A legal practitioner who puts his clients interest above truth betrays our professional ethics.

In the rising area of Africa, the training of lawyers is going to be extremely important because it is in the training that the forms and norms are absorbed by the future practitioners and judges. It is obvious that schools of law will have to be established in many parts of Africa; the schools must commence the task of creating the legal profession, and the profession must set the standards for all who come. In view of the expense it may be necessary for lawyers serving a common system in different countries in Africa to be trained in a pooled law school to serve all of them as in the countries of the French Community. It is the task of the law schools to teach accurate law, to develop in the students a scholarly and technical approach to all legal problems, and to enhance the sense of personal and professional integrity.

But, apart from the personal qualities of the individual lawyer or would-be lawyer, the judicial system and the system of training lawyers must be designed to enable these qualities to manifest themselves in practice. The experience of the whole of the world shows that the minimum institutional requirements for the Rule of Law are:

1. an Independent Judiciary,
2. an Independent Bar and,
3. an Independent Law School.

Independence in these bodies is only a relative matter; for, it is impossible to get a completely independent judiciary, bar or law school. Each one depends for its existence on the act of someone other than itself. Thus, the Judiciary must be appointed, promoted or in extreme cases, removed by someone. The rights of the Bar to appear in courts must be within the framework of some legislation. The law schools must be established by someone, and their cost must be borne by someone. In any case, lawyers whether as judges, practitioners or teachers, are men subject to
direct and indirect conscious and unconscious pressures and pre­judices.

The institutional independence that experience teaches must be established as their object, an endeavour to minimize the extent to which these human failings will affect the administration of justice with particular reference to the Rule of Law.

1. The Judiciary is made as independent as possible by provisions for:
   a) Appointment of the judges for life.
   b) Guarantee of a salary which is well above average.
   c) Immovability from office except by cumbersome and difficult procedures, aimed at ensuring that the judges shall not be removed except for good reason.

2. The independence of the Bar is secured by:
   a) The inculcation of a sense of independence during law school days.
   b) The existence of a well known code of conduct for members of the Bar, enforced by disciplinary action, including expulsion from the profession.
   c) Absence of interference in the performance of legal duties outside the legal profession itself.

The independence of the law schools is possible only where universities and law schools are not instruments of state policy, but institutions of learning, where the teacher and students are free to follow their minds and the direction of their studies.

These are general statements summing up the experience of many countries in the world, which have faced the problem of working out practical rules for institutions and machinery for securing the Rule of Law. This general framework of practical measures designed to secure the Rule of Law appears to be accepted generally throughout the countries in Africa with which this Conference is concerned.

These countries may be divided roughly into two groups, viz., countries which derive their legal institutions from the Common Law countries such as Britain and America and countries deriving their legal institutions from one or the other of the Civil Law countries.

The countries in the first group are:

In the second group are:

Ethiopia and Zanzibar are in a special class.
In the Common Law countries one may differentiate between independent states and territories in varying degrees of colonial dependence.

The independent countries, unlike the United Kingdom, have written constitutions which provide *inter alia* for the establishment of a Judiciary on principles very similar to those in the United Kingdom. Human rights are written into and guaranteed by the constitutions. The constitutions of Nigeria, Ghana, Liberia and Sudan – for instance – provide for human rights and for an independent Judiciary *inter alia* to protect those rights.

Neither South Africa nor semi-independent Southern Rhodesia, on the other hand, mention human rights in their constitutions, but in both cases the independence of the Judiciary and the Bar are accepted on somewhat similar lines to those followed in the United Kingdom. The judges are appointed by the Governor-in-Council, i.e., the Executive, they hold office for life and their salaries are secure from the Executive's interference during term of office – promotion of judges to Appellate Courts is also a right of the Executive.

In both countries the legal profession is separated into Barristers and Solicitors, as in the United Kingdom, called Advocates and Attorneys respectively. Both sections are statutorily regulated in that the qualification for enrollment in each branch is laid down by statute.

The two branches are organized separately into the Southern Rhodesia Bar Association, the South African Bar Association on the one hand, the Law Society of Southern Rhodesia and the Law Society of South Africa on the other. The latter two are statutory, but the Attorneys in addition have a non-statutory voluntary association known as the Side Bar Association. The code of conduct for the Bar Association is much the same as that of the United Kingdom, the salient features of which, so far as they affect the Rule of Law, are:

a) That an Advocate must accept every brief offered him for a reasonable fee in the courts in which he holds himself out;

b) that he must put his client's case without fear or favour, putting forward every legitimate argument that can be put on behalf of his client;

c) that he must not act as judge by prejudging the merits or moral or legal justification of the client's case.

These are designed to ensure that unpopular causes or persons shall not be left without legal representation.

In both Southern Rhodesia and South Africa, unlike in the United Kingdom, the prosecution of criminal cases is in the hands of the prosecutors who are civil servants as well as advocates. In the traditional British system, the prosecution of criminal cases before the courts is done by members of the Bar in private practice, i.e.
independent persons (except in a few major cases). In both South Africa and Southern Rhodesia prosecution is done by the Attorney-General's staff, who are civil servants and therefore liable to executive pressure – in some cases. This may have a bearing on the Rule of Law, especially in cases of political or semi-political prosecutions.

In the Colonial dependent territories of Tanganyika, Uganda, Kenya, Northern Rhodesia, Nyasaland, Gambia and Sierra Leone, i.e., countries in the Common Law Group, the position regarding the independence of the Judiciary was in law as stated by Goddard C. J. in Terrell v. Secretary of State for the Colonies in 1953, viz.,

“The provisions of section 3 of the Act of Settlement relating to the tenure of judges of the Supreme Court in England did not apply to the Straits Settlements or to any other Colony. It is for the Crown by prerogative, or for Parliament by statute to set up Courts in a colony, and the conditions upon which judges there hold office are determined by the terms of the Statutes – made by parliament – or under the prerogative”.

Consequent upon this, in 1955 at the Commonwealth and Empire Law Conference, the following resolution was passed:

“This Conference is of the opinion that the Supreme or High Court Judges of the Colonial Empire should be appointed to hold office during good behaviour and not during Her Majesty's pleasure”.

Since that date various of the territories have enacted or are planning to enact statutes aimed at supplementing this resolution. The general pattern is this:

1. The judges are appointed by the Queen through the Secretary of State for Colonies from among persons who either are already or have been judges in Her Majesty’s Dominions, or Advocates of seven years standing.
2. Their salaries are fixed and cannot be reduced during continuance of office.
3. Their appointments are until the statutory age of retirement, and they may only be removed from office for proven inability or misbehaviour.

A procedure for removal is laid down, viz., the question of the inability or misbehaviour is referred to the Judicial Committee of the Privy Council (which must so advise the Queen) after an enquiry ordered by the Governor in the territory by three persons who have held high judicial office, has so recommended. This method provides, as nearly as possible, for the institutional independence of the Judiciary. There are variations on this theme, but all aim at the same result.
In all these territories, the legal profession is a fused one in that a person qualified as a Barrister in England does both the work of a Barrister and that of a Solicitor. In some a difference occurs at the stage when a practitioner becomes a Q.C. because from then on he must only do the work of a barrister. In all cases there is a statute regulating the legal profession, i.e., to say prescribing qualifications for practice and grounds and circumstances in which a legal practitioner may be disqualified.

In general there are no law schools in dependent territories, and qualifications are those in the United Kingdom or some other Commonwealth country. Thus, the normal mode of qualification is by qualifying in the United Kingdom as a Barrister or Solicitor, but Advocates from other territories in the Commonwealth are also accepted.

The Law Society in both Kenya and Uganda, for example, is the governing body of all legal practitioners. It is a body created by statute and the Committees of these bodies are elected by lawyers practising in the country. Thus, within the Law, the Bar is fully able to organize itself. Members of the Colonial Legal Service in the Attorney-General's staff, etc., are not members of the Law Society though the Attorney-General and Solicitor-General are ex officio members of the Law Society Committee, which has disciplinary powers.

The second group of countries consists almost wholly of African countries within the French community. Almost all of them follow the French pattern, under which the Judges are appointed by the Government, university qualifications being required, before appointment. A type of pooled law school for member states has been established, (see G. Mangin’s article in the Journal of the International Commission of Jurists, Volume II No. 2, page 75 et seq.). The principle of irremovability of the Judiciary is laid down in several Constitutions viz.

The Constitutions of Mauritania Section 43
Niger " 45
Upper Volta " 59
Ivory Coast " 55
Tchad " 50
Gabon " 38

all make provisions enshrining the principle of irremovability of the Judiciary.

In addition, several of the Constitutions provide for the establishment of a “Superior Council of the Judiciary” (Conseil supérieur de la magistrature) on the pattern of the French corresponding institution:

Upper Volta Section 58
Ivory Coast " 54
All the Constitutions, e.g.,

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with no exception, give the Legislature competence to fix the general structure of courts and the organization of procedures. This means that the exclusive power of enacting rules on these subjects is conferred on the appropriate legislatures, any interference by the Executive being excluded in accordance with the principle of separation of powers.

There is no specific provision in any of the said Constitutions to prohibit the Legislature from interfering with the course of pending or impending cases.

However, the basic principle of Separation of Powers and of the independence of the Judiciary, is laid down in most of the Constitutions.

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In addition, several of the Constitutions expressly say that the Judiciary is the guardian of individual freedom:

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The net effect of this is to prevent any interference with the course of a pending or impending case or cases.

With respect to the organization of the Bar in the new African states, all that can be said is that under most of the Constitutions
the Legislature is competent to enact rules governing the auxiliaries de la justice; which include the Bar:

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The information so far received suggests that there is room here for the more autonomous organization of the lawyers themselves.

EQUAL ACCESS TO THE LAW

Even in countries in which there is no constitutional declaration of human rights, or which, having such declarations, have no specific right of equal access to law, or equal protection of the laws, it may be taken to be the lawyer's attitude that all persons are equal before the law and have equal access to it.

Thus, a South African Text Book Writer and Professor of Law, Professor Wille, writes:

"Rules of Law must be impartial; they must be the same for all persons, impartiality is in fact one of the main elements of reasonableness. There is a presumption that all the inhabitants of this country enjoy equal civil rights under the law. The Rules of Law must consequently provide equally of treatment for all persons irrespective of colour, race, religion or any other characteristics. Thus, for the enjoyment of protection of rights it makes no difference whether the individual occupies a hut or a palace, whether he is a native or non-native, whether he be white or coloured, European or non-European."

This, it is common knowledge, is not always the attitude of the Legislature, and if a legislature enjoys parliamentary sovereignty then it may "lawfully" direct the courts and the lawyers to determine the rights of persons according to their colour, creed or race. South Africa, for instance, and to some extent Southern Rhodesia, do this.

But it is a tribute to the legal profession that even in South Africa the basic attitude of the lawyer is that justice means equality of all persons in their legal and human rights, whether such rights are proclaimed in a Constitution or not.

It is well known that in modern circumstances the declaration of human rights in a constitution or their theoretical recognition in law may be rendered worthless, if the litigant is not able to enforce the right. His ability to enforce or protect these rights be-
fore the courts often depends on his ability to secure adequate legal representation. It is common knowledge that everywhere the services of competent lawyers are costly and difficult to obtain.

In many countries in Africa there are large sections of the population which could never afford the normal charges made for legal services in court or out. To these persons the equality before the law appearing in the quotation from Wille's *Principles of South African Law, supra* would be an idle bit of philosophizing. Traditionally, lawyers have always been concerned to assist poor persons who need legal representation. Thus the idea of *pro deo* or Dock Defence arose as the lawyers contribution to the free, or as nearly as possible, free legal representation for cases requiring it. This tradition appears to have survived in most countries in Africa, especially where the person requiring legal representation is in danger of capital punishment or long terms of imprisonment. All reports received show that the legal profession everywhere has always been ready to represent the poor and other needy cases free of charge where "life, liberty, property, and reputation are at stake".

In the provision of legal aid, etc., there is again a division between the Common Law and the Civil Law countries’.

In the Common Law Countries (which here include South Africa and Southern Rhodesia, and many of the African independent states which have recently won independence from Britain), the pattern appears to be that in criminal cases - of a capital nature - legal representation is always available, either as dock brief, or as *pro deo* or Dock Defence or on some state aided legal aid service for which a very low, almost nominal fee is paid from public funds. In Civil matters, in both Southern Rhodesia and the Union of South Africa, there is a procedure under which, in the superior courts, any person who is not able to raise a stated minimum outside the value of his personal clothing and tools of trade, is regarded as a pauper and may be given legal representation free of charge, either to bring an action or to defend one. As in both countries the most needy cases are Africans (i.e., non-Europeans) whose disputes come before other than a superior court, this scheme of things does not always help the people who need it most.

If the principle of equal access to the law and equal protection of the laws is an essential ingredient of the Rule of Law, as we submit it is, then it would appear that lawyers, particularly, lawyers in Africa, should continue to study ways and means of giving real effect to this essential of the Rule of Law by ensuring that all who need legal representation shall not fail to get it. This need is more important in Africa where there are so many who are poor and ignorant - and who may suffer unwarranted invasions on their rights either without realizing it, or realizing it, are powerless to defend their rights.
The Congress at Delhi said:

"Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those threatened as to their life, liberty property or reputation, who are not able to pay for it. This may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means, legal advice or representation by lawyers of the requisite standing and experience. This is a question which cannot be altogether disassociated from the question of adequate remuneration for the services rendered. The primary obligation rests on the legal profession to sponsor and use its best efforts to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility."

The circumstances of each country are different, and it may be impracticable to work out any common method of achieving this clearly stated objective. In present day Africa the question of numbers of available lawyers to do this work is an important consideration. The following is a brief survey of legal aid available in such of the countries as have sent reports (Southern Rhodesia and Union of South Africa have been dealt with above).

Mali: In civil cases plaintiffs must make a cautionary deposit refundable if the action succeeds – this could work hardship on the poor litigant.
In criminal cases – a system much like that in France is in existence under which compulsory legal aid (uncompensated in any way) is granted to accused persons.
The type of counsel assigned to such cases is usually either a student or a junior barrister.

Malagasy Republic: Only in major criminal cases is legal aid available, irrespective of financial means.
If a barrister is not available there is a provision for the Court to appoint any suitable person to represent the accused.
There is a legal aid board which decides when legal aid may be granted in civil cases or minor criminal matters.
There is no free legal advice service.

Kenya: There is no organized legal aid in civil cases, but litigants may proceed personally in forma pauperis.
In criminal matters the Chief Justice may, in his discretion, grant legal aid to deserving cases. The remuneration is out of a fund voted by the Chief Justice for the purpose. In capital cases legal aid is granted as of course.
Advocates are ready always to appear for a nominal fee, or no fee at all, in cases affecting basic human rights.