THE RULE OF LAW AND THE ROLE OF THE LAWYER.*

In the post-war world the Rule of Law has become something of a catch-cry. It has been an element in the cold war. Yet the Western world justly regards the circumstance that, by and large, Western society is characterised by the Rule of Law as a most important distinguishing feature between it and the Communist world .The latter being founded upon dictatorship, authoritarianism and, at least under Stalin, tyranny does not appear to enjoy the advantages of freedom, certainty and justice under the law to anywhere near the same extent to which they exist in the West.

It is true that, since Stalin, some attention has been given, so we are told, to the establishment of a system of "socialist legality" which appears to be a move in the direction of the Rule of Law.

However, the rest of the world believes that, under Communism, the ordinary citizen cannot be sure that there will be in all cases, for the determination of his case, a known principle of law, generally applicable and administered by an impartial tribunal which is bound to give a hearing to those affected by it. An independent judiciary administering justice without fear or favour is not believed to exist because the State's wishes or interests in any particular case may turn out to be the supreme law and there is no independent legal profession to fight for the rights of the citizen against the State and, if need be, against the Bench itself.

In this situation the Western world, in struggling against the Communist world, has been engaged in what is called a battle for the minds of the peoples in the vast under-developed areas. The Afro-Asian countries are offered the choice, among other things, of Rule of Law institutions on the one hand, or Communist methods of rule and government on the other. The Western heritage, with its modern emphasis on democracy, freedom, political and civil rights—human rights in general—includes as a central and cherished characteristic the Rule of Law. The two opposing ideologies are different in many respects and not the least in relation to the rule and role of law, the administration of justice and the position, power and social significance of the legal profession. It is understandable, therefore, that Western governments, international organisations such as the Human Rights Commission and private bodies such as the International Commission

* A paper read at the 1965 Law Summer School held at the University of Western Australia. Both this paper and the following one were prepared and delivered independently of each other.

of Jurists, in the general struggle of ideologies, give great prominence to the Rule of Law.

The Rule of Law is not an abstract thing in this struggle of ideologies. It is not merely a notion for the organisation of the administration of justice to be considered as a kind of political abstraction. In the developing countries a most significant part of the battle is over the role of economic planning. Planning is now commonly accepted everywhere; but in the developing countries it is strongly argued by some that the plan is the supremely important thing. Nothing must be allowed to stand in the way of fulfilling the plan and producing the most rapid economic development possible. Forced labour is said to be permissible by those who argue in this way and human rights, political and civil, are relatively unimportant; they can wait until there is sufficient economic progress. Fortunately these arguments, which are part of the justification of Communist methods of economic organisation, are not well received in the developing countries.

By and large a great number of those countries adopt democratic methods of economic planning and, accordingly, believe that political and civil rights, established and protected under the law, need not await successful economic development. There are, nevertheless, always two schools of thought about these matters and it is for this reason that the debate about the Rule of Law and its necessary features and prerequisites is such an important part of the current ideological struggle. On any view of the matter, economic planning and the great emphasis given to government activity in the economic field, even under a democratic system, have in the new countries subjected classic Rule of Law ideas to much stress and strain. What has emerged is of considerable significance for our present discussion.

It is in this international context that we must take up the subject which demands constant attention throughout the whole world today—"The Rule of Law and the Role of the Lawyer." We have to keep under continuous review the role of the lawyer and the position of the legal profession in the Western world and in our own society, because it is essential that we should not allow the necessary features of our own Rule of Law system to be undermined whilst we are endeavouring, with others, to persuade the Afro-Asian countries and even, in the long run, the Communist countries to adopt it.

Before coming to consider the role of the lawyer in countries such as our own, where the Rule of Law substantially speaking exists, and before endeavouring to assess the extent to which the real enjoyment of the Rule of Law depends upon the existence and availability of a free and independent legal profession, it may be useful to con-

sider some points arising in relation to the Rule of Law in the developing countries where the battle between the ideologies is more critical than in our own country. In this way we may learn some lessons and isolate some important points for checking and consideration when we turn to look again at what is happening in Australia. There is no better way of ascertaining the essential features of the Rule of Law in the modern world than by examining the problems that arise when attempts are made to establish it in the emerging countries. The tests of the reality of its existence in such countries can then be applied in Western countries in order to see what departures from, or threats to, the Rule of Law, if any, are developing.

It would be useful to undertake this task after having reminded ourselves of some of the basic principles of the Rule of Law as enunciated in the proceedings of the International Commission of Jurists, an institution "devoted to the Rule of Law." In the Act of Athens in 1955 "free jurists from forty-eight countries" declared, *inter alia,* that the State is subject to the law, that governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement. Judges should be guided by the Rule of Law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence as judges. Finally, and this is most important for our present purposes, lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.[1]

At Delhi in 1959, the Report of the 4th Committee of the International Congress of Jurists coming from fifty-three countries, and organised by the International Commission of Jurists stated that it is essential to the maintenance of the Rule of Law that there should be an organised legal profession free to arrange its own affairs and that "wherever a man's life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation."[2]

Clause X of the Report of the 4th Committee at Delhi is as follows:—

> "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

1 For the text of the Act of Athens see THE RULE OF LAW IN A FREE SOCIETY (Report of the International Congress of Jurists, New Delhi, India, 1959) at 2.

2 *Ibid.,* at 13.

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 assess 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 dissociated from the question of adequate remuneration for the services rendered. The primary responsibility rests on the legal profession to sponsor and use its best effort 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."[3]

It will be seen from what has so far been said that the right to legal representation and advice is regarded as fundamental where life, liberty, property or reputation are threatened. If the person threatened is unable to pay for proper legal advice and representation the remedy is most decidedly not to abolish the right to have such representation, allegedly in the interest of the impecunious person threatened, but to provide it for him. And what is provided must be adequate, sponsored by the legal profession and properly remunerated. The State must assist the legal profession in carrying out its responsibility. This is the direct antithesis of the course proposed by some in their misplaced attempts to assist the poor in relation to law and litigation. The rich have always been able to afford to protect their rights by resort to the legal profession. The poor in developed countries and, to a much greater extent, the poor in developing countries have not been and are not able to afford to do this. The remedy is not to deprive both rich and poor of legal representation but to organise things so as to give to both what only the rich otherwise could afford. The alternative course, which generally takes the form of saying that legal representation in a given type of matter is forbidden helps neither party to get a just solution according to law but encourages and permits decisions in which the law may not be properly applied and the facts may not be thoroughly analysed and investigated.

It is of the greatest significance that the International Commission of Jurists at Delhi took the course which has just been outlined because it was particularly concerned about the poorer developing countries and at Delhi decided "to give special attention and assistance

[3] *Ibid.*, at 14.

to countries now in the process of establishing, reorganising or consolidating their political and legal institutions."[4]

No one at Delhi thought that the best way of helping the poor was to abolish the right of legal representation. On the contrary careful attention was given to the provision of proper systems of legal aid. Amongst the various systems of legal aid which were discussed was that operating in the United Kingdom, conducted by the legal profession itself, with the expense met by contributions from the litigants (according to means) and by subsidy from the State. The system is based upon the free choice of legal representative by the litigant and applies to legal advice as well as representation. However, the 4th Committee at Delhi noted that the problem of the right to legal representation arises mainly in administrative matters in England. "Before certain administrative tribunals especially those dealing with industrial injuries and national insurance, a party is, in theory but not always in practice, deprived of the right, mainly in the interests of cheapness and in order not to give an unfair advantage to the other party who would probably be able to pay for more expensive advice and representation."[5]

It can be seen from the fact that the 4th Committee report saw fit to note this defect in the English system, that a big question arises about administrative tribunals as well as courts and that arguments based on cheapness and unfairness due to disparity of means have to be carefully examined. Prima facie there should seem to be no basis for distinction between proceedings in courts and before administrative tribunals so far as legal representation is concerned. If proper legal aid is provided for the one it would seem that there is no ground for not providing it for the other.

Throughout the whole Western world there has been an enormous growth, since Dicey's time, of government by regulation and of reliance upon administrative discretion in matters affecting rights and property. It is notorious that Dicey gave scant attention to the extent to which administrative law had already developed, in his day, in England and also to the powers which had already been placed under the law in administrative hands. He had not, in consequence, given sufficient though to the way in which individuals could be affected by discretionary decisions made, under the law, outside the courts. He had, further, misunderstood the droit administratif and had not seen the advantages of having some ultimate administrative Court of Appeal. The vast growth of government economic planning and regu-

4 *Ibid.*, at 3.
5 *Ibid.*, at 306.

lation and of administrative discretion since Dicey has only served to emphasise tendencies already at that time in existence and to demonstrate that, by virtue of the sovereignty of Parliament and under the Rule of Law, administrative bodies and not the courts handle a great range of discretionary decision making affecting individuals and their rights.

The International Commission of Jurists has noted that:—

> "In an age such as ours, when social organisation 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."[6]

The Report of the African Conference from which the quotation comes, went on to note that:—

> "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."[7]

The point was also made at this Conference[8] that 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 individuals' freedom, particularly in the economic field was virtually unlimited. When government planning came, the people had come to value greatly economic freedom and freedom generally. A warning note was sounded that the African masses may not be ready to see a threat to their liberties in the pursuit by the new governments of speedy wealth, education and social development.

With all this in mind, at the African Conference on the Rule of Law—Committee II, dealing with Human Rights and aspects of Administrative Law, decided that:—

> "2. While recognising that inquiry into the merits of the propriety of an individual act by the Executive may, in many

6 Report of the African Conference on the Rule of Law, (Lagos, Nigeria, 1961) at 70.
7 *Ibid.*, at 70.
8 *Ibid.*, at 70-71.

cases, not be appropriate for the ordinary courts, it is agreed that there should be available to the person aggrieved a right of access to—

(a) a hierarchy of administrative courts of independent jurisdiction; or

(b) where these do not exist, to an administrative tribunal subject to the overriding authority of the ordinary Courts.

"3. The minimum requirements for such adminisrative action and subsequent judicial review as recommended in paragraph 2 above are as follows:—

(a) that the full reasons for the action of the Executive be made known to the person aggrieved; and

(b) that the aggrieved person shall be given a fair hearing; and

(c) that the grounds given by the Executive for its action not be regarded as conclusive but shall be objectively considered by the court.

"4. It is desirable that, whenever reasonable in the prevailing circumstances, the action of the Executive shall be suspended while under review by the court."[9]

It seems from the stress which is laid upon the right of the person aggrieved to a fair hearing, from the earlier criticism of the lack of a right of representation in administrative proceedings in the United Kingdom, from the great emphasis given to the need for adequate legal aid, and from the lack of any distinction made between the ordinary courts and the administrative tribunals, that the right of representation is regarded by the various congresses and conferences of the International Commission of Jurists as extending to administrative tribunals.

At a seminar, which I was fortunate enough to attend, on Human Rights in Developing Countries recently organised at Kabul, Afghanistan by the Human Rights Division of the United Nations, the right to legal counsel was regarded as fundamental. One of the most basic prerequisites of the right to a fair trial, it was there agreed, was the existence of an adequate number of well-trained lawyers, jealous of their independence, imbued with a sense of professional ethics and fearless when faced with pressures of the government, political or economic groups or public opinion. All speakers agreed that every

9 *Ibid.*, at 17-18.

accused person and every litigant in non-criminal suits should have the right to be assisted by legal counsel if they so chose. This raised for consideration the whole question of legal aid and it was agreed that no one should be left without legal counsel if he desired such assistance but was unable to pay for it. This caused special problems in developing countries, as did the training and provision of sufficient numbers of lawyers. The system of providing legal aid by lawyers who were full-time public servants was criticised because such public agencies might, to a certain extent, tend to jeopardize the independence of the legal profession. The system of legal aid operating in the United Kingdom was discussed; some thought that many developing countries could not afford such a system. However, all stressed that the essential prerequisite for the functioning of such a system was the existence of a sufficient number of well-trained, independent and fearless professional lawyers.

One speaker in Afghanistan suggested that, in order to assist poor or uneducated litigants, who are unable to arrange properly for the gathering and proper presentation of evidence through legal counsel, or their own efforts, it might be advisable to empower judges to make more or less detailed inquiries *proprio motu* into cases. Such a practice was followed so it was said, by the French Conseil d'Etat. However, other speakers felt that the implementation of such a suggestion would require a very complicated, costly and cumbersome organisation which might exceed the capabilities, not only of developing countries, but of most developed countries as well. Others said that it would be dangerous to adopt such a suggestion because if judges descended into the forum to involve themselves in the making of investigation they might well, even subconsciously, adopt a biased view of the case. The proposal deriving from practice in the administrative tribunal in France, did not therefore commend itself to participants in the seminar.

In the discussion in Afghanistan the argument that there should, in some circumstances, be no legal representation for anyone because of poverty of some, was not put forward at all.

The consideration given to these matters, both in the proceedings of the International Commission of Jurists, and in the Afghanistan seminar on Human Rights in Developing Countries indicates that, even in emerging countries where there is much poverty and few lawyers, what every one wants is not limitation upon the right of legal representation but on the contrary proper systems of legal training and legal aid. Suggestions that legal aid should be provided by a bureaucratic legal apparatus of the State, or by the independent investigatory activity of the tribunal are not acceptable to democratic

jurists in the new countries. They want proper legal representation and aid from a fearless and independent legal profession and they appear to want it in all proceedings, whether in courts or administrative tribunals where life, liberty, property or reputation are threatened. The drive in such countries is towards training and bringing into being in sufficient numbers lawyers of independence and courage and the establishment of proper systems of legal aid which will ensure that experienced legal representation is available to all.

Expressed in a general way, the lesson to be learned from what has been said is that the Rule of Law means little unless, in the first place, all can enforce their rights and be protected in their life, liberty, property and reputation by the full applicability to all of established law and, secondly, unless the facts to which the legal rule is to be applied can be fully investigated on the merits. For these purposes, freedom under the law depends substantially upon the existence of a strong and independent legal profession and the availability of capable legal representation in all cases.

In the new countries most people interested in democratic forms of society can see the dangers inherent in the proposition that the rich should be deprived of the right to legal representation because the poor cannot afford it. Most can see that, despite the enormous economic and educational difficulties that stand in the way, the real line of progress is to provide the poor with what the rich have, not to take it away from the rich. This is the path to truth and justice and to reasonable equality and certainty in the administration of the law. Deprivation of legal representation is a move along the road to arbitrary decisions not based upon adequate and open investigation and analysis.

One would imagine from all this that in the wealthy developed countries the greatest care would be taken to ensure the right of legal representation in all courts and administrative tribunals, and that the argument based on cheapness and disparity of means would never be heard. However, this is not the case. Despite the well-recognized danger to the reality of the Rule of Law these arguments are regularly raised and additional arguments as well. The main additional argument is that the presence of lawyers adds to the length and technical complexity of cases and that forensic techniques evolved in ordinary civil and criminal cases in the courts are unsuitable techniques for many kinds of litigious issues and especially for issues arising in administrative and arbitral tribunals. The last-mentioned argument will be dealt with hereafter. For the moment the other arguments to

the effect that cheapness and disparity of means justify in some cases abolition of the right to representation will be discussed.

In Australia today there is a tendency to argue that, in some types of proceedings of an administrative kind, legal representation should not be allowed because an experienced or expert tribunal can, after hearing the parties themselves, and after making an inspection or independent investigation, make a satisfactory decision in an expeditious and cheap way. It is argued that those who can afford legal representation in such proceedings should be denied the right because the financial burden upon an impecunious opponent of providing legal representation would be too great. The obvious answer to this, which has been evolved in the discussions about the Rule of Law in developing countries, is that disparity of means should be dealt with, as it has been to a considerable extent dealt with in the United Kingdom, by a proper system of State subsidised legal aid.

The Law Council of Australia is at the present time pressing for a system of legal aid in federal matters similar to the English system.[10] It is obvious that attention will have to be given to extending such a system to administrative tribunals as well as to ordinary courts. If a full and satisfactory system of legal aid, subsidised by the State, is in existence and all have access to advice and representation by able and properly remunerated lawyers, the arguments based upon cheapness and disparity of means can be resisted.

When it comes to pressing for such a system of legal aid in a wealthy country like Australia, one is frequently met with the argument that, if such a system existed it would result in a great increase in litigation in all tribunals. A really satisfactory system of legal aid, it is argued, could not be provided because of this likely increase. Here again, enlightened persons in developing countries can see the position more clearly. They can see that very many cases are not brought and very many rights cannot be enforced because of the lack of legal advice and representation. They can see that cases which should be litigated but are not and rights which are not enforced because of such lack of advice and representation, prove that the Rule of Law is to that extent not a reality and that there is one law for the poor and one for the rich. If there would be more litigation for all kinds because of the adoption of a really effective and fair system of legal aid, if in other words this additional social service provided by a subsidised profession resulted in more cases which ought to be litigated, being litigated, this would mean that previously the Rule of Law was

10 See (1964) 1 *The Law Council Newsletter,* at 8.

not fully operating in Australia. The only question is—can we afford a really effective system of legal aid?—not whether it is needed or justifiable. Certainly increase in litigation is no argument against such a development.

It is never permissible, pending the development of an adequate system of legal aid, to submit to the argument that cheapness and disparity of means justify abolition of the right to legal representation. Nor is it permissible to adopt the view that unless legal questions arise lawyers are not necessary.

It is argued by some that technical questions, matters of fact involving expert opinion, indeed matters of disputed fact whether involving expert opinion or not, can be readily investigated and decided without legal assistance and that lawyers should be kept out because they complicate such proceedings and make them longer and more technical, both legally and in other ways.

The first answer to this kind of argument is that such matters of fact, whether in expert fields or not, are commonly before the courts in ordinary litigation in which no one argues that legal representation should be abolished. Controversy about disputed questions of fact is part of the traditional work of the lawyer. Sorting out relevant from irrelevant material, correct factual analysis, facing up to facts and balancing evidence is normal work for the lawyer. It is essential to ensure that all tribunals do this work properly and lawyers by occupation and training are a great help in such judicial investigation and analysis. It is, of course, quite erroneous to regard lawyers as experts in legal matters and not in other matters and hence of no use in technical controversy. This is to miss the whole point. What is required by the Rule of Law is that when such controversies affect rights they shall be decided after a proper hearing in which law and facts, whether technical or not, are properly investigated after hearing both sides. Lawyers are skilled in seeing that the full case of a party is properly presented and understood and that it is properly weighed and considered.

It would, however, be quite erroneous for us to assume that the forensic techniques evolved for adversary litigation necessarily lend themselves to automatic translation into the administrative field. Lengthy cross-examination of experts on credit or on expert matters is frequently unnecessary, unsuitable and unfair. It is notorious, for example, that it is very difficult to get expert economists to give evidence in the big federal wage cases because of the nature of the cross-examination to which they are subjected. Such people are

accustomed to academic debate and controversy and welcome having their arguments, theories and opinions submitted to the analysis and criticism of their colleagues in journals, lectures, seminars and so on. But this type of cross-play of expert debate takes place upon a thoughtful and considered basis. It will be necessary for lawyers, both on the Bench and at the Bar, to evolve techniques to enable experts to make their opinions known and to have them answered and analysed by the other side in an intellectual way if experts are to be willing to participate in arbitral proceedings. Strong *ad hominem* cross-examination and questions designed to trap an expert, *viva voce* questioning which does not allow time for careful thought and consideration and for consultation of books and authorities; all these techniques of a forensic kind tend either to drive the expert out or to produce a successful campaign to get rid of the lawyer. If the lawyer is to stay he is going to have to reconcile himself to new techniques of analysis and investigation not known in the common law courts.[11]

There was very strong criticism of the role of the lawyers in the television inquiries where lengthy cross-examination on credit and other matters was resented by businessmen who believed that much of what was done was not useful and did not help the inquiry. Whether this be so or not, a lot of new thinking has to be done on the role of cross-examination in administrative proceedings and on the whole range of forensic techniques and their applicability to administrative tribunals. This is not the place to go into the complex subject in detail. But we are examining the role of the lawyer in relation to the Rule of Law and if we wish to make out a case for legal representation before administrative tribunals as well as before the ordinary courts, it will not be enough to rely on so-called axioms about the role of lawyers. We shall have to demonstrate by adjusting our techniques and methods that we can assist in factual investigations and analyses and that the Rule of Law is aided and assisted in administrative cases by our presence. There are some who think that the business community has been to a considerable extent driven out of the ordinary courts by delays in the administration of justice, by lengthy cases and by the consequences of the adversary system of litigation. Whether this be so or not lawyers have to persuade others that their presence guarantees the Rule of Law and their absence threatens it. To do this they have constantly to put and keep their house in order.

11 For a discussion of the use of forensic techniques in general wages cases in the Commonwealth Arbitration Commission and of the role of experts see Kerr, *Procedures in General Wages Cases in the Commonwealth Arbitration Commission,* (1961) 3 JOURNAL OF INDUSTRIAL RELATIONS, 81-93.

Having said this it is nonetheless of vital importance to realise, as many democrats in developing countries realise, that the right to legal representation is fundamental both in the ordinary courts and in administrative tribunals. In the United Kingdom and in other countries which derive their institutions from the United Kingdom, the extraordinary influence of Dicey resulted in a generation of lawyers putting far too much effort into fighting a losing battle to protect the Rule of Law by preventing too much resort to delegated legislation and administrative discretion. It would have been much better to accept the inevitable and to concentrate upon ways and means of ensuring that administrative decisions made under statutory authority were fair and honest and correct. We should have been concentrating much more than we did, during the last thirty or forty years, upon administrative law, review of administrative decisions both on law and merits, appellate administrative tribunals and means such as the ombudsman for discovering possible administrative error or injustice affecting the individual. In all these fields the lawyer has an important role to play especially in representation in administrative tribunals. If adjustments of technique are necessary let them be made but let the lawyer not abdicate from the administrative field where he is so much needed and where he has such an important role to play in the modern world of collectivism and economic planning and development. This will have to be borne in mind in connection with the proposed legislation on restrictive practices.

Our discussion of this subject—"The Rule of Law and the Role of the Lawyer"—started with recognition of the central importance of Rule of Law ideas in the current ideological struggle. We then noted the importance of such ideas in the work of the Human Rights Division of the United Nations and in the International Commission of Jurists. Having learned what we could about modern developments in relation to the Rule of Law from the deliberations of such bodies and from the problems being faced in developing countries we turned to the situation in Australia in order to make the basic point that legal representation is essential both in ordinary courts and in administrative tribunals and it should be ensured by the establishment of proper systems of legal aid. The role of the lawyer is still the essential condition for the true realisation of the Rule of Law.

However, we should, before winding up our discussion, return to the international context in which the Rule of Law is playing such an important part. In considering the role of the lawyer in connection with the Rule of Law we would be very wrong indeed if we confined our attention to the role of the lawyer as a private advocate in

litigation and controversy between parties. The lawyer also has his role to play on the international stage. The lawyer, both as an individual and within the professional organisations to which he belongs, is able to help to spread the gospel of the Rule of Law throughout the world. It is not accidental that there has been an enormous growth in international legal activity since the last war. The work of the International Bar Association, the International Commission of Jurists, the International Law Association, the Legal Conference of the British Commonwealth and of various Regional legal bodies, and the work of the Division of Human Rights of the United Nations have demonstrated the very significant role of lawyers in spreading Rule of Law methods and in helping to ensure that the legal profession everywhere will be well educated and trained both in law and legal ethics and that it will be strong, fearless and independent.

The legal profession in Australia has played its full part in this international legal activity. Indeed the year 1965 marks the full maturity of the Australian legal profession in this field of work. We are not only organising and holding in Sydney what will be a very important legal conference—the Third—of the British Commonwealth, but we are playing the leading role in bringing into existence a Regional Law Association for Asia and the Far East.[12] We are also accepting, as the United Kingdom legal profession has always done, a role of leadership in establishing an independent legal profession in a colonial area. In our case the colonial area is New Guinea which is moving towards independence and needs, as all other newly developing countries need, an independent and strong indigenous legal profession. The Law Council of Australia, as the organised body of the Australian profession is most active in all these fields and calls upon the help and assistance of very many Australian lawyers in its work.

It may be useful to give an outline of what the Law Council has done to help produce, over the years to come, a sound indigenous legal profession in New Guinea. It sent a committee to New Guinea to investigate the problem on the spot and later submitted a report to the Commission on Higher Education for New Guinea, of which Sir George Currie was the Chairman. That report dealt with the subject of legal education for the New Guinea people. It recommended that a Law School should be established within the Territory at the earliest possible moment as part of a University covering comprehensively the reasonable needs of the inhabitants in professional and

12 For a full account of the proposed Regional Law Association for Asia and the Far East see (1964) *Australian Bar Gazette,* 6, and (1964) 1 *Law Council Newsletter,* 7.

academic disciplines. It also recommended that pending the establishment of a Law School as many matriculants as it is humanly possible to obtain should be trained in Australian Law Schools each year, commencing in 1964 and every year thereafter until the local school begins to function.[13]

The following two passages from the Law Council's Report are not irrelevant in the present context:—

> "The need is not only for a profession competent to the tasks of barristers and solicitors, but for men trained in the role of law and understanding the rule of law who might . . . be expected to lend stability to politics and who will in the not too distant future have to provide candidates for ministerial, administrative and judicial offices which are second to none in importance in a free and stable society."

and

> "Law is so intimately connected with the distribution exercise and control of political power in every field, and with the protection of individual liberty in the clash of political factions, that the need for indigenous lawyers may soon be more keenly felt than the need for indigenous practitioners of other professions which may be further removed from political conflicts."

These two passages should be weighed very carefully in the light of the fact that there is not yet a single indigenous law graduate in the Territory.

In submitting the Law Council's Report to the Commission on Higher Education I was given the opportunity, on behalf of the Council, to give evidence to the Commission. In doing so I presented evidence prepared by the Law Council's Committee, supplementary to its report. Included in that evidence was the following passage:—

> "The importance of the first dozen or so professionally trained indigenous lawyers cannot be over-emphasized. As the most experienced and mature members of the profession, they will be the obvious candidates when it is sought to appoint indigenous Law Ministers and Judges. In the meantime they will be uniquely qualified to contribute to the political life of the Territory in a period of critical constitutional development. They will, by the traditions they establish and the examples they set, greatly influence, if not determine, the future standards of the profession. It will depend on them particularly to establish that tradition of

[13] For the full text of the Report submitted to the Commission see *Legal Education in Papua and New Guinea,* (1964) 1 *Law Council Newsletter,* 4.

a strong fearless and honourable profession, independent alike of of the Government and of the Bench, which is a prerequisite of justice and liberty."

The Law Council's submissions were adopted in full by the Commission and published as an Appendix to its report.[14]

The problem of establishing the Rule of Law in a country such as New Guinea so as to ensure its survival after independence is an extraordinarily difficult one. I have repeatedly referred to the situation in developing countries and to the various factors affecting the situation in such countries. In particular I have given some account of the attitudes and opinions of democratically minded jurists from those countries on the necessary conditions for guaranteeing the realization of the Rule of Law. It is important, however, especially when we are considering the same questions in relation to New Guinea, not to over-estimate the degree of success which has been achieved in the developing countries. The difficulties are great and there are some who think that since independence in many such countries there has been a decline and not an advance in the establishment of the Rule of Law. It would be wrong for the assumption to be made that in the Afro-Asian countries the necessary conditions for real enjoyment of the Rule of Law are commonly understood. My intention has been merely to make the point that enlightened lawyers in those countries appreciate what is involved. Whether their point of view can prevail against pressure for rapid economic development, one-party political systems, lack of trained lawyers and adequate legal aid, and the weak status of the legal profession is doubtful. There are lessons in all this for us when we handle New Guinea policy and, as I have tried to show, in strengthening the Rule of Law even in Australia.

The Law Council of Australia, as has already been noted, is also doing its best to see that a sensible and fair system of legal aid operates throughout Australia. It hopes to see a modern legal service established, not on bureaucratic lines, but run by the profession and subsidised by the State, as in the United Kingdom. Under such a legal social service the profession would be fairly remunerated but would make a contribution by charging fees to some extent less than normal fees. In this way the Law Council hopes to make a contribution to the real enjoyment of the Rule of Law in Australia.

A great deal could be said about the role of the lawyer in spreading the idea of the Rule of Law far and wide throughout the

14 For a review by the present author on the Report of the Commission on Higher Education for Papua and New Guinea see Kerr, *Higher Education in New Guinea,* (1964) 18 THE AUSTRALIAN OUTLOOK, 266.

world, but enough has already been said to make the point that what is being done by the Law Council on the international stage is very much worth doing. This is so not merely because the basic requirements of justice are a gift which the Western world has to offer to all but also because, in the process of persuading as many as possible to accept that gift, we are forced to re-examine what it is we are offering and to look again at what we are ourselves doing with this heritage handed on to us in earlier days. The role of the lawyer, in relation to the Rule of Law, is to ensure that it really operates at home and that, as far as possible, it is accepted in other countries. It is, above all, our duty to keep the whole subject under constant review, to see that we adjust to change whilst keeping the essential heritage intact and that we resist the temptation to believe that every thing worth knowing about the subject was said long ago. The role of the lawyer is to keep the whole notion of the Rule of Law relevant and up-to-date. Our duty is to be contemporary both at home and in our help to others.

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