

# Organisation and Development of the Legal Profession in Africa, in particular the ability of the Bar and judiciary to uphold the rights of both the citizen and the state

*His Hon. Judge T. O. Elias\**

By way of a Preface to the present study on the legal profession in Commonwealth Africa,<sup>1</sup> a brief reference should be made to some of the less well-known contributions made by Lord Denning to the expansion of the frontiers of English law in this field.

I wish to recall that I first sat under the Chairmanship of Lord Denning in the Committee on Legal Development in the Colonies, under the auspices of the House of Commons, in 1954; I was later honoured by an invitation of the Chief Justice of Trinidad and Tobago to give a Commonwealth Lecture series there in the footsteps of Lord Denning who had, a few years earlier, given a similar, but no doubt more authoritative, series of lectures on the Common Law in Trinidad and Tobago; and at the Commonwealth Magistrates Association Conference at Kuala Lumpur I was to have given one of the keynote addresses under Lord Denning's Chairmanship, but the second *coup d'état* in Nigeria, in July 1975, prevented me from leaving Lagos to attend the Conference. I should also recall the two notable occasions when Lord Denning came to Nigeria: once to participate in the Constitution-making Conference on the eve of independence, and again, in 1974, when, accompanied by Lord Elwyn-Jones the then Lord Chancellor of Great Britain, Lord Denning sat with my colleagues and me, as Chief Justice, in the Supreme Court of Nigeria to hear an appeal case.

Thus Lord Denning can be seen as an indefatigable promoter of the development of the legal profession in the newer Commonwealth.

The legal profession in Africa, both at the national and the inter-African level, has had a somewhat chequered history, but the period 1957 to 1960 may be

\*Judge, sometime President, International Court of Justice.

1. The occasion for this study was the invitation by the International Bar Association for me to deliver the keynote address at the African Regional Conference, held in Nigeria, on the main topic, entitled: "Organisation and Development of the Legal Profession in Africa, in particular the ability of the Bar and the judiciary to uphold the rights of both the citizen and the State" on August 1, 1985.

regarded as its watershed. We may perhaps begin the story with the London Conference, held under the chairmanship of the Right Hon. Lord Denning, on the "Future of Law in Africa" at the beginning of the year 1960, which Lord Denning described in his foreword as:

"for Africa a year of decision, indeed a year of destiny. One country after another is acquiring independence, or looking forward to it. Statesmen and lawyers are meeting together to frame new constitutions. But the well-being of a people depends not only on the form of government they have, but also on the ordinary laws of the land. And it is the ordinary law which the Conference considered."<sup>2</sup>

As well as discussing general legal problems, the Conference considered the issue of legal education, which lay at the root of the legal profession throughout Africa. It noted that, with the approach of independence, various countries were already showing real concern with the future of their laws. Two major problems loomed large on their horizon: reorganization and reform of legal education and the provision of research into the local and the indigenous laws to serve the needs of the emerging nations. As for legal education, this had almost everywhere been obtained in the United Kingdom and Ireland and that meant that the lawyers thus available were learned only in the laws and practices of England and Ireland, but knew not African customary laws which formed reasonably substantial parts of the law they must practise back home in Africa. Knowledge of these local laws had to be painfully and gradually acquired by long practice as their overseas training had not, and could not, have embraced African and Islamic laws. It therefore became necessary that legal education, to be meaningful and useful in conditions of independence, must be provided locally and urgently.

In Nigeria, a Federal Government committee report, in 1959, recommended the establishment of a Faculty of Law at the University College, Ibadan, to teach academic courses in the traditional law subjects for three years, while a Law School was to be established in Lagos to teach an additional one-year professional law course with particular emphasis on the solicitors' side of the profession, since the local legal profession is fused and practitioners were called to the local Bar and required to practise as barristers and solicitors, even though their overseas training had been limited to that of barristers.

Also, at the London Conference, it was noted that a Law School and a separate Department of Law had been set up at University College of Ghana. For some time a Law School had been established at the University of Liberia, teaching a three-year course after completion of the University course. The Conference noted that there was as yet no provision for legal education in East Africa, although the Royal Technical College, Nairobi, provided instruction in one or two subjects of legal interest. In the Sudan, the Faculty of Law was being expanded at the

2. *The Future of Law in Africa: Record of Proceedings of the London Conference, 28 December 1959-8 January 1960*, Butterworth & Co., London, 1960.

University of Khartoum to provide full-scale teaching for practice at the Bar. Law teaching was just beginning at the then University College of Rhodesia and Nyasaland. In the United Kingdom itself, the legal education being provided at British universities was being broadened in many cases to cater for the special needs of overseas law students. Indeed, a start had been made to offer limited courses in African and Islamic law in places like the London School of Oriental and African Studies and the University of Southampton. The Council of Legal Education offered three-month Post Final courses following the Bar Finals, in addition to being able to take one or two papers in African and Islamic law studies. In this way legal education in the United Kingdom began to go some way to meeting the needs of African law students during this transitional period. All these could not, however, be regarded as a substitute for what Africa needed for its post-independence legal profession. The London Conference finally recommended the setting up of a committee, under the chairmanship of Lord Denning, for a consideration of what facilities should be provided for additional instruction and training that might be required to ensure that those members of local Bars in Africa who obtained their legal qualifications in the United Kingdom possessed the knowledge and experience requisite to fit them for practice, with special reference to (i) the acquisition of practical experience in addition to academic qualifications; and (ii) the giving of instruction in the functions of solicitor to those who were English barristers or possessed similar qualifications, and who practised as members of a fused profession. Consideration was also to be given by the same or another committee to the practical problems associated with bringing this about.

### **Establishing the new legal profession**

It seems sufficient to take Nigeria as typical, not only because it has as many members of the legal profession as there are in the rest of black Africa put together, but also because its pattern of the new development in the legal profession has been adopted elsewhere in British Africa. Besides, pride of place must be given to Nigeria in that it probably provided the first African legal practitioner to be called to the Bar, at the Inner Temple, in 1828.<sup>3</sup>

The legal profession of Nigeria and, as already explained, of much of British Commonwealth Africa, may be said to be based on two major enactments – the Legal Education Act and the Legal Practitioners Act of 1962. Under the Legal Education Act was established the Council of Legal Education for the whole country, presided over by the Chief Justice of the Federation and having as members the Federal and State Attorneys-General, two Judges of at least High Court rank, the Chairman of the Nigerian Bar Association and some 28 members of the Bar appointed by the Bar Association, the heads of all Faculties of Law in Nigerian Universities, the Director of the Nigerian Law School established by the

3. See G. Thompson, *The First Generation of Sierra Leone Lawyers* (1952), at pp. 52 *et seq.*, Govt. Printer, Freetown. This man arrived in Lagos after his call to the Bar but soon left to establish his practice in Freetown; see also, Elias, *Government and Politics in Africa* 2nd ed. (1963), at p. 145.

Council and a few other persons appointed by the Prime Minister. The Council is responsible for legal education of all persons seeking to become members of the legal profession. For this purpose the Council issues qualifying certificates, although giving the Federal Attorneys-General power of enrolment of persons wishing to become legal practitioners. But those applying for the certificates must satisfy the Council or the Attorneys-General that they have completed a course of practical training of at least one year at the Nigerian Law School, after having obtained a university degree in law.

The Legal Practitioners Act makes provision for the admission and discipline of members of the legal profession who are made up of both existing and future members who have satisfied the requirements of the Legal Education Act. The Roll of Barristers and Solicitors is kept under the authority and supervision of the Chief Justice of Nigeria, subject to the overall regulation of the General Council of the Bar under the chairmanship of the Federal Attorney-General, State Attorney-General and some 28 other members of the Nigerian Bar Association and also members of the General Council of the Bar. A Legal Practitioners Investigating Panel, charged with the duty of conducting a preliminary investigation into any allegation of unprofessional conduct against a legal practitioner, was also constituted to replace the Legal Disciplinary Committee which operated in the pre-Independence era for over fifty years. This Panel consists of the Federal and State Attorneys-General and ten legal practitioners of not less than five years' standing who are appointed by the Nigerian Bar Association. A case may be referred by this Panel to a Legal Practitioners Disciplinary Tribunal consisting of a Judge of the High Court of a State, appointed by the Chief Judge of that Court, the Federal and State Attorneys-General and fifteen legal practitioners of not less than five years' standing appointed by the Bar Association. The penalties for unprofessional conduct are admonition, suspension or the striking off the Roll of the name of a practitioner found guilty by the Tribunal. There is a right of appeal to the Supreme Court of Nigeria.

There is a Legal Practitioners Remuneration Committee consisting of the Federal and State Attorneys-General, chairman and three members of the Nigerian Bar Association, existing to curb the possible charging of excessive fees by legal practitioners. Other safeguards for clients exist in respect of the keeping of accounts and other records for clients' monies, including the compulsory banking of these monies, and there is provision for ensuring liability for professional negligence of any practitioner guilty of the offence. There are provisions for the exemption of certain lawyers who are office-holders from the requirement of enrolment, and these are the Attorneys-General, Solicitors-General, Directors of Public Prosecutions and other such other persons in the public service in the Federation or State as may be specified by order of an Attorney-General. One important provision of the Legal Practitioners Act is that the legal profession must remain fused, that is to say, that a practitioner continues to be entitled to practice

as a barrister or solicitor, as has been the case since the early 1860s. Another important provision is that the Chief Justice of Nigeria has power to grant an *ad hoc* permission to a lawyer from a country with similar legal arrangements to appear before a Nigerian court, often based on reciprocity. This implies that there is no general right of non-Nigerians to be permanently enrolled with a view to setting-up in practice as a barrister and solicitor. Those Nigerians who had been called to the Nigerian Bar and who were not ordinarily resident in Nigeria ceased to be members of the Nigerian Bar as from the date of the coming into force of the Act in 1962. Generally, a person is entitled to have his name enrolled: (a) if he is a citizen of Nigeria; (b) if he satisfies the Chief Justice that he is of good character; and, (c) if he produces to the Registrar of the Supreme Court a qualifying certificate showing that he has fulfilled the requirements of the Legal Education Act, that is to say, that he has a recognized university degree in law and that he has passed the examinations of the Nigerian Law School at the end of the one-year course. It is useful to mention that Africans from other countries have been taking university degrees in law and been allowed to attend courses at the Nigerian Law School and, of course, been called to the Nigerian Bar, since 1962. An important provision of the legislation and other regulations made under it is that such arrangements have been made for citizens of the Organization of African Unity to become qualified as members of the legal profession in Nigeria upon satisfying the necessary legislative requirements. The Council of Legal Education has, of course, to sanction such exemptions in favour of non-Nigerians wishing to practise law in Nigeria.

In this way the Legal Education Act, as well as the Legal Practitioners Act, has ensured that only those satisfying them can become members of the Nigerian legal profession. There are exemptions in the case of those who had university qualifications in law outside Nigeria, but they must also go to the Nigerian Law School for one year, if permitted to do so by the Council of Legal Education. Their qualifications must be those of certain specified universities in America or elsewhere in the Commonwealth, for which arrangements have been made beforehand by the Council of Legal Education. All those candidates admitted to the one-year course at the Nigerian Law School must also attend courses in the Nigerian Legal System, the Nigerian Constitution, the Nigerian Land Law and the Nigerian Criminal Law, showing also a certificate obtained at the end of the one-year course. Only graduates from Nigerian universities are exempted from this Part 1 of the course in the Nigerian Law School. All students must of course pass also Part 2 which consists of the traditional subjects like contract, tort, equity and trusts, company law, industrial law and, of course, etiquette and other subjects necessary for practice as a solicitor.<sup>4</sup>

The foregoing arrangements for the legal profession in Nigeria may be taken to apply, *mutatis mutandis*, generally to British Africa. The position is also governed in

4. Elias, *Nigeria: Development of its Laws and Constitution*, British Commonwealth Series, No. 14, Stevens & Sons, 1967, at pp. 387-395.

those countries by the Legal Professions Act of 1960 of Ghana, which came into force in 1962, superseding the General Practitioners Act of 1958. There may be a General Council of the Bar or a Board of Legal Education but the overall provisions are generally as described above.<sup>5</sup>

### The African legal profession before and since independence

The organization of the Legal Profession just described above clearly antedates 1960. As already stated, the first Nigerian qualified in and returned from the United Kingdom in 1828, since when, and probably before which time, lawyers have been returning in increasing numbers to Nigeria, Ghana and Sierra Leone. Some account has been given about the profession in Ghana,<sup>6</sup> Sudan, Kenya and Tanzania; in Kenya, for instance, the London Conference noted that there were, in 1960, over 300 local (expatriate) practitioners.<sup>7</sup> Gai lamented the absence of African lawyers in Kenya and Tanzania in the early 1960s in these words:

“The result was that there were no African lawyers in Kenya and Tanzania until well into the 1960s, and even then there were only two in Tanzania and five in Kenya. The exclusion of Africans from the legal profession had a number of consequences for the role of the profession and the development of the economy in the rural areas.”<sup>8</sup>

Ghana would seem to have had 903 members of the legal profession at that time.<sup>9</sup> Nigeria is estimated to have had about 5000 lawyers. This fact, as well as the relatively longer established nature of the Nigerian legal profession, may explain why a number of African countries during the 1960-1970 decade turned to Nigeria for the provision of lawyers for government service. Thus a Chief Justice to Uganda, another Chief Justice to Botswana, one or two Supreme Court Justices to Kenya, Tanzania<sup>10</sup> and Malawi, some State counsel to Sierra Leone, and the President of the Court of Appeal in Gambia, were all lent to these countries at their request, often with substantial subsidies paid by the Nigerian Government. Other Nigerian lawyers also served in some of these territories as law professors, lecturers and research officers, especially in Zambia and Uganda. Indeed, this is an outstanding achievement for Nigeria of technical assistance in inter-African cooperation in the legal field.<sup>11</sup>

5. Elias, *Ghana and Sierra Leone: Development of their Laws and Constitutions*, British Commonwealth Series, No. 10, 1962, at pp. 140-146 and pp. 281-283.

6. See *Lawyers in the Third World: Comparative and Developmental Perspectives*, edited by Dias, Luckman, Lynch and Paul, Scandinavian Institute of African Studies, Uppsala, 1981, Chaps. 4-9.

7. See *Future of Law in Africa*, *supra* n.2, at p. 48.

8. See *Lawyers in the Third World*, *supra* n.6, at p. 149.

9. *Ibid.*, at p. 128.

10. There were at the time of the Nigerian Civil War some 29 other Nigerian lawyers on the Bench in Tanzania and in other legal posts. They were, of course, all withdrawn from Tanzania when the latter recognized the secessionist Biafra.

11. The present writer was Federal Attorney-General and Minister of Justice from October 1960 to February 1972 and it was to him that all these requests from other governments in Africa for lawyers and judges were addressed, since most of the government legal functionaries had been known to him in the United Kingdom and elsewhere.

On the basis of the new reorganization of the legal profession, and the advance made since then, the legal profession in Africa has been considerably enlarged.<sup>12</sup> Their role at independence cannot, therefore, be underestimated, if only in creating the climate of opinion conducive to the reception of the new constitutional ideas regarding the Rule of Law and democracy in Africa. Most, if not all, the independence constitutions have contained conspicuous chapters on Fundamental Human Rights, borrowed largely from the United Nations Universal Declaration of Human Rights of 1948.

A careful study of most of the independence constitutions in Africa reveals that there are fourteen heads selected for the fundamental human rights that should be protected. These are:

1. The right to life of the individual against any arbitrary deprivation of it;
2. Freedom from inhuman treatment, that is, from any form of bodily or mental torture, whether in the extraction of confessions from an accused person or from a witness in a judicial proceeding or in any other circumstance of domestic life;
3. Freedom from slavery or forced labour, that is, any form of human bondage, including customary practices of pawn or pledge of persons for debt;
4. The right to personal liberty, which, although this will be found in many of the countries' domestic laws, is especially enshrined for additional guarantee;
5. Rights concerning civil and criminal law, particularly from the point of view of establishing principles and practices for the fair and impartial administration of justice in open court;
6. The right to private and family life, that is, the right to respect for his private and family life, his home and correspondence;
7. Rights concerning religion;
8. The right to freedom of expression in its various forms;
9. Freedom of peaceful assembly and association;
10. Freedom of movement and residence, especially the right to leave and return to one's own country and to reside wherever a person likes within that country, including the right to a passport and similar facilities;
11. The right to compensation for the compulsory acquisition of private property by a government or a government agency;
12. The enjoyment of fundamental rights without discrimination and freedom from discriminatory legislation, whether on the ground of ethnic differences or on any other ground, based on differences of race, sex and similar grounds;
13. Derogation from fundamental rights, especially for reasons connected with the event of war or on the declaration of a state of emergency or when democratic institutions are threatened by subversion in any part of the country;
14. The clearly restricted power of the central government for the safeguard and protection of the country as a whole.<sup>13</sup>

12. One estimate is that there may probably now be about 11,000-12,000 members of the legal profession in black Africa.

13. Elias, *Nigeria: Development of its Laws and Constitution*, *supra n.4*, at pp. 143-162.

Equally important are the provisions of the constitution making elaborate arrangements for the Police Force to ensure the orderly conduct of public and private affairs in accordance with the provisions of fundamental human rights, especially those relating to the right to life and the personal liberty of the subject; for example, that no one should be detained or have his movements restricted for more than 24 hours before being formally charged before a court of law. There is also the reorganization of certain sections of the judiciary so as to ensure the appointment, dismissal and disciplinary control of judges of the superior courts of law and those of customary and local courts throughout the country, including the necessity for ensuring the independence of the judiciary from political and executive interference of any kind. Another very significant provision under the fundamental human rights is the inclusion of specific arrangements for the creation of a common citizenship throughout the country, since this is to promote uniformity of treatment of the various ethnic groups to be found in almost every African country; this phenomenon underlies many of the problems of selection of members of the various legislative houses or bodies and the appointment of most political and executive officers as public functionaries. Also important is the portion of every constitution providing for future amendments.

Since the importance of democratic government is the eternal aspiration after the ideal of social justice for all members of the community, the entrenchment of the fundamental human rights and freedoms is a *sine qua non* for ensuring the success of independence. This is why all these newly independent countries in Africa have done so, in addition to whatever provisions they already had in their laws guaranteeing some of these rights. This is desirable, not only in multi-racial countries, but also in multi-lingual and polyethnic communities. Africa is full of these. Of course, the mere entrenchment of provisions of fundamental human rights in a constitution does not, in itself, guarantee that they will necessarily be enforced after independence, but, since, once entrenched, they are not easy to amend or remove, they at least constitute a warning and a challenge to those who might later want to set the law at naught. These provisions may also be seen as one of the most suggestive means of political education in the subtle and civilized ways of democracy, not only for the new leaders, but also for the people at large.

### **The legal profession in action**

If, as we have accepted, the legal profession dates back to the 1820s, it is permissible to refer to a few incidents which occurred in the closing years of the 19th century. No attempt will be made to catalogue all the events, but mention will be made of a few to illustrate the activities of members of the legal profession, mainly in West Africa.<sup>14</sup>

14. Since there were no African members of the 300 or more lawyers at the London Conference on the Future of Law in Africa, the Conference noted that the advancement of Africans in the legal profession in East Africa had had to be long delayed for fear that the East African lawyers would follow the example of their West African predecessors. See *Future of Law in Africa*, *supra* n.2, at pp. 49-51; see also, *Lawyers in the Third World*, *supra* n.6, at pp. 148-149.



In 1897, the Government of the then Gold Coast introduced into the legislative council a Public Lands Bill in order "to regulate the administration of public land" in the colony. This was taken by the public as an attempt by the Crown to expropriate their land, and a delegation of the Gold Coast Aborigines Rights Protection Society (later re-christened West African Aborigines Rights Society), a political movement consisting of Chiefs and educated Africans, under the leadership of John Mensah Sarbah, the first Gold Coast African lawyer, went to London to interview Joseph Chamberlain, in order to protest against the passing of the Bill. The Government appeared to be intent on passing this Bill so as to check the activities of certain European concessionaries and African traditional chiefs, some of whom were keeping for themselves the royalties accruing from gold mining. As a result of the visit of this delegation the Bill was withdrawn by the Government of the day in the colony.<sup>15</sup>

The Society became accepted as a body which the local British Administration made a practice of consulting on all important measures before they were adopted and passed into law in the Council. This practice of consulting that body was maintained by the British Administration till 1925 when the official majority was replaced by that of the unofficial African members in the Council.

So important is the subject of land to Africans everywhere that this episode led to a West African delegation of lawyers and other political leaders in Nigeria, Sierra Leone and Gambia holding a conference with their Gold Coast counterparts to consider the issue, under the title of what is known as the West African Land Question. The claim was that the Government's attempt to vest all unoccupied land in the Gold Coast colony in the Crown was a thin edge of the wedge which would soon be driven into other West African territories. This was regarded as likely to amount to a complete expropriation of their indigenous owners and that of Ashanti and Kumasi, leading to the acquisition of Lagos land and other territories in West Africa. The Conference also emphasized that their reason for political agitation was to pre-empt a possible European settlement being established in West Africa as had happened in East Africa. Around that time there was afloat a proposal by Lord Leverhume to acquire certain plantations in West Africa. In view of the opposition the whole idea was dropped.<sup>16</sup>

Sierra Leone would seem to have been a strong headquarters for the location and practice by African lawyers during the first half of the 19th century. One or two examples may be given. A Mr Robert Dougan, barrister, of mixed descent, described as a mulatto, arrived in Freetown in 1831, served as Proctor to the Mixed Commission Court, Queen's Advocate and Acting Governor on two occasions and died in 1871. There was also John Carr, a West Indian of African descent, who was Queen's Advocate and Chief Justice of the Colony of Sierra

15. See Caseley-Hayford, *The Truth about the West African Land Question* (1898); and also Lord Hailey, *An African Survey* (1957), at p. 520.

16. Elias, *Ghana and Sierra Leone*, *supra* n.5, at pp. 30 and 49; Lord Hailey, *An African Survey*, *ibid.*, at p. 732.

Leone from 1840 till 1867, during which period he acted as Governor on several occasions and retired in 1867; he later died in London in 1880.<sup>17</sup>

There would seem to have been in the Colony a sizeable proportion of practising lawyers in the last half of the 19th century. The Sierra Leone Bar Association must be one of the oldest in West Africa, since it has been recorded that it addressed a letter of protest on behalf of the Colony in 1899 to the Secretary of State for the Colonies in London on the then burning question of the Mende Revolt of that period.<sup>18</sup>

It is little wonder then that when independence came to Sierra Leone, on April 27, 1961, it became one of the active centres of agitation by its Bar Association against what was considered to be high-handed government. Thus when the new Constitution of Sierra Leone was introduced in June 1978, and passed rapidly through Parliament without the committee stage or public comment, creating a one-party State,<sup>19</sup> giving the President wide powers for declaring a state of emergency, the Bar Association rose in revolt. The Constitution gave the President power to take any measures he deemed necessary regardless of lack of conformity with the existing laws. The courts were given jurisdiction under the Constitution to review emergency measures to determine whether such measures were "reasonably justifiable" for the purpose of dealing with the situation which existed immediately before or during a state of emergency. The lawyers felt particularly affronted by the provision which weakened the tenure of judges in Section 115(1a), which provided that "judges of the Supreme Courts of Judicature may be required by the President to retire at any time after attaining the age of 55 years." This was contrary to Section 115(1c), which required mandatory retirement of judges only at the age of 65. Thus the power given to the President to retire judges at an earlier age was declared unconstitutional and claimed to be invalid by the Bar Association, which no doubt recognized the right to remove incompetent judges under Section 115(3) only after due process of law. Such was the strong opposition of the Sierra Leone Bar that, while reluctantly putting up with the one-party State system, it finally succeeded in having the Constitution amended.<sup>20</sup> This whole episode is only one of several which the Sierra Leone Bar has fought and won.

It is to be noted that Sierra Leone was not alone in experiencing bouts of declarations of emergency since independence, especially following *coups d'état*. Nigeria, Ghana, Uganda and other countries have had their own trying experiences.<sup>21</sup> The prevalence of this phenomenon in nearly all parts of the Third

17. Elias, *Ghana and Sierra Leone*, *ibid.*, at p. 256.

18. See Crooks, *The Colonial Policy of Lord John Russell's Administration* (1843), Vol. 2, at pp. 344-345, cited in Elias, *Ghana and Sierra Leone*, at p. 283.

19. For a detailed study of the constitutional problem relating to Human Rights in a one-party State, in Tanzania and Zambia, see the Records of an *International Seminar on Human Rights, their Protection and the Rule of Law in a One-Party State*, convened by the International Commission of Jurists, Search Press Ltd., London, September 1976.

20. *CJL Bulletin*, No. 4, pp. 20-21.

21. See Elias, *Africa and the Development of International Law* (1972), Ch. 6 on the legality of illegal regimes in Africa.

World has provoked the interesting study: *States of Emergency: Their Impact on Human Rights*.<sup>22</sup> A somewhat comprehensive review of Preventive Detention laws and practices in Australia, Burma, Eastern Europe, India, Japan, Philippines, Singapore and the Soviet Union will be found in an earlier study of the Commission in 1961.<sup>23</sup>

Another significant example of a Bar Association challenging executive excesses may be cited from the Sudan. The Constitution of Sudan contained in Section 62 these words: "Advocates shall defend the constitutional rights of the citizens and shall adhere to the ethics of the profession in accordance with law." The Sudan Bar Association interpreted this provision as prescribing not only a duty incumbent upon the lawyer as an individual, but also as imposing a duty upon the Bar Association actively to defend the rights and liberties of the citizens as a whole. The Association accordingly petitioned the government in 1977 for the repeal of certain laws restricting the constitutional rights of the Sudanese people and of the independence of the judiciary. The Association sent memoranda to the President of the Republic in 1977 and 1978, stating the position of the Bar in the matter and also in 1979 sent a similar memorandum to the Attorney-General requesting him to propose to the People's Assembly a Bill repealing the laws in question. The President of the Bar personally sought audience of the President of the Republic and was assured that the proposal of the Bar would be given careful consideration. The proposal, as adopted by the President, was referred to a high-ranking advisory commission, but no Bill was submitted to the legislature on the subject. Because of this failure of the government to move in respect of the Permanent Constitution of Sudan (Amendment) Act 1975, which the People's Assembly adopted on 16 September 1975, some days after an abortive military coup, Article 41 of the Constitution which guaranteed freedom of movement, and Article 66 which prohibited arrest without warrant while at the same time guaranteeing prompt access to a court after arrest, were both amended by the addition of clauses permitting the legislature to create a system of preventive detention and providing for assignment of residence. The amendment also empowered the legislature to create special procedures for notifying a person detained or assigned to residence of the reasons for such an order or the manner in which he should receive a hearing, but the Act specified that such a procedure should be followed only "when possible." At the time of the bringing into force of this Act, in 1975, there was in existence already a system of preventive detention under the State Security Act of 1973. The amendment now being complained of was regarded by the Bar Association as designed to eliminate the possibility that the Supreme Court would declare unconstitutional this provision of the Act which the Bar Association was already challenging. There were two main grounds prompting the Bar Association to oppose the Act: Articles 81 and 82 of the Constitution which defined the President's duty towards the nation were amended by the addition of a new clause

22. Published by the International Commission of Jurists, 1983, 480 pages.

23. See *Journal of the International Commission of Jurists*, Vol. III (1961), at pp. 27-150.

permitting him to make decisions having the force of law. This was considered by the Bar Association as being inconsistent with Article 118 of the Constitution which gave the President power to act only jointly with the legislature and not to the President alone. The second ground was that Chapter 2 of Part VIII of the Constitution had been amended to permit the creation of one or more courts of State Security before then; the only exception to the judiciary's exclusive exercise of the judicial function was the existence of Courts Martial. This was looked upon as being inconsistent with the rights of every citizen to be tried in normal courts applying normal law and normal procedure. Also opposed by the Bar Association was Article 131 of the Code of Criminal Procedure which regulated the President's power to create special courts for crimes against the security of the State. The Presidential power of detention and prosecution before special courts was widely employed in the wake of attempted *coups* in September 1975 and July 1976. Several persons, up to 150, were implicated in the *coups* and brought before State Security courts and, according to Amnesty International, approximately 100 of them were executed. In view of the strong opposition of the Bar Association the State Security courts fell into disuse by the middle of 1977 and about 1000 detainees were amnestied by 1978. There was, however, a resumption of these practices by the government as a result of the increase in the practice of communists or trade unionists involved in agitation over economic issues and Baathists opposed to the government's moderate position on the Middle East question. This would seem to illustrate the danger that exceptional powers properly adopted in emergency situations, if left in existence after the end of the original emergency, might eventually be used for purposes different from those for which they were originally adopted.

The Bar Association also sought the abolition of the Exercise of Political Rights Act 1974, which was judged to be incompatible with the Constitution and the principle of the equality of citizens. In Paragraph 5 of the Act the Sudanese Socialist Union was empowered, as the sole authorised political party, to deprive a person of his political rights, including the right to be a candidate, the right to belong to constitutional organisations, as well as the right to vote. Such deprivations could be imposed for reasons ranging from conviction of certain crimes to formation of factions within the Sudanese Socialist Union or to "lukewarmness" towards the interest of the State. Although candidacy for government posts is not restricted to party members, yet this provision gave the party, the only party, an effective power to veto other candidates. The fact that the individual's constitutionally recognized rights could be withdrawn, with no right of judicial review, was particularly disturbing. The third measure against which the Bar Association protested was the State Security Amendment Act 1976, which enabled the Attorney-General to attach all property, movable and immovable, of persons charged with offences under the Act. An amendment of 1979 extended the power of attachment to all officials charged with committing crimes in their official capacity. While provisional seizure of assets might well be justified in cases

where corruption or misappropriation of public funds was suspected, the adoption of this measure to a large category of persons still presumed innocent could cause serious hardship and injustice.<sup>24</sup>

The rights and duties of lawyers thus recognized by the Sudanese Constitution to protect the fundamental rights of citizens was a landmark in African constitutional law, reflecting a principle which is only recently being recognized at the international level.<sup>25</sup> It is considered that the Government of Sudan of that period should be congratulated for respecting these rights, recognizing the duties of lawyers in this regard.<sup>26</sup>

It may be noted in parenthesis that Ghana was probably the first independent African country, apart from Ethiopia and Liberia, to enact a Preventive Detention Act in 1958. It provided for the detention of Ghana citizens for actions considered prejudicial to the defence of the State or to relations with other countries or to the security of Ghana. Under it, persons could be detained for periods of up to five years without trial by an Order of the Governor-General. The Act was designed to discourage subversive activities, whether of individuals or of tribal and other groups. It clearly made a valid detention order not liable to challenge by a writ of *habeas corpus* in any court of law. Two opposition Members of Parliament brought a writ to the Ghana Supreme Court which in its Divisional Court at Accra dismissed their application holding, (i) that it would not accept the applicants' argument that the Act as applied by the executive was primitive and (ii) that, although the grounds for the detention would ordinarily be matters regulated by the Criminal Code, there was no legal bar to the Governor-General's exercise of his power under the Act.<sup>27</sup>

### **The International Commission of Jurists and the Centre for the Independence of Judges and Lawyers**

The African legal profession, like its counterparts in most of the other parts of the world, has certainly gained, and is still profiting from, the two institutions: the International Commission of Jurists and its affiliate, the Centre for the Independence of Judges and Lawyers, both based in Geneva. The Commission exists for the promotion of the Rule of Law and the ensuring of the establishment and continuance of democratic government all over the world. It operates through the holding of conferences, seminars and colloquia designed for the study and protection of the rules and practices of democratic institutions on a world-wide basis. Thus it established its first contact with Africa by means of an African

24. That this was in every way contradictory to the maintenance of democracy was pointed out in the International Commission of Jurists pamphlet entitled "Human Rights in a One-Party State", *supra* n.19, at pp. 109-124.

25. See the recent Resolution of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 1980, at p. 37.

26. *CIJL Bulletin*, No. 6, at pp. 28-31.

27. See Elias, *Ghana and Sierra Leone*, *supra* n.5, at pp. 80-81.

conference on the Rule of Law, in Lagos, in January 1961, consisting of 194 judges, practising lawyers and teachers of law from 23 African nations, as well as nine countries of other continents. It reached conclusions regarding (a) Human Rights in relation to government security, (b) Human Rights in relation to aspects of criminal and administrative law, and (c) the responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society. The Conference also adopted a Declaration inviting the African governments to study the possibility of adopting an African Convention of Human Rights that would protect individuals aggrieved by a violation of public or private law and enable them to seek redress before an international tribunal of appropriate jurisdiction. It ended with the adoption of what was christened "The Law of Lagos", the gravamen of which is a commitment of all the governments of the countries from which the participants came to constitutional propriety in government and the avoidance of tyranny everywhere, including the requirement that lawyers and judges should always be made the cornerstone of civilized governmental behaviour.<sup>28</sup>

Because of the subjection of judges and lawyers increasingly to all forms of harassment, victimization, arrests, imprisonment and even assassination, by reason of carrying out their profession with the courage and independence that the profession demands, the International Commission of Jurists established, in January 1978, at its headquarters in Geneva, a Centre for the Independence of Judges and Lawyers, following the decision on this subject taken at its 25th anniversary meeting in Vienna in April 1977. Among the main objectives of the Centre are the collection of reliable information from as many countries as possible about the legal guarantee for the independence of the legal profession and the judiciary, any inroads which have been made into their independence and particulars of cases of harassment, repression or victimization of individual judges and lawyers. Such information is distributed to judges and lawyers and their organizations throughout the world; such organizations are to cooperate in this project by supplying information about erosion of the independence of lawyers and judges in their own or in other countries or by taking action in appropriate cases brought to their attention. Individual lawyers, as well as their organizations, willing in principle to participate, should address communications to the Centre to that effect, on the payment of nominal fees, so that the Centre may bring the subject-matter of the information to the attention of the world legal community.

Attention may be drawn to one or two instances in which the Centre has acted. For instance, a Mr Arthur Pickering, aged 30 years, who was the first non-white person to be admitted to the Windhoek Bar, was a legal adviser to the legally constituted internal wing of SWAPO. He was arrested together with a number of SWAPO officials on 27 April 1979 on the sole ground of his connection with SWAPO as a lawyer. He was previously detained under the Terrorism Act in

28. See *Journal of the International Commission of Jurists*, Vol. III (1961), at pp. 3-28; this publication is worth serious re-reading.

January 1979, when the security authorities were investigating a bomb explosion in Swakopmund, but was released after ten days without charge; he was rearrested under a Proclamation which gave the Administrator-General of Namibia wide powers to detain persons suspected of engaging in subversive activities of a violent nature. The Administrator-General was given powers under the Proclamation to determine the period of detention and conditions of release of detainees. The Proclamation provided for a committee to review detention orders, but the Administrator-General was not bound by its recommendations. The Centre for the Independence of Judges and Lawyers, on the matter being brought to its attention, wrote to the Administrator-General expressing its concern and pointing out that independence of the legal profession is essential to the proper administration of justice and that the detention of a lawyer without charge strikes at the very basis of this independence. Mr Pickering was eventually released from imprisonment and allowed to continue his legal advising to the legally constituted local branch of SWAPO.<sup>29</sup>

Another instance of the successful intervention of the Centre was in connection with Mr John M. Khaminwa, a prominent and well-respected lawyer in Kenya, who was arrested on 3 June 1982 by officers of the Central Investigation Department. A member of the Kenyan Law Association and an advocate of the High Court of Kenya, of the High Court of Uganda and of the High Court of Tanzania, Khaminwa was held under the provisions of the Preservation of Public Security Regulations, and was not charged with any specific offence. The information reached the Centre from several sources, saying that Mr Khaminwa had never affiliated himself with any political organization and that he was a very good lawyer with a commitment to the Rule of Law, which made him willing to handle cases which others were unwilling to undertake. The belief was widespread that Mr Khaminwa's arrest was motivated by his representation of persons who were critical of the Government and who had private claims against government officials; he also represented the wives of several government officials during their divorce actions in court. At the time of his arrest Mr Khaminwa was involved in two cases which had received widespread publicity. He was representing George Anyona, who had been arrested shortly after he had publicly defended the formation of a second political party in Kenya. Mr Khaminwa attempted Mr Anyona's release by filing a writ of *habeus corpus*, but was unsuccessful.<sup>30</sup> The other case involved a German business man with a civil claim against the Attorney-General of Kenya, Joseph Kamere, who had impounded an automobile and equipment owned by the German business man. Mr Khaminwa obtained a court order directing Mr Kamere to return the automobile and the equipment. Mr Khaminwa's arrest was a serious threat to the independence of the legal profession in Kenya which was highlighted in the local daily of July 20, 1982. It is clear that

29. *CIJL Bulletin*, No. 4, at p. 18.

30. *CIJL Bulletin*, No. 4, at p. 18.

the Rule of Law is not furthered when lawyers who have represented unpopular clients or causes are arrested and detained without charge or trial.<sup>31</sup> Mr Khaminwa was detained from June 3, 1982 till October 12, 1983 when he was eventually released.<sup>32</sup>

### **The African Bar Association**

The African Bar Association is a federation of national Bar Associations from English-speaking Commonwealth countries of the continent. At its third Biennial Conference in 1978 it adopted the Freetown Declaration, undertaking as its main commitment the promotion of human rights in Africa and emphasizing in particular the right of the individual to access to the courts and the observance of due process of law as well as the need to oppose laws restricting or ousting the jurisdiction of the courts and penal laws having restrictive effect. At its fourth Biennial Conference, held in Nairobi from 27 July to 1 August 1980, were present delegates from twelve nations: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Sierra Leone, Tanzania, Uganda, Zambia and Zimbabwe. The theme of the Conference was "Law and Democracy in Africa", under the headings: "Courts and Democracy", "Democratic Process in Africa", "Human Rights and a Written Constitution", "Human Rights of African Women" and "Human Rights and Human Development in Africa". At this Conference also the outgoing Secretary-General, Mr Amok Wako of Kenya, gave an account of the Association's efforts to promote human rights since the adoption of the Freetown Declaration of 1978. The African Bar Association participated in several preliminary meetings, one sponsored by the United Nations and the other by the Organization of African Unity, for the purpose of drawing up an original human rights instrument and a mechanism for implementing it. The outcome was the adoption of the African Charter on Human and People's Rights by the Organization of African Unity Assembly of Heads of States in Nairobi in July 1981. Moreover, the African Bar Association played an important role in the creation of the Inter-African Union of Lawyers which is a professional organization encompassing the entire continent. Another important aspect of the Association's activity was its intervention with the Governments of Ghana, Swaziland, Tanzania, Uganda and Zambia, regarding possible human rights' violations, resulting in at least two cases where detained lawyers were released from prison. This fourth Biennial Conference by the Association ended with the adoption of several resolutions concerning human rights, including one recommending the adoption of constitutional provisions limiting the term of office of the President or Chief Executive of a country, another recommending greater involvement of women in decision-making and yet another calling upon member Bar Associations to work towards the ratification of the African Charter of Human

31. *CJL Bulletin*, No. 10, at pp. 5-7.

32. *CJL Bulletin*, No. 12, at p. 4.



and People's Rights and urging governments to ensure that "development policies are truly designed to enhance the advancement of rights for the people of that country." It is interesting to record here the text of a resolution on the judiciary:

"The position of the judiciary in the realization of human and democratic rights is of central importance. The judiciary because of its insecurity has not satisfactorily played its leading role in the development of the democratic process. The method of appointing judges and other judicial officers is identified as one of the factors leading to the present judicial attitude. The Conference consequently resolves:

1. That the judiciary in each member country be more assertive, innovative and bold on fundamental rights issues and that the legal profession in each member country must be represented in each judiciary service commission and should play an active role in the appointments of judges;
2. That the appointing of judges on contract derogates from and strikes at the very core of democratic process and judicial independence. Judges must therefore normally be appointed on a permanent basis and their security of tenure constitutionally agreed."

The Association also established an ABA Human Rights Committee to have constituent meetings in each member country. Its main function is to "educate the public on their fundamental and human rights and to supervise and monitor the enforcing and breaches of human rights in member countries."<sup>33</sup>

Another conference of great interest to the African legal profession was the World Conference on the Independence of Justice, held in Montreal, Canada, from 5 to 10 June, 1983 and attended by delegates from five continents and over 20 international organizations and professional bodies, including international courts. The Conference was organized by the former Chief Justice of the Superior Court of Quebec, Jules Deschênes. It ended by adopting the Universal Declaration on the Independence of Justice, which was later submitted to the United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities. The five commissions into which the Conference was divided consisted of international judges, national judges, lawyers, jurors and assessors, as well as the representatives of the International Commission of Jurists and the Centre for the Independence of Judges and Lawyers.<sup>34</sup>

Finally, mention must be made of the 19th Biennial Conference of the International Bar Association, held in New Delhi from 17 to 23 October, 1982, when the two main topics of the Conference were: "The Eighties – The Challenge to the Legal Profession and the Judiciary" and "Legal Problems of Investment by International Companies in Developing Countries".

33. *CIJL Bulletin*, No. 8, at pp. 15-17. See also, *CIJL Bulletin*, No. 7, at p. 27, dealing with the Geneva meeting on the Independence of Lawyers which was attended by some 11 international organizations, including the Inter-African Union of Lawyers, on 13 March 1981.

34. *CIJL Bulletin*, No. 12, at pp. 13 and 27-57.

Two separate plenary sessions were devoted respectively to the judiciary and to the legal profession.

At that Conference the International Bar Association's Project on Minimum Standards of Judicial Independence successfully completed its task. The standards were adopted and were to be known as the Delhi Minimum Standards of Judicial Independence. The project had been undertaken by the Administration of Justice Committee of the General Practice Section of the International Bar Association. Dr L. M. Singhvi, UN Special *Rapporteur* on the Independence of Judges, Lawyers, Jurors and Assessors, in his valedictory remarks, congratulated the International Bar Association on its adoption of the standards and noted the contributions these standards would make to the reaching of a worldwide consensus. The International Bar Association's project plans to undertake the preparation of a report on compliance with the minimum standards of the judiciary in various countries. The minimum standards of judicial independence consisted of 56 detailed provisions<sup>35</sup> which should serve the African Bar Association particularly well as a useful *vademecum* for its future work.

35. *CIJL Bulletin*, No. 11, at pp. 22-23.