

THE RULE  
OF LAW  
IN A  
FREE  
SOCIETY  
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# The Rule of Law in a Free Society

INTERNATIONAL  
COMMISSION

OF  
JURISTS

GENEVA

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THE RULE OF LAW IN A FREE SOCIETY

A REPORT ON THE INTERNATIONAL CONGRESS

OF JURISTS, NEW DELHI, INDIA

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*Prepared by*

NORMAN S. MARSH

*M.A., B.C.L., of the Middle Temple,*

*Barrister-at-Law, Fellow of University College, Oxford,*

*Sometime Secretary-General of the International Commission of Jurists,*

*Director-Elect of the British Institute of International and Comparative Law*

*With a Foreword by*

JEAN-FLAVIEN LALIVE

*LL.D., A.M.,*

*Secretary-General of the International Commission of Jurists,*

*Member of the Geneva Bar,*

*former First Secretary of the International Court of Justice*

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## FOREWORD

The International Commission of Jurists is happy to submit to its friends the complete Report on the International Congress of Jurists held in New Delhi, India, on January 5-10, 1959. This event climaxed a long and thorough endeavour to define and describe within the context of modern constitutional and legal practice the Rule of Law, a notion familiar to lawyers of many different legal systems but too often viewed as a phrase of uncertain meaning.

The International Commission of Jurists regards the Rule of Law as a living concept permeating several branches of the Law and having great practical importance in the life of every human being; constitutional law, administrative law, criminal law, the organization and function of the Judiciary and of the Bar are typical of them and were therefore chosen as main subjects on the agenda of the Congress. Problems of international law were not, as such, considered at New Delhi although the Rule of Law is of course of great significance for the orderly conduct of relations between States.

The impressive list of participants and the inspiring setting of this event in the capital of a country long renowned for its determined search for peace under justice in its foreign relations and for a faithful adherence to the principles of the Rule of Law in its internal administration have attracted wide international attention to the deliberations of the Congress. Its proceedings in plenary sessions and committees are presented in this volume. It is generally recognized that the *Declaration of Delhi* and the *Conclusions* elaborated by the four Committees of the Congress represent a major achievement in the effort to formulate the Rule of Law and to specify its role in our changing world.

As stated in its Statute, the International Commission of Jurists has been since its inception "dedicated to the support and advancement of those principles of justice which constitute the basis of the Rule of Law". Its establishment was closely related to the apprehension felt in international legal circles over the denial, after the Second World War, of fundamental rights to individuals in a number of countries. Pledging itself to foster understanding of and respect for the Rule of Law, the Commission set out to uphold the best traditions and the highest ideals of the administration of justice. It believes that by mobilizing the jurists of the world in support of the Rule of Law, it will advance respect for fundamental freedoms and recognition of the civil and political rights of the individual;



it also strives to fortify the independence of the Judiciary and of the legal profession, two cornerstones of equal justice under law.

The early stages of the Commission's activities revealed that while there was agreement on how the Rule of Law ought to manifest itself in its daily application, there were some differences of emphasis with regard to certain specific institutions and procedures. These differences notwithstanding, the Commission held that the term Rule of Law stands for a universally applicable set of principles, joined by respect for the individual and by abhorrence of any arbitrary rule withdrawn from effective control by the people over whom it is exercised. Its applicability is therefore not limited to a specific legal system, form of government, economic order or cultural tradition, as long as the State is subject to law and the individual assured of respect for his rights and of means for their enforcement.

These were the ideas underlying the Commission's first International Congress in Athens in June 1955. Its theme was "to consider what minimum safeguards are necessary to ensure the just Rule of Law and the protection of individuals against arbitrary action by the State." The outstanding result of thorough discussions in four committees and plenary meetings was the acceptance of the *Act of Athens*, a document that laid the groundwork to the Commission's worldwide undertaking to formulate a statement of the principles of the Rule of Law.\* A section of the present Report refers to the many activities initiated by the Commission in implementation of this mandate. The participation of lawyers from forty-eight countries who attended the Congress in Athens stimulated an exceptionally broad response to the Commission's first step, an international inquiry based on a detailed Questionnaire the purpose of which was to establish common ground for the definition and elaboration of the Rule of Law. (See pp. 183-186 below.)

The Congress of New Delhi that followed in January 1959 highlighted two years of effort by the Commission's Secretariat, National Sections and Working Groups in many countries. The Working Paper presented to the participants before the actual beginning of their discussions and reproduced here on pp. 187-321 confirmed that the Rule of Law is not solely an attribute of one specific legal system or an obsolete concept from the past; that, on the contrary, the principles which it embodies have a general and timeless application: from a technical legal formula concerned with the protection of the individual against arbitrary action of the government, the Rule of Law thus rose to symbolize justice in a sense going beyond its purely forensic meaning. It has also acquired a new dimension inasmuch as it laid out the terms of a new relationship between the State and the individual. The "dynamic concept" which the Rule of Law became in the formulation of the *Declaration of Delhi* does indeed safeguard and advance the civil and political rights

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\* The *Act of Athens* is reproduced on p. 2 below.

of the individual in a free society; but it is also concerned with the establishment by the State of social, economic, educational and cultural conditions under which man's legitimate aspirations and dignity may be realized. Freedom of expression is meaningless to an illiterate; the right to vote may be perverted into an instrument of tyranny exercised by demagogues over an unenlightened electorate; freedom from governmental interference must not spell freedom to starve for the poor and destitute. This social content of the Rule of Law and the recognition of the necessity to make law and find law with due regard to the everchanging conditions of human existence expands the concept of the Rule of Law from the limited scope of static notions and approximates it with the Rule of Life, as postulated by Prime Minister Jawaharlal Nehru in his memorable opening speech at the Delhi Congress.

It was no mere coincidence that the Congress in Delhi was attended by a majority of participants from Asian and African countries. Long before the opening of its proceedings it was apparent that the Commission's concern with a modern conception of the Rule of Law in a changing world has a particularly strong appeal for lawyers from States hitherto restricted in developing their own independent national institutions. They, more than many jurists of older countries, realize that the idea of Law and Justice cannot be separated from the basic features of community life – the need for economic expansion, for instance, bridging centuries of inaction and producing a great many educational and sociological problems, is closely related to fundamental issues of human rights. Whilst governmental responsibility for social progress of the nation as a whole may temporarily curtail the fullest enjoyment of some freedoms of the individual, social action must never serve as a pretext for imposing and maintaining State supremacy to the detriment of civil liberties.

On the other hand, another important problem which was raised by a number of Asian and African lawyers in New Delhi was the fact that the realization and preservation of the Rule of Law presupposes a good and honest government working with a high degree of efficiency. Can the Rule of Law be fully operative in those States where for instance a well-trained administration and a strong independent Judiciary have not yet entirely evolved?

Mahatma Gandhi once remarked that self-government is better than good government. Now that all nations in the world have acquired or are about to achieve independence, the emphasis of this axiom should shift to the requirement of good government. In these circumstances it is obvious that the best government is a government under the law.

It has been strongly suggested that new countries whose constitutional system and legal institutions are still in a state of flux cannot adopt the elaborate Western pattern of checks and balances which maintains the equilibrium between the power of, and control over,

the three branches of government. The recognition of this argument under given specific conditions and the resulting increased authority of the Executive do not *per se* affect the operation of the Rule of Law. It is the balance between the interest of the citizen and the security of the State that is the vital prerequisite for its firm establishment and maintenance. One of the main problems of our times is how to reconcile these two requirements and the participants in New Delhi strongly felt that this was possible and, indeed, imperative.

In early 1961, the International Commission of Jurists will hold an African Conference on the Rule of Law, in Lagos, Nigeria. The topics on the agenda express the particular preoccupation of jurists with the relationship of the State and the individual in national societies undergoing a revolutionary development and creating institutions commensurate with their newly acquired sovereign rights. The Conference – although regional in its scope – will thus be a logical continuation of the efforts of Athens and Delhi; it will project the vital components of the Rule of Law as earlier formulated in general terms against the background of a dynamic reality represented by the newly emancipated African Continent. In countries where firm legal traditions have still to be established and where the complexity of simultaneous economic, social and political tasks strains the imagination of the observer, the Rule of Law is undergoing the crucial tests of its modern meaning. The warm response with which the Commission's activities and publications have been meeting in Africa has already indicated the outcome: the Rule of Law as formulated in Delhi is not a weapon to protect vested rights and to stifle social progress. It is in fact a living instrument devised to suit the requirements of justice under conditions of man's accelerated march towards freedom and happiness.

The Conference in Lagos will examine the question of Human Rights and Government Security in relation to various aspects of criminal and administrative law; it will also discuss the responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society. These topics are of universal importance and their discussion must necessarily extend beyond the confines of the African Continent. It is with this global nature of the Rule of Law in mind that the Commission initiated in implementation of the Conclusions of Delhi another major project, a *Survey on the Rule of Law* as a basis for a periodically revised balance sheet on the actual state of the laws and proceedings in individual countries. At the time of the first Questionnaire, 1957, the Commission was advancing towards an extensive definition of the Rule of Law. Now, the Congress of Delhi has laid down in some detail the desirable standards and an inquiry of a different type is necessary for the purpose of measuring existing legal systems against those standards. The Commission expects to gather all relevant information on the observance of the Rule of Law in the countries of the world and to serve eventually as a clearing house of new legal thought and practice.

Instances of such activity are already on record; e.g. the international interest in the institution of the Scandinavian Parliamentary Commissioner for Civil and Military Government Administration (Ombudsman) was largely stimulated and promoted by the Commission and some of its National Sections. (See articles in the *Journal of the International Commission of Jurists*, vol. I, No. 2 and vol. II, No. 2).

This enumeration of the expanding activities of the International Commission of Jurists reflects the impetus imparted to its work by the success of the Congress of Delhi. The Rule of Law has acquired an importance and urgency affecting the daily work of every practicing lawyer, judge, teacher of law and jurist in public service. Its social content has a direct bearing on the general public as evidenced by many communications reaching the Secretariat from institutions as well as from individuals from all walks of life. Many write to express their support of our principles; others wish to point to practices contrary to the Commission's concept of the Rule of Law. These complaints do not go unnoticed. The standards of conduct set by the *Conclusions* of Delhi exercise an influence even in countries whose legal system expressly or impliedly denies the validity of the ideological and moral foundation of the Rule of Law, namely its concern for individual human rights. The growing prestige of the Commission has enabled it to take effective measures on behalf of peoples or groups suffering from or threatened by general and systematic injustice. It became apparent that most governments and their leaders are responsive to the pressure of international public opinion and desirous of maintaining or establishing the reputation of a legal State. The Commission will continue to give aid and encouragement to those peoples to whom the Rule of Law is still denied and will expose abuses of justice wherever and by whomsoever they may be committed.

The gradual acceptance of the Rule of Law as applied to daily practice by the *Conclusions* of Delhi, will, it is believed, give rise to those "general principles of law recognized by civilised nations", which, stemming from the concordance of provisions in different national legislations, constitute, according to Article 38 of the Statute of the International Court of Justice, one of the three main sources of international law. In other words, it is believed that in concentrating its efforts on the development of domestic law, the Commission is also contributing to the growth and recognition of international law which will take stronger roots in the firm ground of the legal communities of individual States than in an international codification. This, it is submitted, is the organic way towards the establishment of a world Rule of Law. Its progress may perhaps appear less spectacular, but the foundations on which it rests are more solid and less apt to bring about disappointments caused by over ambitious plans devoid of the indispensable groundwork of the Rule of Law practised on the national level.

A series of concrete examples illustrating the impact of the

Commission's promotion of appropriate national legislation and administration of justice could be given, but one or two must suffice. They indicate a trend which points the way towards the acceptance of a common denominator of the Rule of Law in the practice of individual States. The Minister of Justice of one Latin American Republic wrote to the Commission that the frame of reference of a committee of experts and members of Parliament entrusted with the complete revision of his country's Code of Criminal Procedure was based upon the *Conclusions* of Delhi (Committee III); in a number of other countries, Bar Associations have decided to press for adoption of regulations regarding the rights and duties of the legal profession following the pattern set by the findings of Committee IV of the Delhi Congress.

In parts of the world, such as Europe and Latin America, the issue of adequate safeguards of human rights has been already approached on an international level and a sound basis was found to exist for multinational conventions and an appropriate machinery of enforcement. Here, most of the principles and rules involved have already achieved recognition by all countries of a given area and the progress towards international codification is the logical next step which the Commission has supported and continues to promote whenever objective conditions justify hopes of a successful and permanent solution. It is gratifying to note that the new Constitution of Nigeria includes many provisions of the European Convention of Human Rights of 1950 and it is to be hoped that the practice of co-ordinating internal human rights legislation of new countries with existing international conventions will provide a new and valuable safeguard of their strict observance by individual States.

The International Commission of Jurists presents to the readers the Report of the New Delhi Congress in the awareness that the intervening period has amply proved the correctness of the creative legal thinking reproduced on the following pages. The scheme devised for the preparation of the material was based on two main considerations: firstly, to acquaint the reader with the activities that preceded the Congress and with the main trends of thought developed during its actual deliberations; secondly, to give a brief outline on the background and organization of the Commission. The first part of this task was assumed by Mr. Norman S. Marsh, who prepared the summary of the proceedings in the four Committees and in the plenary sessions of the Congress from a complete tape-recording of all meetings and discussions. There was added to this account a list of participants and the programme of the Congress. The section dealing with the preparatory stage of the Congress contains the Questionnaire on the Rule of Law and the Working Paper prepared by Mr. Marsh on the basis of answers received to that inquiry.

The basic facts on the International Commission of Jurists which wind up this volume, are reprinted from a brochure prepared

by the Secretariat of the International Commission of Jurists.

In concluding, I would like to express here again the Commission's gratitude to Mr. Marsh, its former Secretary-General and the present Director of the British Institute of International and Comparative Law, whose initiative and scholarship have contributed so greatly to the Commission's work on behalf of the Rule of Law.

JEAN-FLAVIEN LALIVE

## PREFACE

In presenting this Report I would like to take the opportunity of thanking the many individuals and organisations without whose assistance, so freely given, the extensive preparation for the Congress of New Delhi, the Congress itself and this Report would not have been possible. I am particularly indebted to the Governing Body of University College, Oxford, whose generous grant of two and a half years' leave of absence enabled me to take up the appointment as Secretary-General of the International Commission of Jurists. To the latter body, and especially to its Executive Committee, I would wish to express my deep appreciation of the wide freedom and unfailing support accorded to the Secretary-General in the direction of the Commission's affairs. Having to leave the Commission before the culmination of its work on the Rule of Law at New Delhi, I have been very fortunate in having as my successor Dr. Jean-Flavien Lalive, who together with the Administrative Secretary, Mr. Edward Kozera, strived incessantly and with outstanding success to make the Congress of New Delhi a significant legal occasion.

The basis of discussion in the four Committees of the New Delhi Congress was the Working Paper which is printed on pp. 187-321 of this Report. In the preparation of the first draft of this Paper at The Hague I was greatly assisted by Mr. George Dobry, M.A. (Edinburgh), of the Inner Temple, Barrister-at-Law, Mr. Sompong Sucharitkul, M.A., D.Phil. (Oxford), Docteur en Droit (Paris), LL.M. (Harvard), of the Middle Temple, Barrister-at-Law, formerly Professor in the Universities of Chulalongkorn and Tammasart, Bangkok and Mr. R. van Dijk, Ph.D. (Cambridge), LL.M. (Leyden), and by the secretarial labours of the staff of the Commission. The final version of the Working Paper prepared after my return to Oxford owes much to the devoted work of my Secretary, Mrs. Joyce Mangeolles.

A Report which deals with the laws of many countries and has been compiled from material from several languages is likely to contain some inaccuracies and misunderstandings. For these I must ask indulgence. For the spirit of the undertaking the International Commission of Jurists may reasonably expect sympathy. For the practical development of its work on the foundations laid at New Delhi I hope that it will have an increasing measure of world co-operation.

NORMAN S. MARSH

University College, Oxford

## ACT OF ATHENS

We free jurists from forty-eight countries, assembled in Athens at the invitation of the International Commission of Jurists, being devoted to the Rule of Law which springs from the rights of the individual developed through history in the age-old struggle of mankind for freedom; which rights include freedom of speech, press, worship, assembly and association and the right to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.

Being concerned by the disregard of the Rule of Law in various parts of the world, and being convinced that the maintenance of the fundamental principles of justice is essential to a lasting peace throughout the world,

Do solemnly Declare that:

1. The State is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
3. Judges should be guided by Rule of Law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties on their independence as judges.
4. 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.

And we call upon all judges and lawyers to observe the principles and

Request the International Commission of Jurists to dedicate itself to the universal acceptance of these principles and expose and denounce all violations of the Rule of Law.

Done at Athens this 18th day of June, 1955.



## DECLARATION OF DELHI

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This International Congress of Jurists, consisting of 185 judges, practicing lawyers and teachers of law from 53 countries, assembled in New Delhi in January 1959 under the aegis of the International Commission of Jurists, having discussed freely and frankly the Rule of Law and the administration of justice throughout the world, and having reached conclusions regarding the legislative, the executive, the criminal process, the judiciary and the legal profession, which conclusions are annexed to this Declaration,

### NOW SOLEMNLY

Reaffirms the principles expressed in the Act of Athens adopted by the International Congress of Jurists in June 1955, particularly that an independent judiciary and legal profession are essential to the maintenance of the Rule of Law and to the proper administration of justice;

Recognizes that the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized;

Calls on the jurists in all countries to give effect in their own communities to the principles expressed in the conclusions of the Congress; and finally

Requests the International Commission of Jurists

1. To employ its full resources to give practical effect throughout the world to the principles expressed in the conclusions of the Congress.
2. To give special attention and assistance to countries now in the process of establishing, reorganizing or consolidating their political and legal institutions.
3. To encourage law students and the junior members of the legal profession to support the Rule of Law.
4. To communicate this Declaration and the annexed conclusions to governments, to interested international organizations, and to associations of lawyers throughout the world.

This Declaration shall be known as the Declaration of Delhi.

Done at Delhi this 10th day of January 1959.

# **INTERNATIONAL CONGRESS OF JURISTS**

**NEW DELHI, INDIA  
JANUARY 5-10, 1959**

## **CONCLUSIONS**

### **REPORT OF COMMITTEE I**

#### **The Legislative and the Rule of Law**

##### **CLAUSE I**

The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.

##### **CLAUSE II**

(1) In many societies, particularly those which have not yet fully established traditions of democratic legislative behaviour, it is essential that certain limitations on legislative power referred to in Clause III hereof should be incorporated in a written constitution, and that the safeguards therein contained should be protected by an independent judicial tribunal; in other societies, established standards of legislative behaviour may serve to ensure that the same limitations are observed, and a lawyer has a positive interest, and duty to assist, in the maintenance of such standards of behaviour within his particular society, notwithstanding that their sanction may be of a political nature.

(2) To implement the principles set forth in the preceding Clause I it is essential that the powers of the Legislature be fixed and determined by fundamental constitutional provisions or conventions which:

- (a) guarantee the organisation of the Legislature in such a way that the people, without discrimination among individuals, may directly, or through their representatives, decide on the content of the law;

- (b) confer on the Legislature, especially with regard to the matters set out in Clause I, the exclusive power of enacting general principles and rules as distinct from detailed regulations thereunder;
- (c) provide for control, by the representatives of the people, over the exercise by the Executive of such subordinate legislative functions as are necessary to give effect to legislation; and
- (d) organise judicial sanctions enforcing the principles set out in this Clause, and protect the individual from encroachments on his rights under Clause III. The safeguards contained in the constitution should not be indirectly undermined by devices which leave only the semblance of judicial control.

### CLAUSE III

(1) Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.

(2) The governments of the world should provide the means whereby the Rule of Law may be maintained and furthered through international or regional agreements on the pattern of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, or otherwise. Such agreements should provide an opportunity of appeal to an international body for a remedy against denial of the rights implicit in the Rule of Law in any part of the world.

(3) Every legislature should, in particular, observe the limitations on its powers referred to below. The failure to refer specifically to other limitations, or to enumerate particular rights is not to be construed as in any sense minimizing their importance.

The Legislature must:

- (a) not discriminate in its laws in respect of individuals, classes of persons, or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes, or minorities;
- (b) not interfere with freedom of religious belief and observance;
- (c) not deny to the members of society the right to elected responsible Government;
- (d) not place restrictions on freedom of speech, freedom of assembly or freedom of association;
- (e) abstain from retroactive legislation;
- (f) not impair the exercise of fundamental rights and freedoms of the individual;

- (g) provide procedural machinery ("Procedural Due Process") and safeguards whereby the above-mentioned freedoms are given effect and protected.

#### **CLAUSE IV**

(1) The principles stated in the foregoing Clauses represent the proper aspirations of all men. Every legislature and every government should endeavour to give full effect to the foregoing principles, not only in relation to their own countries, but also in relation to any territories under their administration or protection, and should take steps to abrogate any existing laws which are inconsistent therewith.

(2) The legislatures and the governments of the world should advance by every means in their power the ultimate and universal application of the principles here enunciated.

#### **REPORT OF COMMITTEE II**

##### **The Executive and the Rule of Law**

The Rule of Law depends not only on the provision of adequate safeguards against abuse of power by the Executive, but also on the existence of effective government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society.

The following propositions relating to the Executive and the Rule of Law are accordingly formulated on the basis of certain conditions which are either satisfied, or in the case of newly independent countries still struggling with difficult economic and social problems are in process of being satisfied. These conditions require the existence of an Executive invested with sufficient power and resources to discharge its functions with efficiency and integrity. They require the existence of a Legislature elected by democratic process and not subject, either in the manner of its election or otherwise, to manipulation by the Executive. They require the existence of an independent Judiciary which will discharge its duties fearlessly. They finally call for the earnest endeavour of government to achieve such social and economic conditions within a society as will ensure a reasonable standard of economic security, social welfare and education for the mass of the people.

In the light of the foregoing the following propositions have been agreed upon.

#### **CLAUSE I**

In modern conditions and in particular in societies which have undertaken the positive task of providing welfare services for the

community it is recognized that legislatures may find it necessary to delegate power to the Executive or other agencies to make rules having a legislative character.

The grant of such powers should be within the narrowest possible limits and should carefully define the extent and purpose of delegated legislation and should provide for the procedure by which it can be brought into effect.

Public emergency threatening the life of a nation may require extensive delegation of powers. Even in such cases, however, the Rule of Law requires that every attempt be made by the Legislature to define as carefully as possible the extent and purpose of the grant of such delegated powers, and the procedure by which such delegated legislation is to be brought into effect.

In no event shall fundamental human rights be abrogated by means of delegated legislation.

#### **CLAUSE II**

To ensure that the extent, purpose and procedure appropriate to delegated legislation are observed, it is essential that it should be subject to ultimate review by a judicial body independent of the Executive.

#### **CLAUSE III**

Judicial review of delegated legislation may be usefully supplemented by procedure for supervision by the Legislature or by a committee or a commissioner of the Legislature or by other independent authority either before or after such delegated legislation comes into effect.

#### **CLAUSE IV**

In general, the acts of the Executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the Courts.

#### **CLAUSE V**

The judicial review of acts of the Executive may be adequately secured either by a specialized system of administrative Courts or by the ordinary Courts. Where specialized Courts do not exist it is essential that the decisions of *ad hoc* administrative tribunals and agencies, if created (which include all administrative agencies making determinations of a judicial character), should be subject to ultimate review by ordinary Courts.

Since this supervision cannot always amount to a full re-examination of the facts, it is essential that the procedure of such *ad hoc* tribunals and agencies should ensure the fundamentals of fair hearing including the rights to be heard, if possible in public, to have advance

knowledge of the rules governing the hearing, to adequate representation, to know the opposing case, and to receive a reasoned judgment.

Save for sufficient reason to the contrary, adequate representation should include the right to legal counsel.

#### **CLAUSE VI**

A citizen who suffers injury as a result of illegal acts of the Executive should have an adequate remedy either in the form of a proceeding against the State or against the individual wrongdoer, with the assurance of satisfaction of the judgment in the latter case, or both.

#### **CLAUSE VII**

Irrespective of the availability of judicial review to correct illegal action by the Executive after it has occurred, it is generally desirable to institute appropriate antecedent procedures of hearing, enquiry or consultation through which parties whose rights or interests will be affected may have an adequate opportunity to make representations so as to minimize the likelihood of unlawful or unreasonable executive action.

#### **CLAUSE VIII**

It will further the Rule of Law if the Executive is required to formulate its reasons when reaching its decisions of a judicial or administrative character and affecting the rights of individuals and at the request of a party concerned to communicate them to him.

### **REPORT OF COMMITTEE III**

#### **The Criminal Process and the Rule of Law**

The rights of the accused in criminal trials, however elaborately safeguarded on paper, may be ineffective in practice unless they are supported by institutions, the spirit and tradition of which limit the exercise of the discretions, whether in law or in practice, which belong in particular to the prosecuting authorities and to the police. Bearing that qualification in mind, an attempt has been made to answer the question: If a citizen of a country which observes the Rule of Law is charged with a criminal offence, to what rights would he properly consider himself entitled? This question has been considered under the heads which follow. It is for each country to maintain and develop in the framework of its own system of law the following rules which are regarded as the minimum necessary to ensure the observance of the Rule of Law.

## **I. CERTAINTY OF THE CRIMINAL LAW**

It is always important that the definition and interpretation of the law should be as certain as possible, and this is of particular importance in the case of the criminal law, where the citizen's life or liberty may be at stake. Certainty cannot exist in the criminal law where the law, or the penalty for its breach, is retrospective.

## **II. THE PRESUMPTION OF INNOCENCE**

The application of the Rule of Law involves an acceptance of the principle that an accused person is assumed to be innocent until he has been proved to be guilty. An acceptance of this general principle is not inconsistent with provisions of law which, in particular cases, shift the burden of proof once certain facts creating a contrary presumption have been established. The personal guilt of the accused should be proved in each case.

## **III. ARREST AND ACCUSATION**

(1) The power of arrest, whether in *flagrante delicto* or not, ought to be strictly regulated by law, and should only be exercisable on reasonable suspicion that the person concerned has committed an offence.

(2) On any arrest the arrested person should at once be told the grounds of his arrest.

(3) On any arrest the arrested person should at once and at all times thereafter be entitled to the assistance of a legal adviser of his own choice, and on his arrest should at once be informed of that right in a way which he would clearly understand.

(4) Every arrested person should be brought, within as short a period as possible, fixed by law, before an appropriate judicial authority.

(5) After appearing before such judicial authority, any further detention should not be in the hands of the police.

## **IV. DETENTION PENDING TRIAL**

(1) No person should be deprived of his liberty except in so far as may be required for the purposes of public security or the administration of justice.

(2) Every arrested person should have a right, renewable at reasonably short intervals, to apply for bail to an appropriate judicial authority. He should be entitled to bail on reasonable terms unless either:

- (a) the charge is of an exceptionally serious nature, or
- (b) the appropriate judicial authority is satisfied that, if bail is granted, the accused is not likely to stand his trial, or

- (c) the appropriate judicial authority is satisfied that, if bail is granted, the accused is likely to interfere with the evidence, for example with witnesses for the prosecution, or
- (d) the appropriate judicial authority is satisfied that, if bail is granted, the accused is likely to commit a further criminal offence.

#### **V. PREPARATION AND CONDUCT OF DEFENCE**

The Rule of Law requires that an accused person should have adequate opportunity to prepare his defence and this involves:

- (1) That he should at all times be entitled to the assistance of a legal adviser of his own choice, and to have freedom of communication with him.
- (2) That he should be given notice of the charge with sufficient particularity.
- (3) That he should have a right to produce witnesses in his defence and to be present when this evidence is taken.
- (4) That, at least in serious cases, he should be informed in sufficient time before the trial of the nature of the evidence to be called for by the Prosecution.
- (5) That he should be entitled to be present when any evidence for the Prosecution is given and to have the witnesses for the Prosecution cross-examined.

#### **VI. MINIMUM DUTIES OF THE PROSECUTION**

The duty of the Prosecution should be fairly to place the relevant evidence before the Court, and not to obtain a conviction at all costs. If the Prosecution has evidence favourable to the accused which it does not propose to use, it should put such evidence at the disposal of the accused or his legal adviser in sufficient time to enable him to make proper use of it.

#### **VII. THE EXAMINATION OF THE ACCUSED**

No one should be compelled to incriminate himself. No accused person or witness should be subject to physical or psychological pressure (including anything calculated to impair his will or violate his dignity as a human being).

Postal or telephone communications should not be intercepted save in exceptional circumstances provided by law and under an order of an appropriate judicial authority.

A search of the accused's premises without his consent should only be made under an order of an appropriate judicial authority.

Evidence obtained in breach of any of these rights ought not to be admissible against the accused.



## **VIII. TRIAL IN PUBLIC**

The Rule of Law requires that criminal trials should ordinarily take place in public. The proper existence of exceptions to this rule is, however, recognized. The nature of these exceptions should be laid down by law and their application to the particular case should be decided by the Court.

Criminal trials should be open to report by the press but it is not compatible with the Rule of Law that it should be permissible for newspapers to publish, either before or during a trial, a matter which is likely to prejudice the fair trial of the accused.

## **IX. RETRIAL**

After a final conviction or acquittal no one should be tried again on the same facts, whether or not for the same offence.

## **X. LEGAL REMEDIES, INCLUDING APPEALS**

Every conviction and sentence and every refusal of bail should be challengeable before at least one higher Court.

It is essential that there should be adequate remedies for the breach of any of the rights referred to above. The nature of those remedies must necessarily depend on the nature of the particular right infringed and the system of law which exists in the country concerned. Different systems of law provide different ways of controlling the activities of the police and of the prosecuting and enquiring authorities.

## **XI. PUNISHMENT**

The Rule of Law does not require any particular penal theory but it must necessarily condemn cruel, inhuman or excessive preventive measures or punishments, and supports the adoption of reformative measures wherever possible.

# **REPORT OF COMMITTEE IV**

## **The Judiciary and the Legal Profession under the Rule of Law**

### **CLAUSE I**

An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercise of the judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underlie it. It is implicit in the concept of independence set out in the present

paragraph that provision should be made for the adequate remuneration of the Judiciary and that a judge's right to the remuneration settled for his office should not during his term of office be altered to his disadvantage.

#### **CLAUSE II**

There are in different countries varying ways in which the Judiciary are appointed, re-appointed (where re-appointment arises) and promoted, involving the Legislative, Executive, the Judiciary itself, in some countries the representatives of the practising legal profession, or a combination of two or more of these bodies. The selection of judges by election and particularly by re-election, as in some countries, presents special risks to the independence of the Judiciary which are more likely to be avoided only where tradition has circumscribed by prior agreement the list of candidates and has limited political controversy. There are also potential dangers in exclusive appointment by the Legislative, Executive, or Judiciary, and where there is on the whole general satisfaction with the calibre and independence of judges it will be found that either in law or in practice there is some degree of co-operation (or at least consultation) between the Judiciary and the authority actually making the appointment.

#### **CLAUSE III**

The principle of irremovability of the Judiciary, and their security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence, particularly if he is seeking re-appointment, he is subject to greater difficulties and pressure than a judge who enjoys security of tenure for his working life.

#### **CLAUSE IV**

The reconciliation of the principle of irremovability of the Judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial.

#### **CLAUSE V**

The considerations set out in the preceding paragraph should apply to: (1) the ordinary civil and criminal Courts; (2) administrative Courts or constitutional Courts, not being subordinate to the ordinary Courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other

judicial functions (juries, assessors, Justices of the Peace, etc.) should only be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular positions. All such persons have in any event the same duty of independence in the performance of their judicial function.

#### **CLAUSE VI**

It must be recognized that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of judicial business and that, subject to the limitations on delegations of legislative power which have been dealt with elsewhere, it may delegate part of this responsibility to the Executive. However, the exercise of such responsibility by the Legislative including any delegation to the Executive should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.

#### **CLAUSE VII**

It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs. But it is recognized that there may be general supervision by the Courts and that there may be regulations governing the admission to and pursuit of the legal profession.

#### **CLAUSE VIII**

Subject to his professional obligation to accept assignments in appropriate circumstances, the lawyer should be free to accept any case which is offered to him.

#### **CLAUSE IX**

While there is some difference of emphasis between various countries as to the extent to which a lawyer may be under a duty to accept a case it is conceived that:

(1) Wherever a man's life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;

(2) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;

(3) it is the duty of a lawyer which he should be able to discharge without fear of consequences to press upon the Court any

argument of law or of fact which he may think proper for the due presentation of the case by him.

**CLAUSE X**

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

New Delhi, India  
January 10, 1959

## LIST OF PARTICIPANTS AND OBSERVERS

AGAOGLU Süreyya ( <i>Mrs</i> ) (Turkey)	Barrister-at-Law; past President, International Federation of Women Lawyers
AGHA Safiya ( <i>Begum</i> ) (Pakistan)	Attorney-at-Law; former Lecturer, Sind Muslim Law College, Karachi
AHRNBORG Sten Bertil (Sweden)	Barrister; Assistant Professor of Law, Stockholm University; Member, Board of the Swedish Bar Association
AISAWAN Phra Pibul (Thailand)	Judge, Supreme Court of Thailand
ALAFRIZ Arturo A. (Philippines)	Attorney-at-Law; President, Federation of Bar Associations of the Philippines 1953-1955, 1957-; Judge, Court of First Instance 1954; Professor of Law; Philippine Law School and Arelanno University, Manila
AMERASINGHE Sirimevan (Ceylon)	Barrister-at-Law
ANGELL Ernest (U.S.A.)	Attorney-at-Law; Chairman, American Civil Liberties Union; Chairman of the Committee of the American Bar Association to co-operate with the International Commission of Jurists; Vice-President, Association of the Bar of the City of New York
ANGELO Homer G. (U.S.A.)	Attorney-at-Law; Chairman, Section of International and Comparative Law, American Bar Association; former Adviser, USA Representative to the United Nations
ASLAM Kazi M. (Pakistan)	President, West Pakistan High Court Bar Association, Peshawar
AUJOL Jean-Louis (France)	Attorney at the Paris Court of Appeal; First Vice-President of the Association des Juristes Européens
AUNG U Hla (Burma)	Advocate; Executive Secretary, Burma Law Institute
BADAWI Ali (United Arab Republic)	Professor of Law, University of Cairo

<b>BASSILI Stephen</b> (United Arab Republic)	Attorney-at-Law; former Bâtonnier, Cairo Bar
<b>BELBEZ Hikmet</b> (Turkey)	Attorney-at-Law; Professor, Faculty of Law and Political Sciences, University of Ankara; former Dean, Faculty of Law, University of Ankara; former Judge, Commercial Court 1939-1943
<b>BENJELLOUN Magid</b> (Morocco)	Advocate General, Supreme Court
<b>BENTIVOGLIO Ludovico M.</b> (Italy)	Professor of International Law, University of Messina
<b>BENTSI-ENCHILL Kwamena</b> (Ghana)	Barrister-at-Law; Secretary, Ghana Bar Association
<b>BONSAL Dudley B.</b> (U.S.A.)	Attorney-at-Law; President, Association of the Bar of the City of New York
<b>BOULOS Philippe</b> (Lebanon)	Attorney-at-Law; former Minister of Justice and of Foreign Affairs 1941-43; former President of the Court of Appeal
<b>BOUTROS-GHALI Boutros Y.</b> (United Arab Republic)	Professor of Law, University of Cairo
<b>BOWIE Robert R.</b> (U.S.A.)	Professor, Harvard University; former Assistant Secretary of State for Policy Planning
<b>BRENTA Hector L.</b> (Argentina)	Attorney-at-Law; former Counsellor and Under-Secretary of the Ministry of Labour and Pensions 1955-1956
<b>BROWNELL Jr. Herbert</b> (U.S.A.)	Attorney-at-Law; former Attorney-General of the United States
<b>BRYCESON Michael A.</b> (U.K.)	Solicitor of Supreme Court of England
<b>BURDEAU Georges</b> (France)	Professor of Law, University of Paris and Institut d'études politiques de Paris
<b>CAIRNS Sir David Scott</b> (U.K.)	Q.C.; former Chairman, Monopolies and Restrictive Practices Commission

CASSEL Christian A. (Liberia)	Member, National Bar Association Liberia; Chairman, Liberian Delegation, 2nd Part, 1st General Assembly 1946; Attorney-General of Liberia 1944-1957
U CHAN HTOON (Burma)	Judge, Supreme Court of Burma; Adviser to Constituent Assembly of Burma on Constitution 1947-1948; former Attorney-General of Union of Burma
CHITEPO Herbert W. (S. Rhodesia)	Barrister-at-Law
COHN Haim H. (Israel)	Attorney-General of Israel
COWEN Zelman (Australia)	Professor of Public Law and Dean of Faculty of Law, University of Melbourne
DAL A. J. M. van (Netherlands)	Attorney-at-Law
DEBPHTAKS Vithun (Thailand)	President of the Court of First Instance, attached to the Supreme Court
DELOUKAS Nicholas (Greece)	Attorney-at-Law; Professor of Law, Thessaloniki and Athens School for Industrial Studies, Member, Council of the Athens Bar Association
DENNING Lord (U.K.)	Lord of Appeal in Ordinary
DEVASER Kunden Lal (Malaya)	Barrister-at-Law; former Member, Bar Council of Malaya; former Malayan Delegate to United Nations
DEVLIN Sir Patrick (U.K.)	Justice of the High Court, Queen's Bench Division
DIAZ Ramon (Venezuela)	Attorney-at-Law
DOBRY George (U.K.)	Barrister-at-Law
DRAY Jacques (France)	Honorary Procurator of the Republic; Advocate at the Court of Appeal of Oran
ERMACORA Felix (Austria)	Professor of Law, University of Inns- bruck

ESCOBEDO Manuel G. (Mexico)	Attorney-at-Law; former President, Barra Mexicana
ESEN Bülent N. (Turkey)	Professor of Law, University of Ankara; Attorney-at-Law
FARUQI Abdus S. (Pakistan)	President, Karachi High Court Bar Association
FEDERSPIEL Per T. (Denmark)	Attorney-at-Law; Member, First Chamber Danish Parliament; Member, Consultative Assembly, Council of Europe; former Minister of Special Affairs 1945-47; former Delegate, UN Assembly 1946-49
FERGUSON John H. (U.S.A.)	Attorney-at-Law; former Deputy Director, Policy Planning Staff, Department of State
FERNANDO Thusew S. (Ceylon)	Judge, Supreme Court of Ceylon; former Solicitor-General; former Attorney-General
FOURCADE Jacques-Marie (France)	Vice-President of the National Assembly; former President of the Haute Cour de Justice
FRANCISCO Vicente (Philippines)	Attorney-at-Law; President, Francisco College; former delegate of the Philippines to United Nations
GARCIA Basileu (Brazil)	Professor of Penal Law, University of Sao Paulo
GARDINER Gerald A. (U.K.)	Q. C.; Chairman, General Council of the Bar of England and Wales; Benchers, Inner Temple; Member, Committee on Supreme Court Practice and Procedure 1947-53; Member, Lord Chancellor's Reform Committee
GAUNTLETT John W. (U.K.)	Solicitor
GOLDIE Louis F. E. (Australia)	Senior Lecturer, Canberra University College



GOLSHAYAN Abbas Gholi (Iran)	Senator; Procurator and Judge 1925-35; former Minister of Justice
GRAVEN Jean (Switzerland)	Dean of the Faculty of Law, University of Geneva; President of the Court of Cassation of Geneva; Chairman of the Swiss Group of the International Associ- ation of Penal Law
HAMSON Charles <sup>2</sup> J. (U.K.)	Professor of Comparative Law, Cambridge University; Fellow of Trinity College, Cambridge University
HIRANO Ryuichi (Japan)	Professor of Law, University of Tokyo
HOUMAN Ahmad (Iran)	Professor of Law, University of Teheran; former First President of the Court of First Instance of Teheran; former Presi- dent of the Court of Appeal
HU Henry H. L. (Hong Kong)	Barrister; Honorary Secretary, Hong Kong Bar Association
HURWITZ Stephan (Denmark)	Professor of Law, University of Copen- hagen; Parliamentary Commissioner for Civil and Military Government Adminis- tration
ILLANES-BENITEZ Osvaldo (Chile)	Judge, Supreme Court of Chile
ISHAQUE M. Khalid (Pakistan)	Advocate; former Lecturer in Consti- tutional Law and Criminal Law
JACOBSEN Einar (Norway)	Advocate
JONES Frederick E. (U.K.)	Q. C.; Member of Parliament; British Representative on Rumanian, Hungarian and Bulgarian Treaty Commissions 1949
KABES Vladimir M. (U.S.A.)	Legal Consultant, International Com- mission of Jurists
KÄGI Werner (Switzerland)	Professor of Public Law and Modern Constitutional History, University of Zurich

KATZ Rudolf (Germany)	Vice-President, Federal Constitutional Court, Karlsruhe
KAZÉMI Parviz (Iran)	Senator; Secretary "Iran Jurists Association"; Advocate; former President, Criminal Court, Teheran; former professor of Law
KEITH-SELLAR Forbes (Malaya)	Advocate and Solicitor; former Secretary and Member, Bar Council, Federation of Malaya
KELLEY Florence ( <i>Miss</i> ) (U.S.A.)	Attorney-at-Law
KOZERA Edward S. (U.S.A.)	Administrative Secretary, International Commission of Jurists
KRÉHER Jean H. (France)	Advocate; former President of the Executive Committee of the World Federation of United Nations Associations
LALIVE Jean-Flavien (Switzerland)	Attorney-at-Law; Secretary-General, International Commission of Jurists
MUKER LALL SINGH (Malaya)	Barrister-at-Law
LEE KUAN YEW (Singapore)	Advocate and Solicitor; Secretary-General, People's Action Party
LEE Tai Hee (Korea)	Vice-President, Korean Legal Centre
LOMBARD Laurence M. (U.S.A.)	Attorney-at-Law
MACBRIDE Séan (Eire)	Senior Counsel; Delegate to the Council of Europe from Eire since 1954; Minister for External Affairs 1948-51; Vice President, Council of OEEC 1948-51; President, Council of Foreign Ministers, Council of Europe 1950
MANGAT Nahar Singh (Kenya)	Q. C.; former President, Law Society of Kenya
MARSH Norman S. (U.K.)	Fellow of University College, Oxford; former Secretary-General, International Commission of Jurists

MARTENS Wilhelm (Germany)	Former President, Oberlandesgericht, Karlsruhe 1945-55
MAST André-Joseph (Belgium)	Professor of Law University of Ghent; Councillor of State
MATSUDA Jiro (Japan)	Judge, Tokyo High Court; former Director, Legal Training and Research Institute of the Supreme Court of Japan
MIZUNO Totaro (Japan)	Former President, Federation Japan Bar Associations
MORICE Jean C. J. (Cambodia)	Judicial Expert for the Ministry of Justice of the Royal Government of Cambodia; Professor of Criminal Law at the Faculty of Law and at the Royal School of Administration; Avocat général to the French Section of the Court of Appeal of Phnôm-Penh from March 1951 to August 1953
MORRIS John (S. Rhodesia)	Advocate, High Court of Southern Rho- desia
MUNKTELL Axel Henrik (Sweden)	Professor of Law, University of Upsala; Member of Parliament
MYINT SOE (Burma)	Barrister-at-Law; Lecturer, University of Rangoon
NABUCO José T. (Brazil)	Attorney-at-Law; former President of the Brazilian-American Institute
NADARAJAH K. C. (Ceylon)	Advocate
NATHANSON Nathaniel L. (U.S.A.)	Professor of Law, Northwestern Uni- versity; Consultant, Indian Law Institute, New Delhi
NA-ZIR AHMAD KHAN Chaudri (Pakistan)	President, Pakistan Bar Association; President, Pakistan Legal Centre
NEBIOGLU Osman (Turkey)	Advocate
NICHOLSON John R. (Canada)	Attorney-at-Law

NOCCIOLI Giovanni (Italy)	Judge of the Court of Cassation, Rome
NOOR Tadjoeeddin (Indonesia)	Barrister-at-Law
ONG Huck Lim (Malaya)	Advocate and Solicitor; former President, Bar Committee of Penang; Member, Bar Council, Federation of Malaya
OWEN Walter S. (Canada)	Q.C.; President, Canadian Bar Association
PALMGREN Bo (Finland)	Professor of Criminal Law and Civil and Criminal Procedure, University of Helsinki; former Deputy Chairman of the General Federation of Jurists of Finland
PANGLIM BUKIT GANTANG Datoh (Malaya)	Barrister-at-Law; former Prime Minister, State of Perak, Federation of Malaya
PERSIANI Mattia (Italy)	Advocate; Assistant at the University of Rome
PETTITI Louis E. (France)	Advocate; Deputy Chairman of the Association of European Jurists
PETRÉN Bror E. Gustaf (Sweden)	Assistant Professor of Law, University of Stockholm; Judge, Court of Appeal, Stockholm; General-Secretary, Swedish Section Nordic Council
POC Thienn (Cambodia)	Vice-President of the Court of Cassation; former Minister of Justice
PONNAMBALAM G. G. (Ceylon)	Q. C.; Member of Parliament
PRAMOJ M. R. Seni (Thailand)	Barrister-at-Law; Professor at Law, Dharmasat and Chulalongkorn Universities; former Prime Minister; former Judge; former Minister to U.S.A.
QARI Rabia S. (Miss) (Pakistan)	Secretary, Pakistan Legal Centre
RAJASOORIA Dato R. P. S. (Malaya)	Barrister-at-Law
RAMANI Radha Krishna (Malaya)	Chairman, Bar Council of Malaya

RAMZY Osman (United Arab Republic)	Barrister-at-Law
RAPHAEL Charles G. (U.S.A.)	Attorney-at-Law; former Legal Adviser, UNRRA, Greece 1944-46
RHYNE Charles S. (U.S.A.)	Attorney-at-Law; Immediate Past President, American Bar Association 1957-58; President, American Bar Foundation 1957-58
RÖLING Bert V. A. (Netherlands)	Professor of International and Criminal Law, University of Groningen; former Justice, International Military Tribunal for the Far East; Judge, Special Court of Cassation 1950-54; Delegate to United Nations 1950-57
ROSENTHAL P. G. Walther (Germany)	Chairman, Investigating Committee of Free Jurists
ST. JOHN Edward H. (Australia)	Q. C.; Barrister-at-Law
ST. LAURENT Renault (Canada)	Q. C.; Vice-President, Canadian Bar Association
SALAM Abdul Shakurul (Pakistan)	Advocate; Editor, Pakistan Bar Journal
SANMUGANATHAN Muttusamy (Ceylon)	Lecturer on Constitutional and Inter- national Law, University of Ceylon; Barrister-at-Law
SARGANT Thomas (U.K.)	Secretary, "Justice", British Section of the International Commission of Jurists
SCHNEIDER Peter (Germany)	Professor of Public Law, University of Mainz
SFEIR SFEIR Eduardo (Chile)	Attorney-at-Law; Assistant Professor of Law, University of Chile
SHERIDAN Lionel Astor (Singapore)	Professor of Law and Head of Depart- ment of Law, University of Malaya
SHINN Dong Wook (Korea)	Dean, College of Political Science and Law, Yonsei University; Director, Korean Legal Center

SHUTE Benjamin R. (U.S.A.)	Attorney-at-Law
SIDDIQ M. (Pakistan)	General Secretary, Pakistan Legal Centre
SIKTA Abdalla (Libya)	Permanent Under-Secretary of Justice, Government of Libya
STEPHEN Francis R. (Kenya)	Advocate
STEVENS Harold A. (U.S.A.)	Associate Justice, Supreme Court, Appellate Division, First Department, State of New York
STOREY Robert G. (U.S.A.)	Professor of Law and Dean, Faculty of Law, Southern Methodist University; Ex- ecutive Trial Counsel for United States, Nuremburg 1945-46; Vice-Chairman, Civil Rights Commission 1957-; Past President, American Bar Association 1952-53; Past President, Inter-American Bar Association 1954-56
STRAY Christian (Norway)	Attorney-at-Law; former Member of Parliament
SUCAROMANA Porn (Thailand)	Judge, Court of Appeal
SUCHARITKUL Sompong (Thailand)	Legal Assistant, International Commis- sion of Jurists
SUONTAUSTA Tauno E. (Finland)	Advocate; former Minister of Justice 1948-50; former Judge of the Supreme Administrative Court; former Chairman of the Federation of Jurists of Finland
SUZUKI Saizo (Japan)	Director, Civil Liberties Bureau, Ministry of Justice
TABATABAI Hachem Yazdi (Iran)	Attorney-at-Law, former Judge, Court of First Instance
TANABE Kohji (Japan)	Assistant Judge; Assistant to the Director, Legal Training and Research Institute

TANADA Lorenzo (Philippines)	Attorney-at-Law; Member, Philippine Senate; former Solicitor-General and Chief of the Office of Special Prosecutors; Professor of Law, Manuel E. Quezon, Manila Sto. Tomas, and Far Eastern Universities
THAMAVIT Vibul (Thailand)	Dean, Faculty of Social Administration, Thammasat University
THAN AUNG (Burma)	Barrister-at-Law; Lecturer in Law, University of Rangoon
THOMAS Stephen P. (Nigeria)	Puisne Judge, Western Region, Nigeria
THORSON Joseph T. (Canada)	President, Exchequer Court of Canada; Member, Privy Council; former Dean, Manitoba Law School; former Member of Parliament and former Minister
TIMUR Hifzi (Turkey)	Professor of Law and Dean of the Faculty of Law of the University of Istanbul; Director of the Institute of International Law at the University of Istanbul
TYABJI Hatim B. (Pakistan)	Barrister-at-Law; Legal Adviser, State Bank of Pakistan; former Chief Judge, Chief Court of Sind 1938-47
UEDA Toshio (Japan)	Professor, Tokyo University
UM Min-Yung (Korea)	Attorney-at-Law; Dean, College of Law, Shin Hung University
URRUTIA Francisco (Colombia)	Advocate; former Ambassador to the United States, to the United Nations, to Argentina and to Venezuela; former President of the Security Council; former personal Representative of the Secretary-General of the United Nations
VASAK Karel (France)	Secretary General, Association of European Jurists
VISESSMIT Uthai (Thailand)	Chief, Technical-Legal Division, Juridical Council; former Secretary, Legislative Committee, Juridical Council

VU VAN HIEN (Viet-Nam)	Advocate at the Court of Appeal of Saigon; Chargé d'enseignement at the Faculty of Law of Saigon (Civil Law)
WEBSTER Bethuel M. (U.S.A.)	Attorney-at-Law; Former President, Association of the Bar of the City of New York
WEEKS Alfred L. (Liberia)	Counselor-at-Law, Supreme Court of Liberia; Judge
WEERAMANTRY Lucian G. (Ceylon)	Barrister-at-Law
WHANG Sungsoo (Korea)	Former Vice-Speaker, National Assembly
WOOD Douglas R. (New Zealand)	Crown Counsel, Crown Law Office
WOODING Hugh O. B. (West Indies)	Q. C.; Vice-President, The West Indies Bar Association
YITETAKOU Blatta Kitaw (Ethiopia)	Vice-Minister of Justice
YONG Pung-How (Malaya)	Advocate and Solicitor
ZELLWEGER Edouard (Switzerland)	Constitutional Adviser to the Prime Minister of Libya; former Minister of Switzerland to Yugoslavia

### Indian Participants

ADHIKARI R. S.	Senior Advocate, Supreme Court of India; Advocate General, Madhya Pradesh
AGARWALA C. B.	Senior Advocate, Supreme Court of India; former Judge, Allahabad High Court
AMIN M. P.	Senior Advocate, Supreme Court of India; former Advocate General, Bombay
BANAJI H. D.	Senior Advocate, Supreme Court of India; Senior Counsel, Bombay High Court; former Vice-President, Bombay Bar Council
BHAGWATI N. H.	Judge, Supreme Court of India
BOSE Vivian	Former Judge, Supreme Court of India
CHACKO Dr. C. J.	Provost, Delhi University



CHARI V. K. T.	Advocate General, Madras State; President, Madras Provincial Bar Federation; Senior Advocate, Supreme Court of India
CHATTERJI N. C.	Vice-president, Supreme Court of India Bar Association; Senior Advocate, Supreme Court of India; former Judge, Calcutta High Court
CHOBE B. N.	Senior Advocate, Supreme Court of India
DAPHTARY C. K.	Solicitor General of India; Senior Advocate, Supreme Court of India
DAS S. K.	Judge, Supreme Court of India
HIDAYATULLAH M.	Judge, Supreme Court of India
JHA L. K.	Senior Advocate, Supreme Court of India; former Chief Justice, Patna High Court
MAHABIR PRASAD	Senior Advocate, Supreme Court of India; Advocate General, Bihar
MARKOSE Dr. A. T.	Research Professor, Indian Law Institute, New Delhi
MOOKERJEE R. P.	Dean of the Faculty of Law, Calcutta University; former Chief Justice, Calcutta High Court
MUNSHI Dr. K. M.	Senior Advocate, Supreme Court of India; Executive Chairman, Indian Law Institute; former Minister, Government of India; former Governor U. P.
PAI G. B.	Advocate, Supreme Court of India
PALKHIVALA N. A.	Advocate
PARDIVALA H. R.	Barrister-at-Law; Member, Bar Council, Bombay
PURSHOTTAM TRIKAMDAS	Senior Advocate, Supreme Court of India; General Secretary, Indian Commission of Jurists; former Delegate, U. N. Assembly
SAHAY A. N.	Advocate, Patna High Court
SANYAL H. N.	Senior Advocate, Supreme Court of India; Additional Solicitor General
SAPRU P. N.	Member of Parliament; Senior Advocate, Supreme Court of India; former Judge, Allahabad High Court; former Delegate, U. N. Assembly
SCHROFF I. N.	Solicitor
SETALVAD M. C.	Attorney-General of India; President, Indian Commission of Jurists; Senior Advocate, Supreme Court of India
SIKRI S. M.	Advocate General, Punjab; Senior Advocate, Supreme Court of India
VAKIL N. B.	Solicitor; Solicitor to the Government of India, Bombay

VEERARAGHAVAN A. N.

Secretary, Madras Bar Council; Hon. Secretary, Madras Provincial Bar Federation; Advocate Madras High Court

VIMADALAL S. D.

Senior Advocate, Supreme Court of India

### Observers

AGAOGLU Süreyya

Observer, International Federation of Women Lawyers

AGARWALA Balmukand R.

Observer, Indian School of Synthetic Jurisprudence

KRÉHER Jean

Observer, World Federation of United Nations Associations

MAHMUD ZAMAN

Observer, Member of the Editorial Board, Journal of the Pakistan Legal Centre; Advocate

MANI R. V. S.

Observer, International League for the Rights of Man

MERILLAT H. C. L.

Observer, Ford Foundation; Consultant Legal Studies

PANAKAL J. J.

Observer, Association Internationale de Droit Pénal; Head Department of Criminology, Juvenile Delinquency and Correctional Administration, Tata Institute of Social Sciences, Bombay

RHYNE Charles S.

Observer, Inter-American Bar Association

SCHACHTER Oscar

Observer, United Nations; Director, General Legal Division, United Nations

SHRIDHARANI Dr. K.

Observer, World Brotherhood

SOLER-ALONSO Eugenio

Observer, United Nations Information Centre for India, Burma, Ceylon and Nepal (New Delhi)

STOREY Robert G.

Observer, International Bar Association

WIERZBIANSKI Boleslaw

Observer, International Federation of Free Journalists

# PROGRAMME

## SUNDAY, January 4

- 15.00-22.00 Registration, Congress Secretariat, Hotel Janpath  
18.30-20.00 Informal Reception given by the International Commission of Jurists at Hotel Janpath

## MONDAY, January 5

- 08.30-13.00 Registration, Congress Secretariat, Hotel Janpath

- 09.00-10.30 Opening of Plenary Session\*

Welcome Address by Shri M. C. Setalvad, Attorney General of India, President, Indian Commission of Jurists

Inaugural Address by Shri Jawaharlal Nehru, Prime Minister of India

Speech welcoming invitees of the Congress by Shri S. R. Das, Chief Justice of India, Chairman, Reception Committee

Speech by Mr. Oscar Schachter representative of the Secretary-General of the United Nations

Speech by Mr. Justice J. T. Thorson, President, International Commission of Jurists

Speech by Mr. Justice Vivian Bose, President of the Congress

Vote of thanks by Dr. K. M. Munshi, Vice-Chairman, Reception Committee

- 10.30-11.00 Adjournment

- 11.00-13.30 Plenary Session

Address by Dr. Jean-Flavien Lalive, Secretary-General of the International Commission of Jurists

Introduction to the Working Paper on the Rule of Law by Mr. Norman S. Marsh, Fellow of University College, Oxford

- 13.30-15.00 Lunch

- 15.00-17.00 Committee Meetings

- 18.30 Reception, Minister of Law

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\* All meetings were held at the Vigyan Bhavan, King Edward Road.

**TUESDAY, January 6**

- 09.30-13.30 Committee Meetings
- 13.30-15.00 Lunch
- 15.00-17.30 Committee Meetings
- 18.00-20.00 Cultural Show by Bharatiya Natya Sangh, Sapru House
- Dinner

**WEDNESDAY, January 7**

- 09.30-13.30 Committee Meetings
- 13.30-15.00 Lunch
- 15.00-17.30 Committee Meetings (Drafting and Approval of Committee Reports)
- 18.30-20.30 Reception by Mr. Justice & Mrs. Vivian Bose and Mr. & Mrs. Purshottam Trikamdas, Village at Outdoor Fair
- 22.00 Departure by train for Agra

**THURSDAY, January 8**

- Sightseeing at Agra
- 22.30 Return from Agra

**FRIDAY, January 9**

- 09.30-13.00 Plenary Session
- 13.00-15.00 Lunch
- 15.00-17.30 Plenary Session
- 18.00-19.30 Reception by the Indian Law Institute, Supreme Court Lawns

**SATURDAY, January 10**

- 09.00-12.30 Closing Plenary Session  
Presentation of Final Conclusions of Congress by the President  
Speeches of Farewell and Thanks
- 12.30-14.00 Lunch
- 14.00-17.00 Sightseeing Delhi
- 19.00-20.30 Reception, Asian-African Legal Consultative Committee

## THE PROCEEDINGS OF THE CONGRESS

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[Preliminary Note: *The speeches at the Opening Plenary Session have been given in full. Speeches and debate in the Committees and at the Closing Plenary Session have been summarized on the basis of a transcript of the recorded proceedings of the Congress. An attempt has been made to identify correctly each speaker, but this has not always been possible when his name was not announced at the beginning of his remarks. Where a topic was debated at two or more points in the course of the debate, some rearrangement of the actual order of speaking has been made for the convenience of the reader. Where discussion turned on particular passages in the Working Paper, the appropriate citations or references have been inserted.*]

## **OPENING PLENARY SESSION**

## OPENING PLENARY SESSION

Monday, January 5, 1959

08.30—11.30

Mr. M. C. SETALVAD, Attorney-General of India and President of the Indian Commission of Jurists (Indian National Section of the International Commission of Jurists), called the Assembly to order. In his words of welcome to the participants attending the second International Congress of Jurists held by the International Commission, Mr. SETALVAD drew attention to some of the major problems facing societies today in their struggle for the preservation and strengthening of the Rule of Law:

"On behalf of the Indian Commission of Jurists I extend a hearty welcome to the distinguished Judges, lawyers and professors of law who are visiting us from about fifty countries to attend this Congress of the International Commission of Jurists. The Indian Commission of Jurists was organised only about a year ago and we deem it a great privilege to be the hosts of this second session of the Congress of the International Commission in New Delhi.

"It is in a way appropriate that our ancient country should be the venue of this Congress, the main purpose of which is to study, examine and seek the application of the Rule of Law in all its aspects. It is not without significance that the Dharmashastras of India, our ancient law books, put the law above the King. That is the idea which is embodied in the first article of the *Act of Athens*, solemnly adopted by the first session of this Congress in 1955: 'The State is subject to the law'.

"That *Act* refers to 'the rights of the individual developed through history in the age-old struggle of mankind for freedom' and sets them out as including 'freedom of speech, press, worship, assembly and association and the rights to free elections to the end that laws are enacted by the duly elected representatives of the people and afford equal protection to all.' By the preamble to our Constitution adopted in 1950 the people of India have solemnly declared their resolve to secure to its citizens among other rights liberty of thought, expression, belief, faith and worship, equality of status and opportunity and fraternity assuring the dignity of the individual. The Constitution proceeds to enact a bill of rights embodying these freedoms which it terms fundamental and provides methods for their quick enforcement. It is in the fitness of things that the Congress should hold its sitting in the capital of a country pledged to democratic ideals and principles of freedom and justice, principles to which the International Commission of Jurists has dedicated itself, and for the universal acceptance of which the Commission is striving.

"The session of the Congress is being held at a time which has witnessed great and notable changes in the governmental pattern of a large number of countries. Whether one looks at Europe or at the Middle East or at South-East Asia there would appear to be a noticeable trend in favour of absolute and autocratic authority. Indeed in several countries military rule or dictatorships have been set up avowedly as being necessary in the public interest and as making for quicker development and more efficient government. This must need, I think, be a matter of grave concern to an institution like the Commission, for military or absolute rule necessarily implies the negation of the Rule of Law to the upholding of which the Commission is devoted. It would

seem to be futile to examine and emphasise the various facets of the Rule of Law and suggest measures for its enforcement if the very conditions in which alone the Rule of Law can prevail are to be undermined. I am conscious that the function of the Commission constituted as it is can only be what has been described as 'a juristic and not a political attack' on systems where freedom and justice are denied to individuals. It is also true that Rule of Law cannot be said to be subservient to any particular ideology. Nevertheless it is axiomatic that the rights and dignity of the individual for which the Commission stands can only be achieved and subsist under governmental systems which function with free elections and where laws are enacted by the duly elected representatives of the people. Fundamental freedoms which respect the rights of the individual and provide effective means for their enforcement can thrive only in countries where justice is administered by an independent judiciary and where the profession of the law is able and willing to assist the individual in enforcing his freedoms. The narrowing of the area of free and democratic government must necessarily result in the curtailment and even the total cessation of the operation of the Rule of Law. Perhaps a study of the causes and conditions which are leading to the shrinkage in the area of democratic government is a matter for the political scientist. But in a measure I think these matters are also the concern of the jurist.

"Acknowledged absolute and autocratic rule has at any rate the merit of frankly and openly conceding that it recognises no individual freedoms and rights. The adherents of the Rule of Law have, however, to deal with more subtle and more difficult problems in countries which operate a totalitarian regime under the guise of a democratic government. A number of these countries have *ex facie* carefully drawn democratic constitutions but in practice these constitutions are so worked as to deny to the individual true democratic freedom. Under these regimes we have an opposition as it were between what may be called constitutional law and constitutional reality. The task which faces the supporters of the Rule of Law in such conditions is to ascertain the extent of the liberty allowed to the individual and enquire whether the constitutional forms are real or merely illusory and devoid of meaning. This can be done only by a close examination of the structure of governmental agencies and the manner in which they function. What has to be ascertained is the attitude of the State towards the individual as a human being and the true position of the individual in the State. For, indeed, the Rule of Law as understood by us is based upon 'some fundamental ideas about human nature, about the individual and about the relationship of the individual to the State'. It is a matter of great satisfaction that the International Commission has by conducting a series of studies in different places and different situations contributed largely to our knowledge of the conditions existing in some of the so-called democratic countries.

"But it would be an error to imagine that the enforcement of the Rule of Law needs no vigilance in countries functioning under really representative institutions. Modern governments with their many-fold functions have so largely encroached upon the manner of life and the liberty of the individual that a constant watchfulness is necessary on the part of those concerned with the administration of the law to guard the rights of the individual against the State. Several truly democratic constitutions contain limitations on the legislative power. The law-making functions may not be so discharged as to affect the fundamental rights of the individual or the citizen. The Constitution may provide, as the Indian Constitution does, for a judicial review of legislation alleged to contravene the rights of the subject. But an independent judiciary and an equally independent and a public spirited legal profession become necessary even where such constitutional provisions exist for safeguarding the Rule of Law. Delegated legislation, so extensively resorted to by all modern governments, also requires a continuous watchfulness on the part of the legislators, the judiciary, the



lawyer and the public so that it may be kept within the bounds of the Constitution and the laws under which it is enacted.

"More constant and more irksome to the citizen are perhaps the encroachments of the Executive on the rights of the citizen. Not unoften, under the guise of administrative rules and procedure, the official engages in the furtherance of that policy. Here again the remedy lies in the insistence upon a system which would enable the validity of an executive act to be tested by a mind free from executive bias. These aspects of the enforcement of the Rule of Law, even in States functioning under truly representative institutions, emphasise the need of an independent and fearless judiciary and a legal profession prepared to stand against the Executive and assert the rights of the individual against administrative interference. It needs to be remembered that, even in the advanced systems of democracy which we have so far been able to develop, power lies in the majority of the people and in practice and substance these democratic governments tend to be run by leaders of the majority group. The views and the policies of the party in power have not unoften a tendency to affect the judiciary and even the profession of the law. Such situations are more noticeable in infant democracies where the ruling parties are overwhelmingly strong, opposition parties have not gathered strength and public opinion does not make itself felt. It is, therefore, appropriate that a body like the Commission should repeatedly emphasise the importance of a judiciary who would perform their functions without fear or favour and resist any encroachments by Governments or political parties on their independence and that it should call upon the legal profession to maintain an attitude which would enable it to effectively assert the rights of the individual against the State.

"I cannot end without expressing the deep gratification of the legal profession and the academic lawyers in India at being associated with the distinguished jurists of the world in carrying on studies and concerting measures to strengthen the Rule of Law."

Mr. SETALVAD then requested the Prime Minister of India, His Excellency Mr. JAWAHARLAL NEHRU, to inaugurate the Congress:

"I am happy to be here to accord you a warm welcome on behalf of the Government of India and of myself. Standing here, I feel somewhat overawed by these serried ranks of eminent jurists, lawyers and judges. Most of us have had some kind of experience or other of the law. My own experience has been varied, both to begin with as a lawyer appearing before judges, later as a prisoner in the dock. And so it might be said that some of us who were similarly circumstanced were able to see both sides of the question, because the first thing that strikes one who has had the privilege of this type of experience is that there are two sides to a question even though only one side decides. However that may be, it is clear that unless a community lives under a Rule of Law it will tend to be lawless, to have no rule, and that means more or less an anarchical way of subsisting. So, a rule of law has to be there to bind a community and the first objective of this International Commission of Jurists, to preserve and maintain the Rule of Law, seems to me synonymous with the maintenance of civilised existence. Also if there is to be a Rule of Law there should be independent people, judges, to administer that law; otherwise the law may be used and exploited in the interest, not of the law, but of other interests. Those two basic facts seem to me to stand out.

"At the same time some difficulties arise in facing the consequences of this. One difficulty, of course, is when law ceases to function, as in war. War presumably is an absence of law and only the person with the biggest

gun is supposed to be the arbiter of events. If war is the absence of law, as it is, and not only on the battlefield but also far away from the battlefield, the atmosphere of war, the effect of war on people's thinking, dulls the essence of the law even in the home countries which may be far removed from the theatre of war.

"Law seldom functions with that objectivity, that dispassion, in times of war. If that is so during times of war, real war, some effect of that surely must come during times of cold war, affecting the objectivity of people, moving them to take up stronger attitudes than they normally would and thereby becoming advocates more than judges, inevitably, not deliberately, because even judges cannot always rise above the atmosphere prevailing around them. So it seems to me that, when we live in a period of what is called cold war, we suffer to some extent from that psychology of war which comes in the way of the Rule of Law, which comes in the way of objective, dispassionate consideration of problems and which tends almost inevitably to make us bend this way or that way. From the point of view, therefore, of the law the worst possible environment for it to flourish is war and, to a somewhat lesser degree, cold war, and I am not surprised therefore that law and justice often are casualties when such an atmosphere flourishes.

"Now as I said law seems to be the basis of civilised existence. Without it society would go to pieces. At the same time society changes, it is not static, as we know very well. It has changed vastly because of, let us say, industrial and technical advance and the law has normally adapted itself to it. It had to. If it does not adapt quickly enough there is a divergence, there is a gap between the functioning of the law as it has functioned for some time past and a new development in society due to many happenings such as technological changes etc. Undoubtedly some aspects of the law may be considered to embody some moral or ethical principles. Some other aspects may be the application of those principles to changing circumstances and when those circumstances change the application may also necessarily have to change, otherwise there is friction.

"Obviously the law of, let us say, a thousand years ago when society was very different, would not fit in with society today; therefore law has changed. Law itself is a changing thing apart for some basic approaches. It cannot be otherwise. The moment it is static it becomes out of touch with a changing society and yet there is that danger of the law becoming static or of lawyers having to deal so much with basic things, and precedents, that they think more in terms of an unchanging approach to problems, and do not realise that life is ever changing. I suppose the two functions have to go together. In life, in society, the static element keeps it firmly rooted to certain basic principles and gives a certain continuity and there is also the element of change, which is so essential in a changing society. You want both, continuity and change. Without one of them difficulties arise, as they have often arisen.

"It is obvious that, where kings are not ideal, people want to change them. If there are opportunities of change afforded to them through constitutional and peaceful methods, probably they will take advantage of them. If there are not open to them such opportunities, what then are they to do? What is a country to do under foreign rule with no constitution or anything? Where is the Rule of Law? It is a law imposed by an authority, which does not respond to the will of the people. Therefore all foreign rule - according to the Rule of Law, which you so ably administer - is outside the pale of law. All imposed rule is outside the pale of law. It follows logically, although in practice there may be difficulties. That is a different matter.

"The Rule of Law requires many other things: equal treatment, no racial discrimination and all that. Yet, we know that all of this takes place, and therefore it is outside the pale of law. The Rule of Law requires that

individual rights should be protected, and they should be protected, of course; and as our Attorney General pointed out to you, our Constitution in India lays special stress on the rights of the individual. And if I may say so, it is not our Constitution only, but the whole background of our ancient law also says so.

"Now, in protecting the rights of an individual, no law permits that individual to function in a predatory manner against his neighbour or against society. That is, the law is supposed to curb the predatory instincts of the individual. Now, where is protection of the rights of the individual fitted in with the curbing the predatory instincts of that individual? Some line has to be drawn somewhere, and the line may vary. Otherwise the individual would become a menace to society or a group may become a menace to society. I am merely putting before this distinguished audience some difficulties and problems that arise in my mind because we live obviously in changing times, and times change with amazing rapidity.

"If the distinguished lawyers and jurists of Plato's day had met together – and they were very able men – they would have taken slavery for granted, human slavery. When they accepted slavery, nobody challenged it. And yet later it was not only challenged and condemned but uprooted, practically all over the world, because the social mind would not accept it as such.

"So other things which may have been considered good in a certain age may become not so good, or out of date, in a subsequent age. Every one knows that society changes very greatly because of scientific and technological developments. People's lives change, their association with each other, their problems, their businesses, their methods of production, distribution, everything has changed in the last two hundred years because of the industrial revolution. And the law has tried to keep pace with these changes and often kept pace with them because it is obvious that the law which applied to a pre-industrial society would hardly be applicable to the complicated society of today. And now, the changes go on at a terrific pace in this jet-age, or this space-travel age, brings about new problems.

"All this leads one to think that the Rule of Law, which is so important, must run closely to the Rule of Life. It cannot go off at a tangent from life's problems and be an answer to problems which existed yesterday and are not so important today. It has to deal with today's problems. And yet law, by the very fact that it represents something basic and fundamental, has a tendency to be static. That is the difficulty. It has to maintain that basic and fundamental character but it must not be static, as nothing can be static in a changing world.

"So, this International Commission of Jurists has this tremendous responsibility of looking at this changing world, changing before our eyes from day to day. These is a change in social relationships, in the relationships of nations with each other. Intimate contacts between countries arise all over the world, distances are annihilated, every country is practically the neighbour of the other country. These changes were unknown in the old days when international law, or any kind of law, was considered.

"All these are new problems in a new context, in a new environment. And to look at these as dispassionately as possible, even in an age which suffers from this atmosphere of cold war, is a difficult task, but I am sure that the eminent judges and jurists who are present here and who are used to dispassionate consideration of problems, will be able to face it.

"But before one faces it one has to formulate the question, the problem, just as in a case in Court the issues have to be framed, and unless they are correctly framed the decision may lead you away from the central factor which you are considering. I have ventured to place some

thoughts that come into my mind and I do feel that law and war are incompatible. Just as law is a pre-condition of freedom and peace, the converse also, is true that freedom and peace are necessary before the law functions properly. Both sides, both aspects have to be considered. The Attorney General referred to various matters of deep interest which also lead one to think, lead one into various avenues of thought, and perhaps in the course of your discussions you will consider those various approaches, and the consequences of those approaches, because the biggest thing today is this fact of a rapidly changing society. And, unless that is kept in mind, one is apt to be left behind in one's thinking and action; there is, as the Attorney General said, the judge who protects the individual from the dangers of wrong executive action. That is very necessary I think. And yet it may be that, in a changing society, the judge may be left a little behind by the changes that have come over society and may not quite represent that mood which happens to be the mood of society and which perhaps represents a reality more than the statute law which the judge administers. It may be even that the Executive represents that much more for the moment. It may of course be that the Executive acts wrongly and oppressively and should be pulled up. But there are all these aspects of these questions which are not so simple as to be put down in a simple phrase.

"I welcome you again, distinguished delegates, and wish you success in your labours."

The Chair then introduced the Honourable S. R. DAS, Chief Justice of India and Chairman of the Congress Reception Committee, who also welcomed the participants and discussed briefly the method of work of the Congress.

"On behalf of the Reception Committee and on my own behalf I have great pleasure in extending a very cordial welcome to all the distinguished Delegates attending this, the second International Congress of Jurists.

"The first Congress of this kind was held in 1955 at Athens, where representatives of 48 countries, including India, participated in the deliberations of that body. At that Congress India was represented by Mr. Justice Vivian Bose, who was then a judge of the Supreme Court of India and who is now a Vice-President of the International Commission of Jurists, Mr. Justice Bhagwati, the present Senior Puisne Judge of the Supreme Court of India, and Mr. Purshottam Trikamdas, who is a Senior Advocate of the same Court and is also the Honorary Secretary for the Indian Commission of Jurists at whose invitation this second International Congress is being held in the Capital City of India.

"The Indian Commission of Jurists was registered as a Society under the Societies' Registration Act (1860) as late as April 22, 1958. It speaks volumes for the organising capacity of its Honorary Secretary which alone made it possible for the Indian Commission of Jurists to undertake this heavy responsibility within such a short time after it came into existence. I gather that about 160 Judges, lawyers and professors of law representing about 60 countries are attending this Congress and will participate in its discussions. We welcome all of them with fraternal greetings.

"Attempt has been made, in a humble way of course, for the accommodation of the Delegates during their temporary stay in our midst, and I earnestly hope that they will overlook the shortcomings of the arrangements that the organisers of this Congress have been able to make in the short time at their disposal.

"After the welcome address that has just been delivered by Mr. M. C. Setalvad, the Attorney General of India and the President of the Indian Commission of Jurists, I have very little indeed to say.

"I understand the principal subject for the discussion at this Congress is the Rule of Law in its application to human activities in different spheres of life. The true concept of the Rule of Law, as I conceive it, transcends all periods of races, religions, creeds, and countries. It prescribes a code of conduct alike for individuals as for States and is designed to protect and uphold the liberties of the individuals, not only against their fellow-men but also as against the State. The Rule is not of a transitory nature but seeks to render enduring service to humanity and is of universal application. Rule of Law cannot and does not mean one thing for a particular part of the globe or for the people of a particular race or religion or nationality, and a different thing for another part of the earth or for the people of other races, religions and nationalities. Universality is its distinctive feature and its application extends to human activities in different fields. It seeks to uphold and protect the fundamental human rights and liberties which alone make life worth living: liberty in matters of conscience and religion, freedom of speech, thought and expression, right of free association and movement, right to participate in and regulate the activities of one's own State, and other similar rights which enure from the all-round well-being of the human society.

"I gather you will be mainly engaged in the discussion of the Working Paper on the all-absorbing theme of the Rule of Law. This Working Paper has been prepared in consultation with several leading lawyers, including Mr. C. K. Daphtary, our Solicitor General. It has been so prepared in the light of the answers given to the set of questionnaires that had been sent out by the Commission to many well-known jurists all over the world. The Working Paper deals with different problems arising out of the practical application of the principles of the Rule of Law to human activities in different fields, namely the Legislative, Executive and Judiciary. The proposal, I gather, is that the major aspects of the doctrine will be discussed in four several Committees and that after full and frank discussions in the Committees reports will be submitted before the Plenary Sessions of the Congress. In your deliberations at the Committee stages as well as at the concluding Plenary Sessions, the Delegates will no doubt deal with the matters objectively and arrive at and formulate, after the critical discussions, conclusions calculated to advance the supreme well-being and happiness of the multitude of men and women inhabiting this globe.

"This Congress, I venture to think, is not meant to provide a platform merely for demonstrating the superiority of any particular political theory or ideology over another. The Delegates will, I venture to hope, approach the subjects under discussion purely as human problems and will deal with it strictly on a juristic basis. Their conclusions will have the respectful approbation of all right-thinking persons only if they carry on and keep their deliberations on that elevated plane.

"Once again I extend to the distinguished Delegates a warm welcome and earnestly pray that their endeavours will come to success."

Mr. SETALVAD next introduced Mr. OSCAR SCHACHTER, Director of the General Legal Division of the United Nations and representative of the Secretary-General of the United Nations, who spoke about the International Commission of Jurists and the Congress as follows:

"It is indeed a privilege for me to be here as the representative of

the Secretary General of the United Nations and on his behalf to extend greetings to this distinguished international gathering.

"The International Commission of Jurists is, in a sense, a part of the family of the United Nations, for it has been granted consultative status by the Economic and Social Council, and it has the opportunity to take part in the activities of the United Nations falling within its field. The Charter of the United Nations has wisely recognised that the aims of the Organisation require not only the efforts of Governments and official agencies, but also those of private, non-governmental bodies such as yours. The Prime Minister has with his usual eloquence and clarity shown the connection between the great objectives of the United Nations, the maintenance of peace and international security, and the respect for the Rule of Law. Moreover, in your efforts to promote respect for the Rule of Law and for fundamental freedoms, you are sharing the common purpose of the United Nations in this field, perhaps the most difficult of all its objectives to attain. Yet, your own experience has demonstrated that the legal profession, although coming from different nations, and of different cultures and creeds, can work together effectively towards this great end in the wider interests of mankind.

"I am happy to offer to you my best wishes for a very successful and fruitful Conference.

"Thank you very much."

The floor was given to Mr. Justice JOSEPH T. THORSON, President of the International Commission of Jurists, then expressed the thanks of the International Commission and considered the underlying themes of the Congress:

"On behalf of the International Commission of Jurists, I sincerely thank the Attorney General of India, the Prime Minister of India, and the Chief Justice of India for their gracious welcome to us, and we are deeply grateful to Mr. Schachter as the representative of the Secretary General of the United Nations for his greetings and our warmest thanks go to the Indian Commission of Jurists for their splendid arrangements for the success of this Congress.

"The International Commission of Jurists is an organisation of lawyers from various parts of the world, consisting of Judges, law teachers and practitioners of the law. It is engaged in the great task of furthering throughout the world the Rule of Law based on the fundamental principles of freedom and justice and to this end it has invited 177 individuals from over 50 countries to participate in this Congress. All the participants have been invited as individuals, and not as the representatives of the countries from which they came, so that they may be free to express their own opinions. They are here as lawyers with the responsibility that attaches to them as such. There are no national delegations here.

"Later this morning you will hear from our Secretary-General and our former Secretary-General. They will discuss the aims and objects of the Commission and outline the specific subject matter for which this Congress has been called, and I shall not encroach on their field. I shall take as the theme of my remarks the principles of freedom and justice on which the Rule of Law which we envisage should be based, operating in the orderly society which we are seeking to create in which the freedom of the individual and the sanctity of human personality will be maintained and justice to all its members will be done.

"The concepts of freedom and justice of which I speak are related to one another. Freedom of the individual without the limitation of justice may be, as the Prime Minister has said, merely license and there cannot be justice if the freedom of the individual is denied. So when I speak of freedom I mean freedom that is consonant with the requirements of justice within the framework of an orderly society. I cannot think of a nobler concept than that of freedom. It has been the inspiration of mankind and the mainsprings of human conduct ever since man began to think and yearn for more than animal comfort and it has been a sustaining force to nations, great and small. Many examples could be given if time permitted. In our own lifetime two world wars have been fought and millions of men have died in the defence of democracy based on freedom. We have seen the dissolution of old empires and the establishment of new forms of government in various parts of the world. The spirit of freedom has been a dominating force in these changes.

"The achievement of freedom, where it does not exist, may take time, for the progress of mankind towards freedom has in the past been slow. Even in England, which is frequently called the Mother of Liberty, the fundamental freedoms are not old. The great charters of liberty were not at the time of their passings of universal application. Magna Charta was not wrested from King John at Runnymede in 1215 by the people of England but by the barons. Most of the people were in the status of villeinage that partook of the attributes of selfdom. And even when the Bill of Rights was adopted in 1689 and the sovereignty of Parliament established, the Parliament was not that of the people of England but only of the privileged few who had the franchise. Adult suffrage was not thought of until a long time later, and it was only recently that the rights of women as persons were recognized. Freedom of speech and the discussions of public affairs and freedom of the press are not old, as time goes, and freedom of association, in the broad form of its present acceptance, is a comparatively new concept. It is not so very long ago that trade unions were regarded as unlawful combinations in restraint of trade.

"While the progress in the past was slow, there were great stirrings in the minds of men in the latter part of the 18th Century in the New World as well as in the Old. The United States of America established its independence and in the succeeding century became a haven of hope for peoples from the old world who came to it in the search for freedom and opportunity for themselves and their children.

"In Europe, the people of France arose in the French Revolution in protest against the existing order, stormed the Bastille and eventually built the Republic of France on the foundations of Liberty, Equality and Fraternity. What a magnificent foundation on which to build!

"In this century the pace of the march of man towards freedom has quickened. After the end of the First World War old dynasties were overthrown and the applications of the principle of the right of peoples to their self-determination led to the establishment of many new states. In some of them the freedom of the individual has since then been denied, but I cannot believe that the spirit of freedom which actuated their establishment has left the minds of their peoples.

"In recent years the nations of Asia have risen and repudiated foreign dominations. There are the new republics of India, Pakistan and Ceylon, taking the place of the former Indian Empire, the new nations of Indo-China, the Republic of Indonesia, and new advances towards freedom in such areas as Singapore. And West of here, in the Near East, we have the new State of Israel and the several Arab States, with the surge of national spirit in the hearts of their peoples.

"The light of freedom now shines brightly in Africa, a reminder that freedom is not the exclusive right of any one people. It belongs to all mankind. New States have arisen in North Africa and elsewhere and we have seen self-government and independence come to such countries as Ghana. New republics rise in rapid succession one after the other.

"Admittedly, difficult situations have arisen and will arise, but I feel confident that the spirit that has formed these new nations and achieved their independence will beget the freedom of their individuals. When that happens their victory will be completed.

"I find strong evidence in support of my confidence in the fact that in this old land with its young and strong heart we have as participants in this Congress, in addition to persons from India, Pakistan and Ceylon, lawyers from countries where freedom has been recently won such as Indonesia, Singapore, Malaya, Viet-Nam, Cambodia, Burma, Jordan, Lebanon and Israel from Asia; Morocco, Libya, and Ghana from Africa; the United Arab Republic from Asia and Africa; all seeking to find agreement in the kind of Rule of Law to which they should subject themselves - a Rule of Law under which the dignity of man as an individual would be observed and justice to every member of society would be done. This is a great achievement.

"So I recite my articles of faith. The spirit of freedom is a sustaining and irresistible force, for freedom is essential, to man's self realisation. Human nature demands it. Freedom comes to man as he has arisen and begun to think. It belongs to those who have won it and it can be lost only by thoughtlessness and neglect, as Mr. Setalvad so eloquently said. Constant vigilance is necessary to its maintenance in its full force and power. It is man's greatest treasure and we as lawyers must steadfastly and courageously guard it. That is our duty. We must not and we will not fail."

Following the address by Mr. Justice THORSON, Mr. SETALVAD introduced Mr. Justice VIVIAN BOSE, Chairman of the Congress, who indicated to the participants the lines on which the discussion should proceed.

"Many thousands of words will have been spoken before this Congress ends. We have a tremendous field to cover. I will, therefore, content myself with saying just three things.

"The first is to explain that every member of the Congress is here by personal invitation and not as a representative of any country or group or area. There are therefore no delegates. We are all guests, guests of the International Commission of Jurists. Each has been invited in the hope that he will make some contribution to the solution of our many problems. We, therefore, want the personal opinion of members given soberly and objectively, without fear or favour, without bias or prejudice; and with a courteous understanding of the other fellow who holds a different view, realising that he is also struggling to attain an ideal and may have graver and deeper problems than the rest of us. We cannot all follow a slavish pattern. It would be a poor world if everybody did the same thing, said the same thing and dressed the same way. But we can insist on certain fundamental decencies. Another thing. Though we want your personal views, we also want to know about any different views that are held in your several parts of the world and, if that is at all possible, we would like to know the relative strength of the various conflicting views in a given area.

"The second point that I want to make is this. We cannot discuss everything under the sun. If we travel too wide, our thoughts will be so



scattered that our deliberations will lose their effectiveness. The International Commission of Jurists has set itself certain specific problems and has invited you to help solve them. We will therefore have to confine ourselves *very strictly* to the matters that are raised in the Working Paper. I stress this very particularly. If you know of *systematic* breaches of the Rule of Law, as opposed to stray and isolated wrongs, please bring them to the attention of the International Commission in documented form; then, if the Commission feels that it can usefully investigate the matter, it will do so, and after that, the problem can be discussed at some future Congress in conjunction with the Commission's findings. But we cannot take up fresh matters at this Congress, because discussion of problems by those who have not had the time and chance to study them and inform themselves about the facts is not of value.

"The last point is this. Most of us have been reared in traditions that we value and we are anxious that they should not disappear; others are striving to build new worlds and start traditions that future generations of their countrymen will be able to cherish with affection and pride. But we must all realise that there is an upward surge in human progress and that nothing is static – not even stagnation, for even that rots and decays. Our problem therefore is to weave new threads of thought and fresh ideals into the old fabric in such a way as to retain its beauty and continuity without undermining its inner strength. We are all groping for an answer and our business here is to see whether we as lawyers and judges and jurists cannot stir the conscience of the world into insisting that there shall be certain common decencies for all men in all lands so that as we cross from frontier to frontier we can, each one of us, be sure of being treated as ordinary human beings, judged on our own merits as men, sure of certain basic rights, seeking no favours, asking for no false standards; and that in our own lands we will be able to live as free men in a free atmosphere subject only to such obligations and duties as will ensure that freedom is not licence and that freedom for one man does not mean freedom to trample on the rights of his neighbour. That is the ideal that we have before us. That, I hope, will be the spirit of our deliberations."

Dr. K. M. MUNSHI, on behalf of the Indian Commission of Jurists, then moved a vote of thanks to His Excellency JAWAHARLAL NEHRU, Mr. Justice THORSON and Mr. SCHACHTER and spoke of some of the stresses to which the Rule of Law is subjected today:

"I have great pleasure in moving a vote of thanks on behalf of the Indian Commission to our distinguished Prime Minister, to Mr. Thorson, President, and to Mr. Schachter who is representing the United Nations.

"Of course, to us here the Prime Minister embodies, if I may so put it, the practical struggle for the Rule of Law throughout almost half a century. He has been a practical exponent of it, a practical architect so far as this country is concerned. He has been perhaps the foremost fighter for freedom in this world who has succeeded in his ambitions and has been the architect of a free country. He has been the founder of the Civil Liberties Union in days of our struggle when there was very little civil liberty in this country, and it was his inspiration that led this country – the Constituent Assembly of this country – to frame the Constitution of which the Preamble has been read by my friend the Attorney General and which sets out incomparably the gist of what the Rule of Law stands for. For the last eleven years the Prime Minister has guided this very important democracy in the world, making it a member of the fraternity of free nations in which the Rule of Law is protected by an independent judiciary and in that

respect it is but fitting and proper that he should inaugurate this Congress when it is held outside Europe in Asia for the first time.

"Apart from these things, there is one aspect of it which I cannot help observing that arises from the very pertinent remark which the Prime Minister made and on which he is the fittest person to comment. He has been, as you know, one of the very few statesmen in the world who has stood for and contributed to the organised relations between nations during a period of great strain and he has made a remark which deserves to be considered by this Congress seriously, that the Rule of Law cannot be isolated from the conditions under which it functions and the conditions which strengthen or threaten it, and that, unless there is an international Rule of Law, the Rule of Law may or may not survive in some countries under the stress of modern conditions. It is a problem much vaster than what we are here to consider but at some stage or the other if the Rule of Law is to succeed in prevailing all over the world, there must be, above all, order based on an international Rule of Law which prevents aggression and prevents internal interference in States. Unless those conditions are there, the Rule of Law is not likely to succeed.

"Again I offer our hearty thanks to the President, Mr. Thorson, who has been one of the most valuable exponents of the Rule of Law. He is the President of the Canadian Court of Exchequer, he is the President and an apostle in the service of the cause of the Rule of Law. He has made it his own and in Canada the movement is largely due to his indefatigable zeal.

"We also welcome in our midst Mr. Schachter, Director of the General Legal Division of the United Nations, who represents the Secretary-General of the United Nations. We all have our hopes in the United Nations and it is by and through it alone that we can have an international Rule of Law. I am very glad indeed that this Commission is one of the consultative bodies of the United Nations so far as these matters are concerned and I have no doubt in my mind that the jurists of the Congress will do their best to strengthen the United Nations in its work of establishing peace in the world, not merely by diplomacy, not merely by conventions and treaties, but by establishing the Rule of Law. I also therefore offer my thanks to Mr. Schachter and I have no doubt you will join me all in thanking these three gentlemen heartily and I hope that what they have said will help us to guide the deliberations in the coming few days."

The Attorney-General of India then introduced Dr. JEAN-FLAVIEN LALIVE, Secretary-General of the International Commission of Jurists, who delivered an address on the objectives of the Commission.

"I am deeply conscious of the honour, so short a time after taking up my duties as the new Secretary-General of the International Commission of Jurists, to address this distinguished assembly attended by the foremost members of the legal profession of more than 50 countries.

"My predecessor and friend, Mr. Marsh, will introduce more specifically the proposed subject of our discussions, a subject of paramount importance and through which lawyers may make a worthwhile contribution to the evolution of human society.

"It falls to me to say a few words about the International Commission of Jurists, about its recent progress and its possibilities for the future. What we shall do from now on will be up to a point affected by what we shall achieve at this Congress. As the subject of our consideration is vast and our time limited, I will therefore concentrate on some of the main points only.

"In order to understand the *raison d'être* and significance of the Commission and its activities, I would remind you of its two basic objects, as they emerge from our Statute.

1. Support and advancement of the principles of justice which constitute the basis of the Rule of Law as understood in free countries.
2. Alertness and defence through the mobilisation of world legal opinion against the abuse and violation of such principles of justice.

"As you know, the Commission was created to inquire into the administration of justice and its violations in totalitarian countries. But it was rapidly realized that the concern of the Commission would not be less than world-wide. All those who are acquainted with our activities and have read our publications will know that the Commission acted wherever it was considered that there was a *systematic violation* of a general nature, or a threat thereof, to those fundamental principles associated with the idea of the Rule of Law. Inquiries, publications, holding of Conferences, sending of Observers, taking unofficial steps were some of the practical measures adopted according to circumstances of particular cases and depending on practical possibilities. These various steps were taken in situations as different as these in Hungary, Yugoslavia, Portugal and South Africa. It would be presumptuous to bring to your attention the results attained. Modest as these may have been in some cases, they were substantial in others, as certain governments have shown that they were not insensitive to the steps taken by the Commission and to the reactions of public opinion alerted by it. It is apparent from its past activities that the Commission is not in any way connected or associated with any political movement or ideology. It acts and is devoted to the particular task of vigilance in respect of all violations of such principles of justice which are at the basis of the conception of the Rule of Law.

"But the jurists, who a few years ago created the Commission, were from the outset conscious of the fact that it was necessary to broaden its task in an approach more positive than mere condemnations and criticisms, however necessary and wellfounded. Hence other aspect of our activities was emphasised with increasing vigour.

"This action has consisted in developing, supporting and strengthening the principles of justice inherent in the concept of the Rule of Law. It is in this domain, above all, that the opportunities for the future action of the Commission are considerable. These opportunities will be *all the greater* if the present Congress as a result of its deliberations will reach conclusions which would state and clarify the principles underlying the concept of 'The Rule of Law' in a free society.

"Our work and research carried out up to the present time have clearly established that this concept is not associated with any economic system nor with any rigid theory or definition of human rights or fundamental freedoms. The common denominator is the effective protection of the individual against arbitrary action by governments and public authorities.

"In this field, jurists have a high duty to perform. In recent years, it has been the fashion to contend that the future of humanity is in the hands of scientists, physicists and economists. In fact, undue emphasis on technocracy has to a large extent led our civilization into the grave difficulties in which the world finds itself today. It is true that the achievements of scientists and technicians are remarkable. Men have dominated matter and I would particularly mention the control of the atom, but it still remains for us to learn how to utilise, control and regulate these new powers of domination over matter. It is only the moral and social sciences, and in particular the law, which will enable us to learn how to bridge the immense gap between technological discoveries of our age and their harmonious and

peaceful use within the framework of institutions put at the service of mankind enjoying its liberties and rights.

"As the Prime Minister of India has so eloquently pointed out we live in a world which is in the process of complete transformation. It is a world in which new societies are created at ever quickening pace and in which I believe the role and duty of the lawyers is of urgent and increasing importance. In a large measure, it is for lawyers to provide the structure and organization of these societies and to devise adequate forms of institutions; it is for lawyers to find the ways and methods by which economic, social and technical development of societies must be reconciled with the need to set up free institutions founded on the Rule of Law, in which individual freedom can flourish.

"There is no conflict or contradiction between these two needs. The research of the Commission shows that men need not be deprived of freedom and protection against the State in order to achieve economic progress which is of such manifest and primary importance. Striking evidence that this can be attained is provided in the experience of this great and ancient land in which we have the privilege of being guests today: India, which is demonstrating to the world what immense industrial and economic progress can be made within a very short period of time under a constitution which guarantees and, what is even more important, provides the practical legal machinery for protecting, fundamental freedoms under the Rule of Law. That this legal machinery should work so effectively is of course due to the high standards and independence of the Bench and the Bar in this country, without which no constitutional guarantees, however well drafted, would have substance and reality.

"In order to secure the adoption of systems and institutions based on the Rule of Law and to obtain recognition of these principles in every country. We, as jurists, whenever necessary will have to embark upon an educational mission. We must explain and demonstrate that the concept of the Rule of Law is not a discipline intended to maintain a retrogressive and static condition of society and that, on the contrary, it is a dynamic notion, living and flexible, perfectly capable of being adjusted to economic and social development of new societies. For this reason, it is particularly fortunate that our Congress has assembled at this very time and that its object is the clarification of the Rule of Law in the face of these urgent practical problems.

"Assuming that the work of the next few days will make it possible for us, in some measure, to achieve this end, I would like now to say a few words about the projects for the future action of the Commission. The Commission especially during the last two years, has considerably expanded its activities. This is proved among other things by the impact of its publications and of its other activities in a great many countries. Judges, practitioners and teachers of law constantly turn to the Commission for information or to offer suggestions or to express the feeling of solidarity of the legal professions. In short the Commission meets a real need, the extent of which was not apparent when it was formed only a few years ago.

"Our previous Congress which took place in Athens in 1955 entrusted us with the task of considering what minimum safeguards are necessary to ensure the use of the Rule of Law and the protection of individuals against arbitrary action of the State.

"The results of this study are to be found in the *Working Paper* which is in your hands and on which Mr. Marsh will comment upon presently. We hope that the conclusions which will emerge at the end of this week will constitute a starting point for the new activities of the Commission. We trust that we will receive from you a mandate to seek the implementation, by all means at our command, of the rules and conclusions adopted by you,

both in relation to the countries which violate or ignore them and by all those countries which find themselves at the crossroads, hesitating between different constitutional and legal structures. In this connection, a non-governmental international organization such as ours can perform a particularly useful function. It is true that the Commission does not possess the means of public international organisations, but on the other hand it does not suffer from the inevitable handicaps and limitations of such bodies. Even more important is the fact that the Commission is basically an organisation of individuals who are free from the restraint of diplomatic and governmental exchanges.

"In order to strengthen its effectiveness the Commission intends in the immediate future to increase its contacts with individual lawyers as well as with many other institutions both national and international, with Judges, with Bar Associations, Faculties of Law and learned societies. We also intend to maintain close contacts with the United Nations. As has been recalled the Commission has consultative status with the Economic and Social Council. In this connection I would say that the Commission is greatly honoured by the presence of the personal representative of the Secretary-General of the United Nations and one of his closest and most distinguished advisers whom you have heard this morning.

"Furthermore the Commission intends to encourage the creation of new national sections and to give increased support to the manifold activities of the existing sections which are indispensable in our work. I should add how much we appreciate their co-operation.

"The Commission will also make a particular effort to interest in its work and to enlist the support of the younger generation of jurists, law students, junior barristers, etc., from whose ranks statesmen and world leaders will be recruited. A number of practical projects are now under consideration to this end.

"As we all know, the legal profession, with its tendency to develop an analytical mind, can readily lead towards an attitude of disbelief and skepticism. It is only too easy to consider the concept of human rights and fundamental freedoms and the closely related problem of the Rule of Law as an abstract and theoretical conception or a mere political formula. In fact, we are dealing with practical and living notions charged with meaning and with positive reality and which, by their nature, do affect directly the future of societies as well as our every day life. It is not idle to recall that a lawyer should not be a mere technician of the law as is often the case. He has a wider object to achieve and he must play an active and constructive role in the respective political communities.

"This task is undoubtedly difficult in a world divided and endangered by conflicting ideologies. Nevertheless, it is by no means impossible. The International Commission of Jurists intends to contribute to its accomplishment with all the force at its command, with the assistance and support of all our learned brethren, from near and far. The solidarity of lawyers will permit us to reach our common goal: a World in Peace under the Law."

The next speaker was Mr. NORMAN S. MARSH, former Secretary-General of the International Commission of Jurists, who introduced the topic under consideration by the Congress in an address on "The Rule of Law in a Free Society".

"The gathering, which I have now the honour to address, is met together for a specific purpose: to discuss, elaborate, criticise and finally, it is hoped, with all the alterations and qualifications which may be necessary,

to approve the conclusions of the Working Paper which is before you. That paper purports to be a sketch in broad outline of the conception of the Rule in a free society.

"In introducing such an immense topic, which must necessarily touch on the most fundamental issues of political and social philosophy, apart from its specifically legal content, an extreme modesty is appropriate and, indeed, essential. Such modesty is all the more necessary in the particular circumstances of this Congress.

# I

"I will say nothing about the personal circumstances – for they are self-evident and to me at this moment of speaking painfully apparent – in which I face a galaxy of theoretical and practical legal learning from the greater part of the world. I must, however, in the first place explain why it has been thought appropriate for me to address you in plenary session. It might well be said that in view of the detailed and expert consideration which the *Working Paper* will doubtless receive in the four Committees of the Congress there is no necessity for a general survey of the Rule of Law. So much has been spoken and written about the Rule of Law as a conception that you may well be impatient to turn from the theory to its practical implications in the different legal systems of the world.

"The choice of subjects which have been allocated to the different Committees of the Congress and the analysis which has been made of the problems which arise in these different fields would, however, be scarcely comprehensible without some understanding of the general conception of the Rule of Law underlying them. The conception of the Rule of Law is indivisible. In administrative law or in criminal law for example it may be possible to elaborate rules which seek to realise that conception in practice, but again and again we find that legal definition is forced to admit the limits of its techniques and we rely on that central pool of principles which we call the Rule of Law. In different countries we may use different phrases: 'fair play', 'natural justice' or 'legality' serve this end, but they are scarcely intelligible unless they are related to the general premises of our whole enquiry.

"It may be admitted at the outset that the term Rule of Law is not the clearest or happiest phrase to express the ideas which we have in mind but it is a phrase which is sanctioned by wide usage and has now found its way into at least two important international instruments. Thus, the Universal Declaration of Human Rights of December 16, 1948 declares that:

'it is essential if man is not compelled to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law.'

"In a rather vaguer usage the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 speaks of:

'the Governments of European countries which are like minded and have a common heritage of political traditions, ideals, freedom and the Rule of Law.'

"It may therefore be helpful briefly to consider two different senses in which reference is sometimes made to the Rule of Law. Neither of the meanings which I am about to discuss precisely corresponds with the conception of the Rule of Law adopted in the *Working Paper* before you, but it will be clear that that conception combines to a large extent these

two other interpretations and is indeed hardly comprehensible without reference to them.

"The Rule of Law in its most direct and literal meaning implies certainty in human relations. Men should know their rights and duties in society. The Greeks spoke of law or *nomos*, as the principle of political association which assigns to each citizen his position in society and defines its nature and extent. In 1610 we find the English House of Commons petitioning King James I in the following terms:

'amongst many other points of happiness and freedom which Your Majesty's subjects of this Kingdom have enjoyed under your Royal progenitors... there is none which they have accounted more clear and precious than this, to be guided and governed by certain rule of law.'

"It is this interpretation of the Rule of Law which Dicey in his famous work *The Law of the Constitution* contrasts with:

'every system of Government based on the exercise by persons in authority of wide, arbitrary and discretionary powers of government.'

"From the *Working Paper* before you, and still more from your own experience of the contemporary world, you will not find it difficult to illustrate the practical relevance of this conception of the Rule of Law. It is perhaps pre-eminently in the criminal law, which directly touches life and liberty, that the need for certainty is most evident. Laws making punishable conduct which when entered upon was not only permissible but regarded as the normal expression of political or social activity, offences which are defined in terms so wide or so vague that no one can reasonably anticipate their scope, criminal administration which by design or indifference is fortuitous and discriminatory in its operation – these are the hallmarks of a society lacking a fundamental requisite of tolerable organised living. But the Rule of Law, in the sense in which I have been discussing it, has other less dramatic but important applications. In a world which increasingly recognises the responsibility of the State for regulating spheres of action which were previously left to individual initiative, there are now possibilities of uncertainty added to the always uncertain business of living. A merchant who has built up a trade connection on the basis of a licence granted by the government is suddenly and unexpectedly deprived of his livelihood by the withdrawal of the licence; a publicist who has been allowed freely to move and express views within his own country finds when he applies to an executive agency for a passport that his plans for foreign travel must remain speculative. The Rule of Law as a rule of certainty seeks in these areas to establish standards and criteria, which would transform unmotivated and unknowable executive discretion into reasonable ascertainable administrative law.

"Such a conception of the Rule of Law is, however, open to serious criticism. On the one hand it may be said that it is too rigid and all inclusive. The objection is at least as old as Aristotle.

'It is because law', he says, 'cannot cover the whole of the ground, and there are subjects which cannot be included in its scope that difficulties arise and the question comes to be debated, 'is the rule of the best law preferable to that of the best man?'

"In our own times we are all familiar with the argument of the administrator that the ever changing circumstances of economic and social life or the delicate nature of political and diplomatic relations require very

wide and flexible governmental powers. Yet it is worthwhile to follow Aristotle's argument to its conclusion. While admitting that the Rule of Law, in the sense of a fore-ordained regulation, cannot determine certain governmental decisions, he proceeds to discuss whether such issues should be entrusted to a single individual or to a number of persons. With that particular controversy I am not here concerned, but it does seem to me that in his approach Aristotle comes very near to the administrative problems of our own day. We are much more ready than Dicey for example to recognise the need for wide and discretionary powers in the Government; some loss of certainty may be involved, but uncertainty can be held in check if we pay attention to the methods by which governmental decisions are reached.

"This emphasis on the methods of decision is seen, as far as England is concerned, in the recent Franks Report on Administrative Tribunals and Enquiries, recommendations of which, emphasising the importance of openness, fairness and impartiality in the procedure of administrative tribunals and ministerial enquiries, have now been largely translated into law. In another jurisdiction with a somewhat different legal tradition, and by a judicial rather than a legislative process, the French Conseil d'Etat has similarly underlined the importance of method in administrative procedure; as for example in the well known decision of 1944 in which it annulled the withdrawal of licence from a particular news vendor because the requirement of fairness in a semi-penal issue – in this case an opportunity for the grantee of the license to present her case – had not been observed.

"On the other hand the Rule of Law, when taken to mean simply the certain application of ascertainable laws, has been equally criticised on the ground that it applies too narrow a test. In a country where the laws themselves are unjust or inhumane their certainty of expression and of enforcement will be a poor consolation to their victims.

"Lawyers who combine a sensitive social conscience with a disinclination to sink in the deep waters of politics have endeavoured to solve this dilemma by a variety of arguments. Thus rule *by* law, where law is used by a despot as mere machinery to effect his will, has been contrasted with the rule *of* law or *under* Law, to which at all events as regards the formal methods of law making, even the law giver is subject. As a theoretical argument this hardly seems convincing, for the methods of law making prescribed by law may ignore the reasonable claims of minorities or indeed require only the unchecked decision of a single man. In practice no doubt the argument is much more powerful; despots can seldom show a clean legal title to power; Hitler, for example, found it necessary illegally to imprison or intimidate part of the opposition to obtain the enabling act vesting him with supreme authority. Another solution of the dilemma was attempted by Dicey, who was of course aware of the possible conflict between his cherished principle of the supremacy of Parliament as the ultimate source of law and his equal attachment to the liberties of the subject. Dicey was of the opinion that what he called the general principles of the Constitution (which we might term civil liberties) owed their secure position in England to the fact that they rested on judicial decisions in the Courts rather than in their formal entrenchment in a written Constitution. But in so arguing Dicey evaded rather than solved the difficulty. What he was in fact saying was that in his opinion civil liberties were in safer hands when protected by the judges than when at the mercy of Parliament, in which he revealed his views – or prejudices, if you wish – as to the proper function of Parliament. On the other hand he could not, and did not, argue as a matter of constitutional theory that Parliament was not supreme.

"The Rule of Law to most lawyers means, however, rather more than certainty of the laws and of their enforcement. It is conceived rather as a body of principles, institutions and procedures which can be separated from



the more controversial political and social issues and which are fundamental and self evident in any legal system worthy of the name. Thus, in this sense a lawyer educated in the English legal tradition will speak of the Rule of Law when an American lawyer would refer to Government under Law. A French jurist might speak with the same end in view of *le principe de légalité* or of *la suprématie de la règle du droit*. In the French text of the European Convention for the Protection of Human Rights and Fundamental Freedoms to which I referred at the outset of my address the reference to the Rule of Law in the preamble is rendered as *prééminence du droit*. In a similar context the German conception which is most generally used is that of the *Rechtsstaat*. It was one of the valuable clarifying functions of the Chicago Colloquium on the Rule of Law as understood in the West, held in September 1957 under the auspices of the International Association of Legal Science, and in particular of Professor Hamson's general report on that meeting (which I have had the advantage of reading) not only to draw attention to this varying terminology but also to emphasize the extent to which the linguistic difference covered a real difference of content.

"Between the principles, institutions and procedures, recognized by different legal systems as what – for want of a better phrase – we may call the Rule of Law, there is, it is true, a broad similarity. For example, most countries recognize, at least in theory, the importance of independent judiciary. But the methods by which they seek to realise this ideal – in particular the systems of appointment and removal of judges – are subject to considerable variations. In one country the judges are appointed by the Executive, with a more or less powerful advisory role assigned to the Judiciary itself, in another the judges are at least in part elected by a popular vote, again with or without a restraining factor, in this case conventions which seek to raise the election above party political controversy; in a third country an intermediate solution has been attempted by the setting up of a body, representing the Executive, Legislative and Judiciary, with power to appoint and supervise the Judiciary.

"Similarly, in the sphere of criminal law there is general acceptance of the importance of 'fair trial', but if we seek to analyse the constituents of fair trial, beyond perhaps the necessity of establishing the guilt of the accused beyond 'reasonable doubt' or according to the 'intimate conviction' of the tribunal of trial, we find great differences of approach and emphasis. In some systems it is thought important that the investigation of the facts and the collection and presentation of evidence on which the prosecution rests its case should be more or less directly under the supervision of the Judiciary, in order to ensure that the prosecution should preserve as far as possible the role of impartial investigator of the circumstances surrounding the offence; in other systems a more passive role is assigned to the judge for fear of contaminating him with a prosecutor's zeal, and the restraints on the prosecutor depend to a greater extent on the traditions of his profession and the exclusion by the judge of improperly obtained evidence. In some countries, of which India in its Evidence Act provides a noteworthy example, a compromise solution is attempted, in as far as no confession made in custody can be used unless made voluntarily before the magistrate.

"From these varying patterns the lawyer is tempted to isolate those elements which are common to all or most legal systems, and to build from what he has extracted a supra-national conception of the Rule of Law. Yet I believe such an approach to be misconceived. The significance of the principles, institutions and procedures of a legal system cannot be understood unless they are related to the values of the society to which they are intended to give effect; still less can its particular elements be isolated from the rest of the system. The independence of the judiciary, for example, even if equally achieved in the sense of freedom from interference from

outside authorities, will mean different things in different countries, if the judges vary in their conception of the respective positions of the individual and the State.

"Conversely, what by this method is rejected because it is not common to most countries, may be of the greatest general importance; its apparent absence in certain legal systems, considered to have a high respect for the Rule of Law, may be explicable only be reason of special and fortunate circumstances. Thus, a lawyer should not, in my opinion, be deterred from pressing for a comprehensive liability of the State, as well as of the wrongdoing individual, for wrongs committed in its name, merely because there is a wide variation in the national practice in these matters or because the absence of adequate legal remedies is made more or less tolerable in some systems by the existence of political channels of redress, or by an exceptionally high standard of civil service behaviour.

"The brief survey, which I have attempted, of two possible approaches to a supra-national conception of the Rule of Law may help to explain the point of view adopted in the *Working Paper*. I do not intend to summarize what has been said in that document for it might already be criticised for attempting to compress a vast subject matter within a very few pages. I will only draw your attention to the definition of the Rule of Law given in the *Working Paper* and emphasize some of its implications. That definition reads:

'The principles, institutions and procedures, not always indetical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.'

"You will notice, in the first place, that the definition associated legal principles, institutions and procedures with the values they are designed to protect. That is also the thought underlying the title given to this Congress, 'The Rule of Law in a Free Society'. On the one hand we speak of a 'Free Society', on the other of freedom from 'arbitrary government' and recognition of the 'dignity of man', but the underlying idea is the same. It is true that in countries which have written constitutions embodying a list of fundamental rights the values of the society in question are more self evident; they appear, moreover, to be 'legal' and not merely the underlying political assumptions of that society. On the other hand in countries which possess no written constitution, or at all events which do not purport to set out a comprehensive list of fundamental rights in their constitutions, there is a tendency to limit the scope of the Rule of Law to questions of procedure without regard to the substantive rights which they are intended to protect. In fact, however, rights and remedies are only significant in their relationship to each other. For example, the Fourth Committee will be concerned, among other matters, with what might be regarded as the procedural right of legal representation and advice. Yet the desirability of such a right cannot be assessed without consideration of the purpose which it is supposed to serve, and the extent to which in fact the legal profession worthily upholds that end. It is true that for the practical purposes of this Congress consideration of the values which underlie the Rule of Law in a free society is assigned to the First Committee which will be dealing with legislative power. But this is far from suggesting that the other Committees can afford to neglect the basic assumptions which give meaning to their consideration of institutional and procedural matters. It was indeed our intention in preparing a single and relatively short Working Paper to make it possible for every participant, at whatever level of detailed discussion, to be able to see his particular concern against the wider perspectives of the Congress as a whole.

"Secondly, I would emphasize that in our definition experience is the yardstick by which the principles, institutions and procedures of the Rule of Law have to be measured. We cannot therefore be dogmatic about the appropriateness of different legal institutions and procedures; we must always bear in mind the differing political and social conditions in which the various legal systems of the world operate. This does not, however, mean that we are condemned to a neutral relativism. It is a question of the width of our experience. No one, I imagine, would insist that trial by jury is a universal requisite of fair trial, however deeply he might be attached to that institution within his own legal tradition. On the other hand the experience of most countries would suggest that in all serious cases the inevitability of human error requires some possibility of appeal to a higher tribunal.

"Thirdly, I must make some reference to the ambitious concluding words of the definition: protection from arbitrary government and enjoyment of the dignity of man. They are not intended to be a mere rhetorical repetition of similar ideas. Of the supremacy of law and of its corollary, certainty of law, which are the antithesis of arbitrary government, I have already spoken. I have endeavoured to show that the supremacy and certainty of law do not supply all the elements of the Rule of Law; indeed certainty of law is a relative conception, to be weighed against discretion by reference to extraneous values. Those values we find in the conception of the 'dignity of man'. It includes the political and civil liberties, the right to responsible government, freedom of speech and association, by which in the historical development of many countries, men have asserted that they are the masters and not the servants of the State; but it is much more. It recognises that, without a minimum standard of education and economic security, political and civil freedoms may be more formal than real. This does not mean that the lawyer as such is competent to lay down the economic and social programme of his society but it does imply that in many spheres, particularly in administrative law, he will be called upon to strike a just balance between measures designed to enhance man's dignity as an economic and social being and his political and civil rights. I emphasize this wide interpretation of the dignity of man because too often in the past the protagonists of the Rule of Law have interpreted their cause, or allowed it to be interpreted, in a way unsympathetic to the broad stream of social and economic progress.

## II

"While there are good reasons for a personal note of diffidence and humility in approaching this tremendous theme of the Rule of Law there is even more pressing necessity to emphasize our collective humility as lawyers. The Rule of Law in the broad terms in which I have described it is not the exclusive responsibility of lawyers. It is, behind all the legal technicalities which may hide it from the layman, an attitude of mind; an attitude of mind to be shared by all the members of society.

"This attitude recognizes, in the first place, the indestructible value of the individual personality as the source and justification of all organized living. To cite, perhaps not inappropriately, a European poet, Goethe, who drew much of his inspiration from Eastern culture:

'Höchstes Glück der Erdenkinder ist doch die Persönlichkeit' -  
'Human personality is the greatest joy of mankind'.

"But this attitude of mind recognises equally that man's existence as a distinct moral entity involves his own fallibility. It follows that towards all authorities and institutions set up by man, man's own attitude must be

cautious and critical, critical that is to say in the sense that he is prepared continually to ask himself whether they enhance or depress the dignity of man.

"If I were to seek illustrations of the essential interplay in a free society between, on the one hand, legal and, on the other, political and educational techniques, I might refer to the problem arising in administrative procedure when the relative merits of redress by legal channels are to be weighed against the possibility of political complaint. Or again, I might refer to the unwritten sanction of public opinion making workable and fair a system of appointing judges which by formal legal analysis might be open to serious abuse. In this sense I should agree with Sir Ivor Jennings when he says that the Rule of Law depends on

'intangibles which nevertheless produce an impression on the mind of any observant person who crosses the boundary from a dictatorial State into a free country.'

"But I should not draw the inference that the lawyer's efforts to improve the machinery which lies within his own expert sphere of responsibility are fruitless. I should say rather that the lawyer must recognise that although his own contribution to the development of a free society may be essential it is in itself not enough. This suggests that his duty is not only to improve his own techniques but to make clear to the other members of society the obligation which lies on them.

### III

"If in introducing this *Working Paper* I have struck for the most part a minor key, if I have emphasised the complexities of the subject and my own diffidence in dealing with them, if I have suggested that lawyers can of necessity make only a limited contribution to the welfare of society, it is not because I do not feel strongly and deeply about the Rule of Law. If I have spoken in the language of the student rather than the man of affairs, of the study and not the forum, it is not because I am unaware that in many places the dignity of man is flouted and the safeguards of his freedom disregarded. It is because I believe that, in a broad sense, we all instinctively know what we mean by the Rule of Law and when it is absent. Our purpose is not to formulate generalities of praise or denunciation, but soberly and frankly to consider what are the detailed implications of the Rule of Law and how they may be realized in our differing systems and societies. That is the intention, although imperfectly the achievement of the *Working Paper*.

"As, therefore, you turn to your constructive task, which is indeed to build the framework of a free society, I may conclude with the advice of a mediaeval Latin poet: -

"Si quis habet fundare domum, non currit ad actum impetuosa manus ...

"Circinus interior mentis praecircinet omne materiae spatium.

"If a man has to lay the foundations of a house, he does not set rash hand to the work ...

"The inner compasses of the mind must first encircle the whole quantity of material."

The Opening Plenary Session was adjourned following Mr. MARSH's address. His Excellency the Prime Minister of India met with the participants informally. After luncheon, the Congress participants reassembled in their respective Committees.

**SUMMARIES OF THE PROCEEDINGS  
IN COMMITTEES**

## COMMITTEE ON THE LEGISLATIVE AND THE RULE OF LAW

Chairman: Dr. F. URRUTIA (Colombia)  
Rapporteur: Professor G. BURDEAU (France)  
Secretary: Mr. L. F. E. GOLDIE (Australia)

The Chairman of this Committee, Dr. F. Urrutia of Colombia took the Chair at short notice in place of Mr. José T. Nabuco of Brazil, owing to the latter's unavoidably delayed arrival at the Congress. The registered membership of the Committee is given at the end of this summary, together with the text of the conclusions of the Committee as drafted prior to amendment in the Plenary Session. (Pp. 74-77).

**Monday, January 5, 1959**

15.00—17.30

At the invitation of the Chairman the **RAPPOREUR** began by a general survey of the topics to be discussed and made suggestions as to the order in which they might be considered. He took it in the first place for granted that if the participants in the Committee were convinced positivists they would not be there. He assumed that they all admitted in principle that the legislator is bound by the law. The first object of the discussions therefore would be to define as precisely as possible the principles which are binding on the legislator. The second problem would concern the way in which the legislature is organized from the point of view of putting into effect these basic principles. Closely associated with this question is the extent to which the legislative function is divided between primary and secondary authorities; such delegation of legislative power was a characteristic of modern States but had its peculiar dangers. Finally the Committee would have to consider what sanctions exist or might be imposed to ensure that the legislature observes the rule of law which the rapporteur described as a kind of "super-legality". In this connection it would be necessary to consider the insertion of principles of the Rule of Law in constitutions and the consequent problems which arise in controlling the constitutionality of laws; it would also be necessary to consider the effectiveness of public opinion as a form of sanction to ensure respect for the Rule of Law, which in its turn would raise the whole issue of the way in which the machinery of government is organized.

In the general discussion which followed the first question raised was whether the Committee was to follow the pattern of the Working Paper (see pp. 187—321) or to devise a new plan. Several speakers felt that some modification of the Working Paper was

desirable because in the summary of conclusions presented to the First Committee, in contrast to the actual treatment in the body of the Working Paper, insufficient emphasis had been laid on the Rule of Law as a positive ideal. Thus, in a striking phrase, Mr. M. R. S. PRAMOJ of Thailand said that the guarantees found in traditional constitutions provide only "liberty to starve from the cradle to the grave" and MR. E. H. ST. JOHN of Australia in reinforcing this criticism suggested that the positive values in the Rule of Law should be emphasized by reference to the United Nations Universal Declaration of Human Rights. The RAPPOREUR shared this point of view, although pointing out that the traditional negative liberties of thought, meeting and association appeared at first sight to be in danger of clashing with any positive obligations which may be laid on the legislature to provide positive rights such as the right to work; he therefore thought that the first task of the Committee should be, while taking the traditional negative liberties for granted, to consider how they could in practice be reconciled with the positive rights to which an individual should be entitled in a society under the Rule of Law.

After considerable discussion the Committee proceeded to consider the conclusions set out in the Working Paper (see pp. 187-321) paragraph by paragraph and to amend them or add to them as might be necessary in order to draw attention to the positive duties, as distinguished from the negative limitations, imposed on legislative power.

Paragraph 1 of the Summary and Conclusions of the part of the Working Paper dealing with the Legislative and the Rule of Law read as follows:

"In a society under the Rule of Law both majority and minority alike accept minimum standards or principles regulating the position of the individual within society."

A great variety of views were expressed concerning the above paragraph. It was said, for example, that it was unnecessary and would be sometimes misleading to divide a given society into a majority and a minority, although it was also pointed out that it was important to emphasise that in a free society a minority should not be oppressed by a majority. Another subject of discussion was the appropriateness of the word "accept", a number of speakers feeling that this was an equivocal phrase and that it was necessary to introduce at the outset the idea that certain minimum standards were "guaranteed". This raised the point made, for example, by MR. P. TRIKAMDAS of India that a distinction was necessary, as in the Indian Constitution, between rights which are guaranteed and enforceable in the courts and directive principles which serve only as a general guide to Parliament. A more general criticism was that it was desirable at the outset of the resolutions of the Committee to define the

principles binding on the legislature. There was some difference of opinion as to the degree of detail in which it might be necessary to define these principles, some like Mr. RAMON DIAZ of Venezuela, suggesting a brief reference to the "dignity of man as a human being", others like Mr. S. D. VIMADALAL of India favouring the inclusion of the definition of the Rule of Law given in the introduction to the Working Paper. This read:

"The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man."

It was eventually decided to defer the appointment of a drafting Committee until the resolutions of the Committee had been discussed as a whole.

**Tuesday, January 6, 1959**

09.30—13.30

The RAPPORTEUR began the resumed discussions by pointing out that the proceedings on the previous day had departed from the plan of procedure which he had suggested to the Committee. He feared therefore that inadequate attention was being given to the Rule of Law in its modern setting. "I am not," he said, "the contemporary of Jefferson, Blackstone or Benjamin Constant." He reemphasised, in particular, the importance of the problem of delegated legislation, citing by way of example the power given for the government to make regulations on matters not governed by laws under Article 37 of the Constitution of the Fifth Republic of France. MR. NORMAN S. MARSH, who, as a former Secretary-General of the International Commission of Jurists and author of the Working Paper, was not assigned to any one Committee but endeavoured to assist when required in the discussions of all four Committees, was then asked to speak. He said that he fully agreed that the function of the legislature in a modern society cannot be conceived purely in negative terms, although he thought that there were difficulties for the Committee in deciding as lawyers what would be the appropriate legislative programme for the many types of legislature in the many different parts of the world. He suggested that it might be possible to begin the resolutions with a statement to the effect that the function of the legislature in a free society is to create the social,



economic, educational and cultural conditions in which man can enjoy his freedom; with this constructive attitude made clear, it would not be offensive to say that there are certain things which a legislature must not do because they would in fact detract from the freedom and dignity of man. After Dr. EDOUARD ZELLWEGER of Switzerland had reminded the Committee that the classical negative conception of the Rule of Law, although incomplete, was by no means out of date or unnecessary, particularly in those areas of the world where fundamental political freedoms were denied, Senator L. TANADA of the Philippines and Mr. N. S. MARSH made drafting suggestions for combining the positive and negative aspects of the Rule of Law in the resolutions of the Committee; Mr. M. R. S. PRAMOJ of Thailand made further suggestions emphasising in a draft resolution the necessity for the Rule of Law to be brought into agreement, in the words of Mr. Nehru at the opening plenary session, with the "Rule of Life".

When discussion turned to the methods of control of legislative activities, PROFESSOR B. V. A. RÖLING of the Netherlands drew attention to the existence of international as distinguished from national guarantees of human rights. In particular he mentioned the regional system established in Europe under the Rome Convention of 1950 which provides for a European Commission of Human Rights and a European Court of Human Rights. Mr. ELWYN JONES of the United Kingdom expressed some doubt from an English point of view as to the possibility of admitting judicial supervision over the legislative activities of Parliament as distinguished from the control exercised by the court over subordinate legislation. He considered that the only admissible limitation on the sovereignty of Parliament, at all events as far as United Kingdom was concerned, was the necessity of it submitting at periodical General Elections to the judgment of public opinion. The RAPPORTEUR then referred to the status of Parliamentary sovereignty in France. He spoke of the tacit conventions which in England determine what Parliament may and may not do. He referred to the Constitutional Council set up under Article 56 of the Fifth French Republic. He pointed out that by reason of its Constitution, three of its members being designated by the President of the Republic, three by the President of the National Assembly and three by the President of the Senate, it is essentially a political body. Nevertheless he thought it desirable for the purposes of the Committee to emphasise the control of the constitutionality of laws by the courts, bearing in mind that in countries without old traditions it might have special value.

The Rapporteur's reference to newly independent societies was taken up by Mr. G. G. PONNAMBALAM of Ceylon who considered that in societies with linguistic or racial minorities the rights of minorities should be protected in a written constitution and the accord of the laws with the constitution referred to an independent court rather than to a political body. He proposed to "consider the position not

of political minorities but of permanent national and communal minorities that exist in a number of States today, where the minority of today cannot become the majority of tomorrow and thereby reverse any repressive legislation that may have been passed at a particular time". Mr. N. S. MARSH pointed out that in paragraph 2 of the Summary and Conclusions of the section of the Working Paper dealing with the Legislative and the Law, an attempt at compromise had been made. In some countries (by no means only in England) there is no written constitution or, if there is, it is not subject to the control of the courts, whereas in other countries there are constitutions in various degrees of detail and with varying types of control of the constitutionality of laws. He would however welcome a more emphatic statement that the underlying principles of the Rule of Law, whether ultimately enforced by the courts or by public opinion, must in no circumstances be disregarded.

PROFESSOR WERNER KÄGI of Switzerland warned the Committee against the danger of trying to put too much into the concept of the Rule of Law. It should not be a purely formal concept, but clarity will be endangered if it is sought to contain within it all political ideals. There was a place for fundamental values, but as jurists our conclusions had in many respects to be negative. In preparing a universal document it is easy to state only commonplaces. Too much importance must not be attached to the document itself; greater value lay in the opportunity which discussion gave for mutual understanding of each other's difficulties. However, PROFESSOR KÄGI agreed with the Rapporteur that it was important to re-establish the legislative authority, in view of the growing trend towards delegated legislation and in this connection he especially mentioned the dangers of emergency legislation; he here contrasted the position in Switzerland in the First World War when the government had wide emergency powers without adequate Parliamentary control and the position in the Second World War when emergency legislation of the Executive was subject to the supervision of a Parliamentary Commission. He also endorsed the distinction which had been made by other speakers between classical fundamental rights, which can be effectively guaranteed, and the different position of social or positive rights. Finally he put in a plea for the control of legality under the system operating in what are known as the "direct democracies" by the use of the referendum.

In the ensuing discussion there was some difference of emphasis rather than fundamental division of opinion between those who, like Professor Kägi, were impressed by the distinct character of the legal traditions and political background in each country and those who, like Professor HENRIK MUNKTELL of Sweden, desired to make the resolutions of the Committee and of the Congress as universal as possible. We must try to find, the latter said, the minimum that we think necessary for the dignity of the life of man. Another aspect of this difference of emphasis concerned the position of newly inde-

pendent countries where, as MR. G. G. PONNAMBALAM of Ceylon pointed out, there may be no firmly established conventions of legislative behaviour. Although MR. B. K. YITETAKOU of Ethiopia expressed the view that any control of laws passed by Parliament was contrary to the principle of the separation of powers, on the whole the general opinion was that control of legislative powers was often necessary and could only be dispensed with in countries where, as MR. M. R. S. PRAMOJ of Thailand expressed it, the Rule of Law was supplemented by a generally observed rule of what is and what is not "cricket". There was therefore general agreement with a provisional formulation by Mr. N. S. Marsh of a resolution to the following effect:

"In many societies, particularly those which have not yet fully established traditions of legislative behaviour, it is essential that the minimum standards referred to in the first paragraph should be incorporated in a written Constitution and the safeguards therein contained should be justiciable before an independent judicial tribunal. In other societies unbreakable standards of legislative behaviour may serve to insure that the same minimum standards are observed, and a lawyer in such societies cannot disclaim interest in the maintenance of such standards of behaviour, because, within his particular society, the sanction may be of a political nature."

Some discussion followed on the ways in which control over the legislative function might be exercised in countries where it is necessary. The issue was described by MR. THAN AUNG of Burma of being whether the control should be exercised by a purely judicial tribunal, by a quasi-judicial body or by what was in essence a political body, as under the French Constitution. In this connection MR. SUNGSOO WHANG of South Korea drew attention to the Constitutional Council in his country which consisted of members of the National Assembly and of the Judiciary. He asked the opinion of the RAPPOREUR, who emphasised that the function of judicial review necessarily involved the consideration of political issues different from those, for example, facing a judge in the interpretation of a contract. There could be advantages, therefore, in the co-operation of politicians and judges in performing the function of judicial review. PROFESSOR L. M. BENTIVOGLIO of Italy considered that the question of the control of the legislature must not be entirely considered by reference to a written constitution which can be too detailed, as was his opinion of the Italian Constitution. There was always a living constitution behind and beyond the written constitution as had been pointed out by the well-known authority on Public Law, Professor Verdross. The RAPPOREUR outlined various matters of constitutional control and pointed out that much depended on who had the right to raise a constitutional complaint

before the constitutional tribunal in question. In many countries a private person has not such a right to initiate the complaint. He did not favour the specification in detail of the kind of constitutional control to which the legislature should be subject.

**Tuesday, January 6, 1959**

15.00—17.30

This session was devoted to the consideration of various drafts put forward by the Rapporteur and by Mr. N. S. Marsh, and with consequential amendments by others, with a view to formulating the resolutions which ultimately form the substance of Clause II of the conclusions of the Committee. It would serve no useful purpose to set out in detail the problems of logical arrangement and translation which occupied the Committee. The most interesting discussion of substance concerned the resolution which eventually found expression in Clause II(2)(b) namely:

“To implement the principles set forth in the preceding Clause I it is essential that the powers of the Legislature be fixed and determined by fundamental constitutional provisions or conventions which: . . .

“(b) confer on the Legislature, especially with regard to the matters set out in Clause I, the exclusive power of enacting general principles and rules as distinct from detailed regulations thereunder.”

Mr. M. KHALID ISHAQUE of Pakistan, for example, was of the opinion that it was necessary to give powers to subordinate administrative tribunals to create rights and liabilities but the RAPPOREUR made a distinction between the authority which is given by Parliament, as, for example, to acquire property, and the decision made by an administrative authority to apply this power to one particular house rather than to another. JUDGE HAROLD A. STEVENS of the United States asked whether it might not be necessary to provide for cases of public emergency when it might be necessary to govern in a sense by decree, although the definition of a public emergency must itself be judged by a definite and fixed standard. MR. ELWYN JONES of the United Kingdom was also one of those who had misgivings about any attempt to narrow the scope of subordinate legislation. He pointed out that the Committee had already imposed on the legislature a positive duty of providing for social justice and this in fact necessitated much subordinate legislation.

Wednesday, January 7, 1959

09.30—13.30

The proceedings began by the submission of a draft prepared by a Sub-Committee consisting of the Rapporteur and Senator Lorenzo Tanada of the Philippines, assisted by Mr. Marsh. The draft covered the substance of the matters eventually dealt with in Clause I and Clause II. While most of the issues raised concerned comparatively minor points of drafting where the main interest lies rather in the results reached than in the discussion which preceded it, some questions of principle emerged. For example, MR. TAUNO E. SUONTAUSTA of Finland, in speaking of these societies where standards of legislative behaviour are enforced by public opinion rather than a fixed Constitution, said that the Congress should emphasise the responsibility in such countries of the public generally rather than of the lawyer in particular. And MR. H. D. BANAJI of India wished to emphasise the obligation to maintain standards of legislative behaviour in a positive rather than in a negative way. These points of view eventually found expression in the formulation of Clause II in the Conclusions of the Committee which in part reads:

“... a lawyer has a positive interest, and duty to assist, in the maintenance of such standards of (legislative) behaviour (i.e., as laid down regarding civil and political rights and social, economic, educational and cultural conditions essential to the full development of his personality in Clause I of the conclusions) within his political society, notwithstanding that their sanction may be of a political nature.”

Another matter which led to considerable discussion was the precise form in which the distinction might be expressed between the responsibility of the legislature for primary legislation and of the executive or of other bodies for subordinate legislation. Thus, MR. RAMON DIAZ of Venezuela was afraid that any suggestion that the function of the executive was to carry out the policy approved by the legislature would be dangerously vague and it was eventually agreed to emphasise as is set out in paragraph 2(b) of Clause II of the Conclusions at the Committee that the legislature should have:

“The exclusive power of enacting general principles and rules as distinct from detailed regulations thereunder.”

Another problem discussed was the extent to which there should be insistence on the necessity for judicial control over the things which a legislature should do or not do. The point made by DR. EDOUARD ZELLWEGER of Switzerland, that in Great Britain or in Switzerland judicial control did not exist and was not necessary, was

generally appreciated. But it was emphasised by other members of the Committee as, for example, by MR. M. KHALID ISHAQUE of Pakistan that to add an exception to the final resolution covering countries such as Great Britain or Switzerland would detract from the force of the resolution in countries where the resolution could be most profitably studied. Eventually, a compromise was effected which, perhaps at the expense of some logic, but undoubtedly in accordance with the general spirit of the Committee, laid down that the powers of the legislature should be fixed and determined by fundamental constitutional provisions or conventions which:

“(d) Organise judicial sanctions enforcing the principles set out in this Clause (i.e., Clause II), and protect the individual from encroachments on his rights under Clause III (to be considered below).”

The Committee then gave consideration to the actual substance of the principles which should guide legislative behaviour. A preliminary point was made by MR. NAHAR SINGH MANGAT of Kenya who emphasised that no mention had been made in the discussion or in the Working Paper of the position of colonial territories. He wished it made clear therefore that the principles binding on the legislature should govern not only their own country but any territory under its control or protection. Dealing in detail with limitations on legislative power he was against any limitation of the ban on discriminatory legislation, citing as an example the reservation to European colonists of certain lands in the Highlands of Kenya. He appreciated however the rather rare opportunity which the Congress afforded for a member of the Legislative Council of Kenya to take part in an international discussion.

**Wednesday, January 7, 1959**

15.00—17.30

The discussion began with the submission of a motion by Mr. E. H. St. John of Australia and Mr. G. G. Ponnambalam of Ceylon which, in an amended form, eventually found expression in Clauses III (1 and 2) and Clause IV of the Conclusions of the Committee, which read as follows:

### **CLAUSE III**

“(1) Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.

"(2) This Congress appeals to the Governments of the world to provide the means whereby the Rule of Law as envisaged in the resolutions of this Congress, may be maintained and furthered through international or regional agreement on the pattern of The European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, or otherwise. Such agreements should provide an opportunity of appeal to an international body for a remedy against denial of the rights contemplated by the resolutions of this Congress in any part of the world.

#### CLAUSE IV

"(1) The principles stated in the foregoing Clauses represent the proper aspirations of all men. Every legislature and every government should endeavour to give full effect to the foregoing principles, not only in relation to their own countries, but also in relation to any territories under their administration or protection, and should take steps to abrogate any existing laws which are inconsistent therewith.

"(2) It is recognized, however, that in some countries and territories the nature and condition of the people, or of some of them, is such that it is not practicable to give effect immediately to all of these principles in relation to such countries and territories.

"(3) This Congress appeals to the legislatures and the governments of the world to advance by every means in their power the ultimate and universal application of the principles here enunciated as soon as it may be practicable to do so, by progressive steps directed to that end."

It will be noted that the resolutions above include a reference not only to the Universal Declaration of Human Rights but also to the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, an addition added at the suggestion of Professor B. V. A. RÖLING of the Netherlands. The final version of the resolutions given above eliminated (as a result of the discussion in the Plenary Session, not in Committee I) the qualifying phrases inserted in Clause IV. These qualifications recognised that in some countries all the principles set out in the preceding Clauses could not be immediately put into effect.

The Committee then turned to consider the list of restrictions on legislative power which ultimately found expression in Clause III(3) of the Conclusions of the Committee as follows:

#### CLAUSE III

"(3) Every legislature should, in particular, observe the limitations on its powers referred to below, though the Congress

emphasises that the failure to refer specifically to other limitations, or to enumerate particular rights, is not to be construed as in any sense minimizing their importance.

"The legislative must:

"(a) abstain from retroactive legislation;

"(b) not discriminate in its laws in respect of individuals, classes of persons, or minority groups on the ground of race, religion or other such reasons not affording a proper basis for making a distinction between human beings, classes, or minorities.

It is recognized however:

(i) that a distinction may be drawn between citizens and non-citizens in relation to their civil and political rights, but no person, class of persons or minority groups should be arbitrarily deprived of citizenship rights, and

(ii) that in some societies distinctions may need to be drawn between one class of persons and another as a necessary step in the establishment of an ultimate regime of equal equality for all;

"(c) not interfere with freedom of religious belief and observance;

"(d) not deny to the members of society the right to elected responsible Government;

"(e) not place restrictions on freedom of speech, freedom of assembly or freedom of association, except in so far as such restrictions are necessary to ensure the status and dignity of individuals within society;

"(f) state all exceptions envisaged in this clause with precision and in detail; and

"(g) provide procedural machinery ("Procedural Due Process") and safeguards whereby the above mentioned freedoms are given effect and protected."

A preliminary point was raised by the RAPPOREUR who doubted whether it was possible within the framework of the Congress satisfactorily to enumerate a list of individual rights. He was supported in this by MR. ELWYN JONES of the United Kingdom who feared that the Committee might be doing in haste what had been done in length in the Declaration of Human Rights. MR. N. S. MARSH pointed out that the purpose of the Clause was deliberately not to include all the rights included in the Declaration of Human Rights but only those which must be justiciable before a Court. MR. G. G. PONNAMBALAM of Ceylon felt particularly with reference



to South-East Asia it was important that the document which eventually emerged from the Committee should contain some specific prohibitions on legislative activity and he was supported in this by MR. H. B. TYABJI of Pakistan. A compromise between the two points of view was eventually found on the suggestion of JUDGE HAROLD A. STEVENS of the United States. This compromise is expressed in the first paragraph of Clause III(3) set out above.

A discussion followed on retroactive legislation. MR. N. S. MARSH explained that the original Working Paper had referred to the common practice of imposing certain taxes retroactively owing to the budgetary practice of many States; for this reason it seemed wiser to limit the prohibition of retroactive legislation to penal legislation. Many members of the Committee were not willing to limit the ban on retroactive legislation to penal matters although the RAPPORTEUR pointed out that sometimes retroactive legislation is necessary by way of indemnity.

Considerable difficulty was experienced in reaching a form of words acceptable to the Committee which would ban discriminatory legislation. The original proposal of the Working Paper spoke of the duty of the legislature not to:

*"discriminate in its laws as between one citizen and another, except in so far as the distinctions made can be justified in the particular circumstances of each society as necessary to, or as a necessary step in the establishment of, an ultimate regime of equal opportunity to all citizens."*

There was general agreement in substituting the word "person" for "citizen" but it was pointed out that it could hardly be the view of the Committee that an alien was being discriminated against if he is not allowed to vote and the matter was eventually deferred for further consideration.

With the addition of "observance" to the freedom of religious beliefs and of the word "elected" to the right to responsible government the sub-paragraphs on these topics were agreed. The Committee then turned to restrictions on freedom of speech, freedom of assembly and freedom of association and MR. N. S. MARSH explained that the meaning of the exception in the Working Paper ("except in so far as such restrictions are necessary, to ensure as a whole the status and dignity of the individual within society") was to cover such matters as libel laws and the protection of public order. The Committee decided to retain the exception. Finally the Committee accepted in principle the paragraph emphasising the responsibility of the legislature for the procedural machinery whereby the above mentioned freedoms of the individual are given effect, but at the suggestion of SENATOR L. TANADA of the Philippines expressed this obligation of the legislature in a positive rather than in a negative form.

The Committee then returned to a consideration of discriminatory legislation. MR. PANGLIM BUKIT GANTANG of Malaya pointed out that in polyglot societies it may be necessary to reserve certain rights to certain groups. A rather similar point was made by MR. E. H. ST. JOHN of Australia who referred to the special position of Australian aborigines for example in regard to restrictions on their consumption of alcohol. Eventually with the assistance of MR. ST. JOHN a resolution was agreed in the form set out above, which may be usefully compared with the final abbreviated version arrived at after amendment in the Plenary Session of the Congress.

MR. RAMON DIAZ of Venezuela pointed out that the constitutions of most countries contain some sort of guaranteed rights but that it is common to find clauses of exemption expressed in vague terms referring to the interests of society, and similar expressions, which deprive these rights of any reality. MR. N. S. MARSH suggested, to meet this point, that specific reference be made in the Conclusions of the Committee to the importance of stating all exceptions to the rights of the individual protected against legislative interference with precision and in detail and this proposal was accepted by the Committee [see Clause III(3)(f) above].

Those members of the Committee, including the Rapporteur, who had not been in favour of elaborating restrictions on legislative activity in detail were given an opportunity of signing a statement to the following effect:

"We declare that we were not in favour of the enumeration of rights as set out in Clause III: because

"(i) we consider that any enumeration of rights is in danger of being incomplete;

"(ii) any list of rights considered as the most important necessarily depends on conditions at a given time in a given country;

"(iii) in any event most of the rights enumerated are dealt with in other Clauses of the resolutions of the Committee."

Before the Committee concluded its session MR. E. SFEIR SFEIR of Chile, speaking also on behalf of MR. JUSTICE OSVALDO ILLANES BENITEZ, expressed his deep satisfaction with the results reached by the Committee with the findings of which they were in full agreement, and MR W. S. OWEN of Canada expressed the thanks of the Committee to the Chairman, to the Rapporteur, to the Secretary and to the staff of translators, as well as to Mr. Marsh, for the assistance they had given the Committee.

## **CONCLUSIONS OF THE COMMITTEE ON THE LEGISLATIVE AND THE LAW**

The First Committee submits the following clauses as its conclusions:

### **Clause I**

The function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality.

### **Clause II**

(1) In many societies, particularly those which have not yet fully established traditions of democratic legislative behavior, it is essential that certain limitations on legislative power referred to in Clause III hereof should be incorporated in a written constitution, and that the safeguards therein contained should be protected by an independent judicial tribunal; in other societies, established standards of legislative behavior may serve to ensure that the same limitations are observed, and a lawyer has a positive interest in, and duty to assist, in the maintenance of such standards of behavior within his particular society, notwithstanding that their sanction may be of a political nature.

(2) To implement the principles set forth in the preceding Clause I it is essential that the powers of the Legislature be fixed and determined by fundamental constitutional provisions or conventions which:

- (a) guarantee the organisation of the Legislature in such a way that the people, without discrimination among individuals, may directly, or through their representatives, decide on the content of the law;
- (b) confer on the Legislature, especially with regard to the matters set out in Clause I, the exclusive power of enacting general principles and rules as distinct from detailed regulations thereunder;
- (c) provide for control, by the representatives of the people, over the exercise by the Executive of such subordinate legislative functions as are necessary to give effect to legislation; and
- (d) organise judicial sanctions enforcing the principles set out in this Clause, and protect the individual from encroachments on his rights under Clause III. The safeguards contained in the

Constitution should not be indirectly undermined by devices which leave only the semblance of judicial control.

### **Clause III**

(1) Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights.

(2) The governments of the world should provide the means whereby the Rule of Law may be maintained and furthered through international or regional agreements on the pattern of The European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on November 4, 1950, or otherwise. Such agreements should provide an opportunity of appeal to an international body for a remedy against denial of the rights implicit in the Rule of Law in any part of the world.

(3) Every legislature should, in particular, observe the limitations on its powers referred to below. The failure to refer specifically to other limitations, or to enumerate particular rights is not to be construed as in any sense minimizing their importance.

The legislature must:

(a) not discriminate in its laws in respect of individuals, classes of persons, or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes, or **minorities**;

(b) not interfere with freedom of religious belief and observance;

(c) not deny to the members of society the right to elected responsible Government;

(d) not place restrictions on freedom of speech, freedom of assembly or freedom of association;

(e) abstain from retroactive legislation;

(f) not impair the exercise of fundamental rights and freedoms of the individual;

(g) provide procedural machinery ("Procedural Due Process") and safeguards whereby the abovementioned freedoms are given effect and protected.

### **Clause IV**

(1) The principles stated in the foregoing Clauses represent the proper aspirations of all men. Every legislature and every government should endeavour to give full effect to the foregoing principles,

not only in relation to their own countries, but also in relation to any territories under their administration or protection, and should take steps to abrogate any existing laws which are inconsistent therewith.

"(2) It is recognized, however, that in some countries and territories the nature and condition of the people, or of some of them, is such that it is not practicable to give effect immediately to all of these principles in relation to such countries and territories.

"(3) This Congress appeals to the legislatures and the governments of the world to advance by every means in their power the ultimate and universal application of the principles here enunciated as soon as it may be practicable to do so, by progressive steps directed to that end."

# **LIST OF REGISTERED MEMBERS OF THE COMMITTEE ON THE LEGISLATIVE AND THE RULE OF LAW**

## **First Committee**

M.P. AMIN ( <i>India</i> )	DATOH PANG LIM BUKIT GANTANG ( <i>Malaya</i> )
H. D. BANAJI ( <i>India</i> )	H. R. PARDIVALA ( <i>India</i> )
HIKMET BELBEZ ( <i>Turkey</i> )	MATTIA PERSIANI ( <i>Italy</i> )
LUDOVICO M. BENTIVOGLIO ( <i>Italy</i> )	G. G. PONNAMBALAM ( <i>Ceylon</i> )
BOUTROS Y. BOUTROS-GHALI ( <i>United Arab Republic</i> )	M. R. SENI PRAMOJ ( <i>Thailand</i> )
GEORGES BURDEAU ( <i>France</i> )	RABIA S. QARI ( <i>Pakistan</i> )
NICHOLAS DELOUKAS ( <i>Greece</i> )	BERT V. A. RÖLING ( <i>Netherlands</i> )
RAMON DIAZ ( <i>Venezuela</i> )	EDWARD H. ST. JOHN ( <i>Australia</i> )
FELIX ERMACORA ( <i>Austria</i> )	PETER SCHNEIDER ( <i>Germany</i> )
JACQUES-MARIE FOURCADE ( <i>France</i> )	EDUARDO SFEIR SFEIR ( <i>Chile</i> )
LOUIS F. E. GOLDIE ( <i>Australia</i> )	M. SIDDIQ ( <i>Pakistan</i> )
OSVALDO ILLANES BENITEZ ( <i>Chile</i> )	HAROLD A. STEVENS ( <i>U.S.A.</i> )
KHALID M. ISHAQUE ( <i>Pakistan</i> )	TAUNO E. SUONTAUSTA ( <i>Finland</i> )
FREDERICK E. JONES ( <i>United Kingdom</i> )	LORENZO TANADA ( <i>Philippines</i> )
WERNER KÄGI ( <i>Switzerland</i> )	THAN AUNG ( <i>Burma</i> )
PARVIZ KAZÉMI ( <i>Iran</i> )	PURSHOTTAM TRIKAMDAS ( <i>India</i> )
NAHAR SINGH MANGAT ( <i>Kenya</i> )	HATIM B. TYABJI ( <i>Pakistan</i> )
WILHELM MARTENS ( <i>Germany</i> )	TOSHIO UEDA ( <i>Japan</i> )
R. P. MOOKERJEE ( <i>India</i> )	S. D. VIMADALAL ( <i>India</i> )
AXEL HENRIK MUNKTELL ( <i>Sweden</i> )	SUNGSOO WHANG ( <i>Korea</i> )
JOSÉ T. NABUCO ( <i>Brazil</i> )	BLATTA KITAW YITETAKOU ( <i>Ethiopia</i> )
WALTER S. OWEN ( <i>Canada</i> )	PUNG-HOW YONG ( <i>Malaya</i> )
	EDOUARD ZELLWEGER ( <i>Switzerland</i> )

## COMMITTEE ON THE EXECUTIVE AND THE RULE OF LAW

Chairman: Mr. Justice T. S. FERNANDO (Ceylon)  
Rapporteur: Mr. Justice RUDOLPH KATZ (Germany)  
Secretary: Mr. GEORGE DOBRY (United Kingdom)

The list of registered members of the Committee and the text of the conclusions adopted by the Committee are set out at the end of this summary. (Pp. 98-100).

**Monday, January 5, 1959**

15.00—17.30

The CHAIRMAN began by suggesting that the Committee should, in view of the limited time, consider one by one the eight propositions in the Summary and Conclusions of that part of the Working Paper (see pp. 245—246) devoted to the Executive and the Rule of Law. The first paragraph of the Summary and Conclusions of the Working Paper read as follows:

“In modern conditions, and in particular in large societies which have undertaken the positive task of providing for the welfare of the community, it is a necessary and, indeed, inevitable practice for the Legislative to delegate power to the Executive to make rules having the character of legislation. But such subordinate legislation, however extensive it may in fact be, should have a defined extent, purpose and procedure by which it is brought into effect. A total delegation of legislative power is therefore inadmissible.”

The RAPporteur thought that this formulation went too far in its admission of delegated legislation. He cited the example of the Federal German Constitution which only permits the transfer of such powers to the Executive in very exceptional cases. He mentioned a case before the Federal German Constitutional Court where a law authorising the imposition by the Executive of a sales tax was declared invalid by the Constitutional Court on the ground that no limit was fixed by the parent legislation as to the amount of this tax. He did not think therefore that delegated legislation was inevitable or necessary; these words could only apply to exceptional emergency situations. MR. HERBERT BROWNELL JR. of the United States said that, although the American Constitution provides for a clear separation of powers, in practice the legislature cannot foresee every situation to which a general rule will apply and that therefore,

in making detailed regulations, the Executive has in effect a law-making power. He understood the first paragraph of the Summary and Conclusions of the Working Paper in this sense. LORD DENNING of the United Kingdom thought that the paragraph in question in the Working Paper fairly represented the position in that country and gave the example of a tribunal set up by a law where the details of the procedure to be followed by the tribunal are laid down by the Executive. He thought that it was necessary and inevitable if Parliament was to complete its business in any vast territory for much detail to be delegated to the Executive. In answer to a question from the RAPPOREUR concerning the possible attitude of the English Courts to the sales tax case mentioned by the Rapporteur, he said that in the United Kingdom the authority of Parliament would have to be accepted although he would hope that Parliament would not give such wide powers to the Executive. Mr. Justice JOSEPH T. THORSON of Canada agreed with the point of view expressed by Lord Denning, pointing out that in Canada the doctrine of the sovereignty of Parliament prevailed, with the difference from the United Kingdom that sovereignty was divided between the Central Government and that of the Provinces.

The RAPPOREUR, referring to the experience not only of the Federal Republic of Germany but also to that of Italy and Austria remained unconvinced that delegated legislation was an "inevitable practice", even if it might sometimes be necessary. Professor GUSTAV PETREN of Sweden thought a distinction should be made between rules having the character of legislation, such as rules laying down a sales tax, and administrative regulations, such as those fixing the procedure of an administrative tribunal. After Mr. GEORGE DOBRY of the United Kingdom had drawn attention to examples given in the Working Paper of delegated legislation in a number of countries, such as France under the 1946 Constitution (Article 47), Belgium (Article 67 of the Constitution), and similarly in Japan, the Netherlands and Finland, Professor C. J. HAMSON of the United Kingdom asked the Rapporteur to clear up what appeared to be a misunderstanding of the German position. The RAPPOREUR explained that he was not arguing against delegation in principle but against unlimited delegation. Mr. JOHN H. FERGUSON of the United States suggested that what was in issue was the distinction between a total delegation of power and the delegation of a power within defined standards.

Mr. LAWRENCE M. LOMBARD of the United States drew attention to the danger in small societies, as opposed to very large countries where delegation may be inevitable, of delegating authority to administrative agencies and he mentioned in this connection his own state of Massachusetts. From another point of view Mr. H. R. PARDIVALA of India emphasised that delegated legislation has dangers in a large country, such as India, where there is little effective opposition within Parliament and less mobilised public



opinion outside it than in the longer established democracies. He would be therefore in favour of some indication that the scope of subordinate legislation should be confined within as narrow a field as possible. On the other hand Mr. PER T. FEDERSPIEL of Denmark thought that in certain circumstances Parliament by delegating the execution of the laws to the Executive was able to exercise more control in practice than if it attempted to prescribe the details of the legislation itself. Mr. S. M. SIKRI of India also spoke in qualified support of delegated legislation, disagreeing with Mr. H. R. Pardi-vala and pointing out that under the Indian Constitution the Supreme Court is to some extent able to prevent Parliament from excessively delegating its powers.

Professor ZELMAN COWEN of Australia thought that the procedure by which delegated legislation is brought into effect, if it was to form a necessary part of the parent legislation, should be explained in greater detail. He also considered that in times of crisis, such as war, total delegation of legislative power within a particular field was in fact necessary. Mr. TODJOEDDIN NOOR of Indonesia said that in that country the Executive power in time of emergency can make laws but that this is not regarded as a delegation by the Legislature but as a special provision directly based on the Constitution.

Professor N. L. NATHANSON of the United States raised the wider question whether it is an assumption of the Rule of Law that the Executive only in principle executes the laws while the Legislature makes them. It would be possible to envisage a Constitution where an Executive responsible to the will of an electorate may at times take the place of the Legislature and exercise full legislative power. However, Professor C. J. HAMSON of the United Kingdom drew attention to the importance when the laws are made by the Legislature of public debate which is not generally present when the laws are made by the Executive. If laws are to be made by the Executive it was, as Dr. A. T. MARKOSE of India pointed out, important that a minimum procedure should be laid down in the making of such laws.

Mr. NAVROZ B. VAKIL of India was in general agreement with the drafting of paragraph 1 of the Summary and Conclusions of the section of the Working Paper dealing with the Executive and the Law although he had doubts whether it was necessary to regard delegation as "inevitable". Mr. G. B. PAI of India wished to make a distinction between lesser powers of delegation and delegation of a substantive character; as to the latter it was essential to prescribe the procedure to be followed. Mr. K. BENTSI-ENCHILL of Ghana directed attention to the need for defining emergency powers under which the Executive has the power of declaring a partial emergency and in effect to act as the Legislature within a particular area. He felt that the British system implies a high degree of trust in the

Executive and with it a willingness to give to the Executive wide discretionary powers which are not closely defined.

After this general discussion of paragraph 1 of the Summary and Conclusions of the section of the Working Paper dealing with the Executive and the Law, the detailed redrafting of the Clause was left to a drafting committee and the discussion turned to paragraph 2 in the Working Paper which read as follows:

"To ensure that the extent, purposes and procedure appropriate to subordinate legislation are observed, it is essential that it should be ultimately controlled by a judicial tribunal independent of the Executive authority responsible for the making of the subordinate legislation."

After the RAPPORTEUR had suggested that there might be some difference between the status of judicial tribunals vis à vis subordinate legislation in Italy, Germany, Austria or the United States and the position of the courts in British countries, LORD DENNING of the United Kingdom pointed out that subordinate legislation in that country is in fact controlled by the courts. The only difference between the United Kingdom and some other countries in this respect is that the courts are not able to challenge wide powers of delegation if in fact given by Parliament, but such a practice of wide delegation, although not limited by a written constitution, is restricted by custom.

A number of points were made regarding the terminology of the paragraph cited above. One speaker pointed out that in India it is not a question of a single judicial tribunal but of both the High Courts and the Supreme Court having the power to intervene when the Executive exceeds its powers; and Mr. DOUGLAS R. WOOD of New Zealand, referring back to the first paragraph of the Conclusions, said that the power to make subordinate legislation is, in New Zealand for example, entrusted not merely to the Executive but also to special bodies and in particular to local authorities; the extent of the control which a judicial tribunal can exercise over subordinate legislation will vary according to the type of body to which the delegation is being made. Mr. SÉAN MACBRIDE of Eire mentioned the possibility of the control of subordinate legislation by a body which was not strictly speaking a court and Professor ANDRÉ-JOSEPH MAST of Belgium drew the attention of the drafting committee to be set up to the importance of including within the conception of control by a judicial tribunal the control exercised by the *Conseil d'Etat* in France and Belgium.

The Committee then proceeded to consider paragraph 3 of the Summary and Conclusions of the section of the Working Paper dealing with the Executive and the Law which read as follows:

"Judicial control of subordinate legislation may be greatly facilitated by the clear and precise statement in the parent

legislation of the purposes which such subordinate legislation is intended to serve. It may also be usefully supplemented by supervisory committees of the Legislatures before and/or after such subordinate legislation comes into effect. The possibilities of additional supervision over subordinate legislation by an independent authority, such as the Parliamentary Commissioner for Civil and Military Administration in Denmark, are worthy of study by other countries."

The Danish Parliamentary Commissioner, Professor STEPHAN HURWITZ, briefly described his work\* and pointed out that an older similar institution existed in Sweden, as also in Finland. Professor N. L. NATHANSON of the United States questioned whether it could be assumed that the answerability of the Executive to the Courts was always the most important method of controlling subordinate legislation and hence whether the additional methods of control suggested in paragraph 3 above might not be developed as substitutes for judicial control. But Mr. PER T. FEDERSPIEL of Denmark pointed out that in his country the practical power of the Parliamentary Commissioner to correct an administrative act by the mere force of his recommendation would not necessarily extend to subordinate legislation; the additional control of the courts was also needed. Mr. CHRISTIAN STRAY of Norway added that his country was about to establish a system of control of the administration similar to that existing in Denmark.

Professor C. J. HAMSON of the United Kingdom considered that the experience of the Parliamentary Commissioner in Denmark was an object lesson in the differing efficacy of institutions in differing environments. It was essential to think of the Rule of Law as a function of the total number of social institutions existing in a particular society. From this arose the reflection that it is very easy to concentrate intention on the embellishments of the Rule of Law in an advanced society whereas intention should be concentrated on the minimum necessities in a country struggling to establish the beginnings of the Rule of Law. This led to the conclusion that not enough attention has been paid to the question of the efficiency of the Administration.

**Tuesday, January 6, 1959**

09.30—13.30

Following up the suggestion made by Professor C. J. Hamson of the United Kingdom at the preceding session, Mr. G. B. PAI of

\* See Professor Stephen Hurwitz, "The Danish Parliamentary Commissioner for Civil and Military Government Administration," *Journal of the International Commission of Jurists*, Vol. I, No. 2, pp. 224-243 also Terje Wold (Chief Justice of Norway), "The Norwegian Parliament's Commissioner for Civil Administration, *Ibid.*, Vol., II No. 2, pp. 23-29.

India suggested that in their resolutions the Committee should suggest some standards which might serve to guide those members of the Executive concerned with subordinate legislation. In India a special responsibility in this respect rests with the Public Service Commission which selects the Executive at secretarial and lower levels. Mr. K. BENTSI-ENCHILL of Ghana referred to the problem arising where the responsibility for electoral machinery is in effect delegated exclusively to the Executive. He thought it important that control of electoral machinery should be entrusted to some independent body, not necessarily the Judiciary. Mr. SÉAN MACBRIDE of Eire said that in regard to delegated legislation the Committee must be careful not to lay down rules which might be regarded as political. They should lay down that delegated legislation should not exceed certain bounds: for example, that it should not be a complete delegation and that it should not be a delegation of fundamental rights. Further, they might recommend that where there is delegation it should be subject to the judicial process in accordance with the norms of natural justice. Mr. K. L. DEVASER of Malaya said that in that country questions concerning elections are dealt with by an independent Election Commission and he did not consider it necessary specifically to refer to Elections in the Conclusions of the Committee. He was also of the opinion that in a country such as Malaya subordinate legislation could be better supervised by the Courts than by any Committee of the Legislature.

Professor ZELMAN COWEN of Australia reminded the Committee of the need stressed by Professor C. J. Hamson of the United Kingdom for an efficient Executive especially in the newly independent countries and of the corresponding danger of formulating a set of formal propositions applicable to the older established countries which would have little relevance to the continuing emergency situations in newly independent territories. Mr. MYINT SOE of Burma said that in Burmese experience laws based on Indian acts frequently needed amendment which might sometimes justify the delegation of powers to the Executive. He thought it desirable to indicate in greater detail in the resolution before the Committee how parent legislation in delegating authority might be rendered "clear and precise".

A member of the Committee from India considered that a distinction should be made between the power of the courts to declare subordinate legislation *ultra vires* and a power to strike it out as unreasonable. He also drew attention to the danger of very widely delegated powers, giving as examples a requisitioning law in Bombay authorising the government to evict lawful tenants from their premises on terms which made the government's decision final and the power of a government agency to make a final decision on the amount deductible by a business in respect of depreciation.

The suggestion was then made that it would be desirable to lay down certain fields in which delegated legislation should not be al-

lowed, as for example with regard to the fundamental freedoms laid down in the Indian Constitution. But this, it was pointed out by Indian participants, would be too wide a prohibition as certain freedoms, such as freedom of property and freedom to do business, are frequently affected by subordinate legislation.

There was also disagreement by Indian and Burmese speakers with the view expressed above that there was no value, at least from the point of view of newly independent countries, in the additional supervision by the Legislature of subordinate legislation.

Mr. CHAUDRI NA-ZIR AHMED KHAN of Pakistan at this stage interposed the question: is it right to assume that the Executive will not, unless restrained by the Legislature, observe the Rule of Law? Would it be possible, in other words, to have a Rule of Law where the Legislature and the Executive are combined in one person or body of persons. Professor ROBERT R. BOWIE of the United States welcomed the foregoing intervention. He thought however that historical experience had shown that when Executive and Legislative powers are combined over any length of time there is a tendency towards abuse of power. The same theme was developed by Professor N. L. NATHANSON of the United States who drew attention to the difference between countries which recognised and those which do not recognise judicial review on constitutional grounds. In India, for example, although there may be very broad grants of authority by the Legislature the subordinate legislation will always be subject to review in the Courts on the ground that there is a violation of a constitutionally protected fundamental right. He also drew attention to the advantage of requiring within some limits, as is frequently the practice in the United States, some sort of consultation or hearing procedures in connection with the adoption of delegated legislation. Relating the question raised by Mr. Na-Zir Ahmed Khan of Pakistan to the broad issue discussed by Professor C. J. HAMSON of the United Kingdom and others as to the efficiency of the administration, Professor ANDRÉ-JOSEPH MAST of Belgium was of the opinion that it is necessary to have confidence in the government. The government in modern times has a social role to fulfil and is expected to be efficient. The position is different from that existing 30 or 40 years ago when the main task of the government was to maintain law and order.

Another aspect of paragraph 3 of the Summary and Conclusions under discussion which gave rise to some difference of emphasis, was the system of supervision over the administration existing in Denmark and other Scandinavian countries. The general feeling appeared to be that this system, although of great interest, was not necessarily applicable in large countries with very different traditions from those of Scandinavia.

The Committee then considered paragraph 4 of the Summary and Conclusions of the section of the Working Paper dealing with the Law and the Executive. This read as follows:

"In the ultimate analysis the enforcement of duties whether of action or restraint owed by the Executive must depend on the good faith of the latter which has the monopoly of armed force within the State; this is even true of countries which possess the advantageous traditional power of the courts to commit to prison for contempt of its orders."

The RAPPOREUR favoured the exclusion of the reference to contempt of court as an institution peculiar to the Common Law. A number of speakers followed who expressed dissatisfaction with this clause and, with the reservation that the question of control of the armed forces might be referred to the International Commission of Jurists as a possible subject for future discussion, the Committee passed to paragraph 5 of the Summary and Conclusions, namely:

"But in any event the omissions and acts of the Executive should be subject to review by the courts. A 'court' is here taken to mean a body independent of the Executive, before which the party aggrieved by the omission or act on the part of the Executive has the same opportunity as the Executive to present his case and to know the case of his opponents."

The RAPPOREUR regarded this as the centre point of the discussion, the key to the interpretation of the Rule of Law. Mr. PER T. FEDERSPIEL of Denmark drew particular attention to the importance of forcing the Executive to make discovery of relevant documents and mentioned in this connection the favourable position of the citizen vis à vis the State in Sweden. Mr. G. B. PAI of India thought that the clause should cover acts or omissions which were not necessarily illegal or unconstitutional; the word "review" did not therefore seem appropriate. U HLA AUNG of Burma thought it important to distinguish a Court from a body composed of Members of Parliament or other group. Here Professor ZELMAN COWEN of Australia again reminded the Committee of the fundamental question, raised several times previously, whether judicial control of Executive acts was fundamental to the Rule of Law. Professor N. L. NATHANSON of the United States, who had previously been one of those to suggest this issue, said that he himself felt that for the great generality of cases, where Executive action affects individual rights, there should be a right of review or control by the Judiciary or an equivalent independent body. He thought, however, that the paragraph set out above was too wide in its "bland assumption" that all the acts and omissions of the Executive should be subject to review by the Courts and he referred to Acts of State (*acte de gouvernement*).

Professor BÜLENT ESEN of Turkey took up a point made by a previous speaker concerning the meaning of "Court" in paragraph 5 and suggested, in view of the position of certain "High Courts"

consisting of Committees of the Legislature, which in some countries deal with political crimes, that a Court should be defined as a body independent of the Executive *and* of the Legislature.

Mr. S. M. SIKRI of India agreed with Professor Nathanson in thinking that the clause under discussion was too wide, and referred in particular to the discipline of the armed forces. The appointment of an officer, for example, could be hardly subject to judicial review. To meet these difficulties Mr. SEÁN MACBRIDE of Eire suggested that use might be made of the formula to be found in Article 6 of the European Convention of Human Rights, providing that in the determination of his civil rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. A number of other speakers spoke on the scope of paragraph 5, the general tenor of their remarks being that in its existing form it was too wide. There was however some difference of opinion, in that some felt that the remedies available to the individual to challenge decisions of the Executive were not as wide in common law countries generally as they were in many civil law countries and they were anxious to indicate the desirability of extending the rights of the individual in this respect; but, as opposed to this point of view, Dr. A. T. MARKOSE of India reminded the Committee that they were drawing up minimum rather than maximum rules, a point of view which was reinforced by Mr. CHRISTIAN A. CASSEL of Liberia. On the other hand, the RAPPOREUR who was supported in this by Professor GUSTAV PETREN of Sweden was in favour of setting a level in the resolutions to which governments might aspire.

**Tuesday, January 6, 1959**

15.00—17.30

The Committee began by considering paragraph 6 of the Summary and Conclusions of the Working Paper dealing with the Executive and the Rule of Law. This read as follows:

“It is not sufficient that the Executive should be compelled by the Courts to carry out its duties and to refrain from illegal acts. The citizen who suffers loss as a result of such omissions or illegalities should have remedy both against the wrong-doing individual agent of the State (if the wrong would ground civil or criminal liability if committed by a private person) and in any event in damages against the State. Such remedies should be ultimately under the review of courts, as defined in the fifth paragraph above.”

The RAPPOREUR said that in every normal State the citizen should have a remedy against the wrong-doing State or against the local authority by whom the wrong-doing official is employed. He was less certain about a personal remedy against the official concerned. There was not normally such a remedy in Germany. The CHAIRMAN suggested that an additional remedy against the official might help to prevent illegality. LORD DENNING of the United Kingdom said that until recently there had in that country been no remedy against the State, only against the official; now, by Statute, there was a remedy against the State but not in all cases. He favoured a remedy against the wrong-doing individual and asked the Rapporteur what would happen in Germany if the wrong-doing official went outside his authority altogether, as, for example, where a policeman commits an assault. The RAPPOREUR replied that it depended whether the official was exercising public power or not; if a policeman, for example, on his private initiative committed a robbery, he would not involve the State in liability; but where the State was liable it might be able to bring a second action against the wrong-doing official. LORD DENNING asked why the innocent private person should have to enquire whether the policeman was acting under public authority or not. The RAPPOREUR replied that it was a greater advantage to be able to sue the State as the plaintiff would be sure in that event of recovering his damages whereas the official might be penniless. The RAPPOREUR made it clear that he was speaking only of civil liability and not criminal liability. In answer to further questions with regard to liability for omissions as well as for acts of commission the RAPPOREUR said that in Germany in respect of certain acts a time limit is set and if after demand no action is taken within the set time liability will arise. Mr. HOMER G. ANGELO of the United States referred to the practice in the United States to have a "bonding fund", a form of insurance which is paid for either by the official or by the State or municipality of which he is an official. LORD DENNING added the point that, in the light of his recent experiences in Poland, it was important to emphasise the right to get damages from the State, because the private person might not be able to institute criminal proceedings against the official concerned. Professor C. J. HAMSON of the United Kingdom said that it appeared that the intention of paragraph 6 was to combine the best features of the Continental and Common Law systems but he doubted whether such a combination were possible. He thought that where the immediacy of the remedy is of the greatest importance, as for example in the case of a wrongful arrest, the Common Law principle of the liability of the official concerned was a great value. On the other hand where you are dealing with a sophisticated right as, for example in connection with the decision of a town planning authority, the Continental type of remedy against the State, as developed in French administrative law, is most efficient. Mr. K. L. DEVASER of Malaya questioned whether



it was possible to recover damages both from the individual and the State where, for example, a police officer makes a search without a warrant. Damages would not be recoverable from the State because the State never authorised the act. Mr. H. R. PARDIVALA of India had no objection to the paragraph as it stood but said that as a matter of fact in Indian law the State is not liable in damages for a wrong act of a public officer unless the State has authorised the act or subsequently ratified it. Another point raised by an Indian participant, Mr. NAVROZ B. VAKIL, with regard to Indian law was the rule that in a civil suit against the State two months notice to the State department is required. He thought there were occasions when a period of notice might defeat the efficacy of the relief. Mr. MYINT SOE of Burma said that the position in that country with regard to this point was the same as in India.

There was in general a broad measure of agreement on this paragraph although the final words of the paragraph, "such remedies should ultimately be under the review of Courts, as defined in the fifth paragraph above", was a subject of some criticism. Mr. HERBERT BROWNELL JR. of the United States suggested that this might be amended to the effect that the remedy should either be originally in the Court or should at least provide for ultimate judicial review.

The Committee then considered paragraph 7 of the Summary and Conclusions which read as follows:

"The ultimate control of the Courts over the Executive is not inconsistent with a system of administrative tribunals as is found in many (especially common law) countries. But it is essential that such tribunals should be subject to ultimate supervision by the Courts and (in as far as this supervision cannot generally amount to a full appeal on the facts) it is also important that the procedure of such tribunals should be assimilated, as far as the nature of the jurisdiction allows, to the procedure of the regular courts in regard to the right to be heard, to know the opposing case and to receive a motivated judgment."

The RAPPORTEUR said that administrative tribunals were unfamiliar to Continental lawyers. Administrative Courts were real courts and operate exactly like other courts. LORD DENNING of the United Kingdom said that his country had had much trouble with what are called administrative tribunals, although these difficulties are now being overcome. They were not courts in the ordinary sense of the word in that there might be no appeal on law or on fact and that their Chairman might be appointed by the government department concerned which might regard the tribunals as part of the administrative machinery of government. They deal with such things as insurance benefits, health insurance, planning inquiries and com-

pulsory acquisition. It was felt that a tribunal which was appointed by a Minister, who was in a sense a party to one side of the case, might be unsatisfactory. The courts have gradually evolved a form of control by writs where tribunals exceed their jurisdiction or if they decide wrongly on a point of law. By a new Act (Tribunals and Inquiries Act 1958), an obligation is laid on tribunals and ministers giving decisions to state their reasons. If these are wrong in law they can be corrected by the courts. The courts can decide what is a point of law and where a tribunal comes to a conclusion which no reasonable person could hold, correction of that conclusion is regarded as correction of a point of law. Indirectly, therefore, there is some supervision with regard to fact. Mr. JOHN H. FERGUSON of the United States said that in that country they had similar bodies to the administrative tribunals in England dealing with many topics, by no means confined to social insurance – e.g., public power, trade, railways, the stock exchange, etc. There is court review on points of law and on conclusions of fact where there is no evidence on which such a conclusion could have been based. He suggested that it might be helpful to avoid the use of the word “tribunal” to prevent confusion with the Continental administrative court. Professor ANDRÉ-JOSEPH MAST of Belgium thought it important to emphasise that a system of administrative law and administrative courts was in no way inconsistent with the Rule of Law. He feared that the opening sentence of the paragraph under discussion (“the ultimate control of the Courts over the Executive is not inconsistent with a system of administrative tribunals as is found in many – especially common law – countries”) might suggest a contrary conclusion. A somewhat similar point was made by Professor GUSTAV PETREN of Sweden who thought it important that the Committee should pronounce in favour of administrative tribunals because they usually provided a very inexpensive remedy for the individual. On the other hand he agreed that such tribunals should be subject to the supervision of the courts provided that by the word “courts” was understood not merely the common law courts of England, for example, but also the *Verwaltungsgerichte* of Germany and the *Conseil d'Etat* of France. Mr. H. R. PARDIVALA of India said that there were administrative tribunals in India which as in the United Kingdom could be controlled by writs; but in addition, under the constitution, the High Courts had been given the right of superintendence over all tribunals and the word “superintendence” has been construed as meaning judicial superintendence when the tribunals exercise judicial functions. There is also a right of appeal direct from a tribunal to the Supreme Courts by leave of the latter body. Mr. G. B. PAI of India said that a defect of some tribunals in India was that legal representation was not allowed as a matter of right.

At this point Mr. N. S. MARSH, who as the draftsman of the Working Paper divided his time between all four Committees, inter-

vened with regard to the remarks made above by Professor Mast to explain the negative form in which the subject of administrative tribunals was introduced in paragraph 7 of the Summary and Conclusions. He thought that a cautious approach corresponded with the historical development of administrative tribunals in, for example, the United Kingdom and the United States, but he wished to emphasise that he fully appreciated that administrative courts in the Continental practice and ordinary courts were, in the matter of their procedure and organization, on the same footing.

The discussion was resumed on the right to counsel before administrative tribunals and LORD DENNING of the United Kingdom mentioned the strong feeling of trade unions that in labour disputes for the sake of low costs and informality neither side should be compelled to go to counsel and that the only way to ensure this is to say that neither side shall have the right to brief counsel. He was not sure that this was his personal opinion but doubted whether legal representation could be laid down as an essential principle; the important thing was the right to be heard. Mr. HERBERT BROWNELL, JR. of the United States agreed from the point of view of American experience with Lord Denning's remarks. Mr. K. BENTSI-ENCHILL of Ghana pointed out that legal representation before certain tribunals might be important as, for example, where fundamental rights were in issue. Mr. G. B. PAI of India, while appreciating the argument of Lord Denning and Mr. Brownell on legal representation, drew attention to the importance of legal representation before tribunals dealing with important and complicated matters, such as industrial tribunals in India, the decisions of which might have far reaching importance on industry. Professor C. J. HAMSON of the United Kingdom suggested that a reference should be made in the resolution of the Committee to a right to legal representation, which ought not to be restricted except for sufficient and special reasons.

The Committee then proceeded to consider paragraph 8 of the Summary and Conclusions of the section of the Working Paper dealing with the Executive and the Law, namely:

"The prevention of illegality on the part of the Executive is as important as the provision of machinery to correct it when committed. Hence it is desirable to specify a procedure of enquiry to be followed by the Executive before taking a decision. Such procedure may prevent action being taken which (being within an admitted sphere of discretion allowed by the Courts) if taken without such a procedure might result in grave injustice. The Courts may usefully supplement the work of legislatures in insisting on a fair procedure antecedent to an executive decision in all cases where the complainant has a substantial and legitimate interest."

The RAPPORTEUR said that from a point of view of a Continental jurist the underlying thought of paragraph 8 was strange. It seemed unnecessary to underline the necessity for a due process of administration. LORD DENNING of the United Kingdom said the clause was very widely phrased but that there were circumstances when it was desirable that the Executive should follow a certain procedure before taking an administrative act. But there were other instances, in time of war for example, when such preliminary enquiries would not be possible. Mr. HERBERT BROWNELL, JR. of the United States doubted whether in view of paragraph 7, already discussed, paragraph 8 was necessary, but Professor GUSTAV PETREN of Sweden, speaking as a member of a Swedish Royal Commission recently set up to make special rules for administrative procedure, felt that it was important to provide by statute the framework of administrative actions. Mr. PER T. FEDERSPIEL of Denmark felt that a point which had been overlooked was the necessity for requiring the Executive in any decision affecting an individual or group of individuals to state its reasons, a view which was also shared by Mr. K. BENTSI-ENCHILL of Ghana. However Dr. A. T. MARKOSE of India drew attention to the concluding words of paragraph 7 of the Summary and Conclusions, already discussed, which refer to the necessity of a "motivated judgment".

Continuing the discussion on paragraph 8 Professor ANDRÉ-JOSEPH MAST of Belgium, while agreeing to some extent with the point of view of Professor Petren thought it important that the courts or tribunals should not intervene in administrative action to the extent of instructing the Executive how its task should be carried out. Mr. S. M. SIKRI of India considered that the eighth paragraph of the Summary and Conclusions should be struck out or greatly modified. He gave examples of Executive action, such as the fixing of the price of wheat or the declaration of a particular area as a disturbed area, where a procedure of enquiry would be inappropriate. On the other hand, the issue of licences to individuals for particular economic activities might reasonably be subject to a preliminary enquiry. Professor C. J. HAMSON of the United Kingdom felt however that something in the nature of paragraph 8 should be retained. He was impressed by the fact that the French *Conseil d'Etat* was particularly interested in the English procedure of preliminary hearings before an administrative decision. Professor STEPHAN HURWITZ of Denmark shared the point of view of Professor Hamson and thought that it would be possible to formulate exceptions to deal with emergency situations. He was strongly in favour of including a provision that the reasons for decisions must be stated. Professor Hurwitz was supported in this by Mr. NAVROZ B. VAKIL of India.

Mr. DOUGLAS R. WOOD of New Zealand although in favour of omitting the eighth paragraph of the Summary and Conclusions felt that if it were to be included it should be made clear that the recom-

mended preliminary procedure is merely an additional safeguard to the ordinary right of the citizen to apply to the Courts for an injunction. Mr. K. BENTSI-ENCHILL of Ghana suggested that it could be laid down that legislation giving discretion to the Executive should indicate as far as possible the way in which it was to be exercised. Different types of discretion would require different methods of their exercise. Mr. K. L. DEVASER of Malaya emphasised the importance of the principle that the Executive should state its reasons. He mentioned particularly in this connection the position arising where the Executive arrests a person, detains him for 28 days and only then gives the reason. Before a man's liberty is taken away there should be some sufficient enquiry or statement of the reasons for depriving him of this liberty. U HLA AUNG of Burma referring to preventive detention in that country said that a person can be arrested by the police under orders of Executive officers and detained for an indefinite period without assigning any reason. Professor C. J. HAMSON of the United Kingdom said that he was in some dilemma regarding the question of the statement of reasons by the Executive. It was useless to provide for the statement of reasons (which might be the wrong reasons) unless you also provided for the validity of the reasons to be tested by the courts. But the latter provision would require a revolution in thinking in the United Kingdom. LORD DENNING pointed out that in regard to matters coming before administrative tribunals there was now provision by the Tribunal and Inquiries Act of 1958 for the statement of reasons. But there were questions, such as whether an alien should be deported or not, where there was no obligation to state reasons. It might be possible to limit the obligation to state reasons to a particular sphere of administrative action.

In answer to a question Mr. H. R. PARDIVALA of India said that under the Preventive Detention Act the government is bound to disclose the grounds on which the man has been arrested but it is not open to the Court to go into the validity or correctness of those grounds. Procedure by way of habeas corpus would only lead to the release of the detained person if the grounds as stated were outside the scope of the Preventive Detention Act. He thought that Professor Hamson's fear that the statement of reasons might be injurious to the person affected could be removed by providing that the reasons would not be supplied unless the person concerned asked for them. The value of stating reasons lay in the opportunity which it gave the courts to decide whether the reasons lie outside the scope of the Act under which action is taken. Mr. SÉAN MACBRIDE of Eire thought that the problem regarding the statement of reasons was already solved by the principle on which the Committee had already agreed, namely, that wherever there is an infringement of a personal right there must be recourse to judicial process. Professor GUSTAV PETREN of Sweden said that in the draft on administrative procedure on which they were working in Sweden the two main points were — the right of

the individual affected by the decision to present his view in advance and the right to be given reasons for the decision. He was rather surprised that the question of deportation and detention had been discussed, because he would have thought that these were questions where reasons must obviously be given. Mr. S. M. SIKRI of India said that the reasons for administrative decisions would always be found in the files but the question was whether these files should be disclosed. Efficient administration would not be possible if there was such disclosure, and if there was such disclosure, the true reasons would not be stated on the files. In answer to a remark by Professor HAMSON of the United Kingdom who said that such a refusal to disclose reasons on the part of the Executive was a weakness in United Kingdom and, it would appear, in Indian practice, Mr. SIKRI added that the question was whether the Executive or the Judiciary were to govern. Mr. HERBERT BROWNELL, JR. of the United States suggested as a possible compromise that paragraph 8 should be amended to the effect that the same sort of rules as were laid down in the preceding paragraph for administrative tribunals should apply to other action of the Executive where the complainant has a substantial and legitimate interest.

**Wednesday, January 7, 1959**

15.00—17.30

The session began by a discussion of a preamble to the draft Summary and Conclusions prepared by the Drafting Committee. The preamble in the form finally approved by the Committee read as follows:

"In its deliberations the Second Committee concluded that the Rule of Law depended not only on the provision of adequate safeguards against abuse of power by the Executive, but also depended upon the existence of effective government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society.

"The following propositions relating to the Executive and the Rule of Law are accordingly formulated on the basis of certain assumptions which are achieved or should be sought to be achieved in a civilized society in a foreseeable future. They assume the existence of an executive invested with sufficient power and resources to discharge its functions with efficiency and integrity. They assume the existence of a Legislature elected by democratic process and not subject, either in the manner of its election or otherwise, to manipulation by the executive. They assume the existence of an independent judi-

ary which will discharge its duties fearlessly. They assume, finally, the earnest endeavour of government to achieve such social and economic conditions within a society as will ensure a reasonable standard of economic security, social welfare and education for the mass of the people."

There was general agreement on the desirability of such a preamble but there was some discussion as to whether there should not be a note of caution included, explaining that the standards laid down represented an aim at which, in the words of the *RAPPORTEUR*, "normal democratic life under the Rule of Law should aim". This point of view was urged, among other speakers, by Mr. G. B. PAI of India and eventually found expression in the opening sentence of the second paragraph of the preamble set out above.

The Committee then discussed paragraph 1 of the Summary and Conclusions. As finally agreed by the Committee this read:

"In modern conditions and in particular in societies which have undertaken the positive task of providing welfare services for the community it is recognized that legislatures may find it necessary to delegate power to the Executive or other agencies to make rules having a legislative character.

"The grant of such powers should be within the narrowest possible limits and should carefully define the extent and purpose of delegated legislation and should provide for the procedure by which it can be brought into effect.

"War or other public emergency threatening the life of a nation may require extensive delegation of powers. Even in such cases, however, the Rule of Law requires that every attempt be made by the legislature to define as carefully as possible the extent and purpose of the grant of such delegated powers, and the procedures by which such delegated legislation is to be brought into effect.

"In no event shall fundamental human rights be abrogated by means of delegated legislation."

In the discussion which finally led to the adoption of the above text, Mr. SÉAN MACBRIDE of Eire suggested amendments, which were incorporated, firstly to emphasise the positive task of the Executive in providing welfare services for the community and secondly to emphasise that delegated legislation *might* be necessary rather than to suggest that it *is* necessary. He also regretted the absence of a ban on total delegation of legislative powers, as on delegation with regard to matters affecting fundamental personal rights. The latter point, as may be seen above, was eventually incorporated in the resolution. Mr. LAWRENCE M. LOMBARD of the

United States wished to emphasise the desirability of making parent legislation specific, thus minimising the necessity as far as possible for delegated legislation. Doubts were expressed by some speakers about the form in which the third section of the first paragraph of the resolution dealing with war and other public emergencies was originally expressed; in the ultimate form agreed on by the Committee greater emphasis, as may be seen above, was laid on the necessity of defining even in times of emergency the extent and purpose of delegated powers.

Only minor alterations of terminology were made during the discussion on paragraph 2 of the Summary and Conclusions, which in its final form read as follows:

“to ensure that the extent, purpose and procedure appropriate to subordinate legislation are observed, it is essential that it should be subject to ultimate review by a judicial body independent of the Executive.”

During the discussion on the final form of paragraph 3, which read:

“judicial review of delegated legislation may be usefully supplemented by procedure for supervision by a Committee or a Commissioner of the Legislature or by other independent authorities either before or after such delegated legislation comes into effect.”

The question was raised whether there should not be some reference to the Scandinavian system of Parliamentary Commissioners. Against this it was said that this might weaken the control by the Courts. It was eventually agreed, without specific reference to Scandinavian systems, to include among the various forms of supervision that by a Commissioner of the Legislature.

On paragraph 4, which in its final form read as follows:

“In general the acts of the Executive which directly and injuriously affect the personal property or rights of the individual should be subject to review by the courts. A ‘Court’ is here taken to mean an independent judicial body before which the party aggrieved has an adequate opportunity to present his case and to know the case of his opponent.”

the discussion showed that there was some fear on the part of some members of the Committee that all acts of the Executive would become subject to court supervision and that the courts would in fact be governing the country. The discussion turned, as the RAP-  
PORTEUR pointed out, on a suggested phrase of the drafting committee:

“It is important that the exact area of this restraint (i.e., of acts



of the Executive) should be determined by the courts and not by the Executive."

Professor N. L. NATHANSON of the United States, against the criticisms made of this provision, felt that it was necessary to recognise that there were certain areas of administration not subject to judicial control where substantial rights of the individual were concerned. It seemed essential that the courts should themselves determine how large this area should be. Professor C. J. HAMSON of the United Kingdom on the other hand thought it better to ignore those areas of Executive action not subject to judicial control, because in better governed States they were tending to disappear as was true of the *Acte de Gouvernement* in France. LORD DENNING of the United Kingdom suggested that the paragraph should begin:

"The *legality* of acts and omissions of the Executive should be subject to review by the courts."

but eventually the compromise, set out in the opening sentence of the paragraph, was reached in which a suggested formulation by Mr. SÉAN MACBRIDE of Eire was largely adopted. The latter considered that the word "legality", as suggested by LORD DENNING, would greatly restrict the powers of the Courts. It would not be possible to look behind an order produced by the government.

Paragraph 5 of the resolutions read in its final form as follows:

"The judicial review of acts of the Executive may be adequately secured either by a specialized system of administrative courts or by ordinary courts. Where specialized Courts do not exist it is essential that the decisions of *ad hoc* administrative tribunals and agencies, if created, (which include all administrative agencies making determinations of a judicial character) should be subject to ultimate review by ordinary courts.

"Since this supervision cannot always amount to a full re-examination of the facts, it is essential that the procedure of such *ad hoc* tribunals and agencies should ensure the fundamentals of fair hearing including the rights: to be heard, if possible, in public, to have advance knowledge of the rules governing the hearing, to adequate representation, to know the opposing case, and to receive a reasoned judgement.

"Save for sufficient reason to the contrary, adequate representation should include the right to legal counsel."

Although there was a considerable discussion on the exact drafting of this paragraph, an important point was that raised by Professor GUSTAV PETREN of Sweden who wished to make it clear

that in fact administrative tribunals were extremely varied in their arrangement. Sometimes it was better for there to be an appeal through a whole hierarchy of administrative tribunals before the courts became seized of the matter and sometimes the ordinary courts could deal with the matter more efficiently. The paragraph set out above reflects the desire of the Committee to meet, as far as possible, Professor Petren's point.

The discussion on paragraphs 6, 7 and 8 which in their final form may be read at the conclusion of this Summary, was mainly concerned with questions of appropriate terminology and did not raise any substantial new issues which had not previously been discussed by the Committee.

## CONCLUSIONS OF THE COMMITTEE ON THE EXECUTIVE AND THE RULE OF LAW

In its deliberations the Second Committee concluded that the Rule of Law depended not only on the provision of adequate safeguards against abuse of power by the Executive, but also depended upon the existence of effective government capable of maintaining law and order and of ensuring adequate social and economic conditions of life for the society.

The following propositions relating to the Executive and the Rule of Law are accordingly formulated on the basis of certain assumptions which are achieved or should be sought to be achieved in a civilized society in a foreseeable future. They assume the existence of an executive invested with sufficient power and resources to discharge its functions with efficiency and integrity. They assume the existence of a Legislature elected by democratic process and not subject, either in the manner of its election or otherwise, to manipulation by the executive. They assume the existence of an independent judiciary which will discharge its duties fearlessly. They assume, finally, the earnest endeavour of government to achieve such social and economic conditions within a society as will ensure a reasonable standard of economic security, social welfare and education for the mass of the people.

In the light of the foregoing assumptions, the following propositions have been agreed upon by the Committee on the Executive and the Rule of Law.

1. In modern conditions and in particular in societies which have undertaken the positive task of providing welfare services for the community it is recognized that legislatures may find it necessary to delegate power to the Executive or other agencies to make rules having a legislative character.

The grant of such powers should be within the narrowest possible limits and should carefully define the extent and purpose of delegated legislation and should provide for the procedure by which it can be brought into effect.

War or other public emergency threatening the life of a nation may require extensive delegation of powers. Even in such cases, however, the Rule of Law requires that every attempt be made by the legislature to define as carefully as possible the extent and purpose of the grant of such delegated powers, and the procedures by which such delegated legislation is to be brought into effect.

In no event shall fundamental human rights be abrogated by means of delegated legislation.

2. To ensure that the extent purpose and procedure appropriate to subordinate legislation are observed, it is essential that it

should be subject to ultimate review by a judicial body independent of the executive.

3. Judicial review of delegated legislation may be usefully supplemented by procedure for supervision by a Committee or a Commissioner of the legislature or by other independent authority either before or after such delegated legislation comes into effect.

4. In general, the acts of the Executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the Courts. A "Court" is here taken to mean an independent judicial body before which the party aggrieved has an adequate opportunity to present his case and to know the case of his opponent.

5. The judicial review of acts of the Executive may be adequately secured either by a specialized system of administrative courts or by ordinary courts. Where specialized Courts do not exist it is essential that the decisions of *ad hoc* administrative tribunals and agencies, if created, (which include all administrative agencies making determinations of a judicial character) should be subject to ultimate review by ordinary courts.

Since this supervision cannot always amount to a full re-examination of the facts, it is essential that the procedure of such *ad hoc* tribunals and agencies should ensure fundamentals of fair hearing including the rights to be heard, if possible, in public, to have advance knowledge of the rules governing the hearing, to adequate representation, to know the opposing case, and to receive a reasoned judgment.

Save for sufficient reason to the contrary, adequate representation should include the right to legal counsel.

6. A citizen who suffers injury as a result of illegal acts of the Executive should have an adequate remedy either in the form of a proceeding against the State or against the individual wrongdoer, with the assurance of satisfaction of the judgment in the latter case, or both.

7. Irrespective of the availability of judicial review to correct illegal action by the Executive after it has occurred, it is generally desirable to institute appropriate antecedent procedures of hearing, enquiry or consultation through which parties whose rights or interests will be affected may have an adequate opportunity to make representations so as to minimise the likelihood of unlawful or unreasonable executive action.

8. It will further the Rule of Law if the Executive is required to formulate its reasons when reaching its decisions and at the request of a party concerned to communicate them.

# **LIST OF REGISTERED MEMBERS OF THE COMMITTEE ON THE EXECUTIVE AND THE RULE OF LAW**

## **Second Committee**

SÜREYYA AGAOGLU ( <i>Turkey</i> )	ANDRÉ-JOSEPH MAST ( <i>Belgium</i> )
HOMER G. ANGELO ( <i>U.S.A.</i> )	JIRO MATSUDA ( <i>Japan</i> )
U HLA AUNG ( <i>Burma</i> )	H. C. L. MERILLAT ( <i>Observer</i> )
KWAMENA BENTSI-ENCHILL ( <i>Ghana</i> )	MYINT SOE ( <i>Burma</i> )
ROBERT R. BOWIE ( <i>U.S.A.</i> )	NATHANIEL L. NATHANSON ( <i>U.S.A.</i> )
HERBERT BROWNELL JR. ( <i>U.S.A.</i> )	OSMAN NEBIOGLU ( <i>Turkey</i> )
MICHAEL A. BRYCESON ( <i>United Kingdom</i> )	TADJOEDDIN NOOR ( <i>Indonesia</i> )
CHRISTIAN A. CASSELL ( <i>Liberia</i> )	G. B. PAI ( <i>India</i> )
ZELMAN COWEN ( <i>Australia</i> )	BROR E. GUSTAF PETRÉN ( <i>Sweden</i> )
LORD DENNING ( <i>United Kingdom</i> )	ABDUL SHAKURUL SALAM ( <i>Pakistan</i> )
KUNDEN LAL DEVASER ( <i>Malaya</i> )	MUTTUSAMY SANMUGANATHAN ( <i>Ceylon</i> )
GEORGE DOBRY ( <i>United Kingdom</i> )	OSCAR SCHACHTER ( <i>Observer</i> )
MANUEL G. ESCOBEDO ( <i>Mexico</i> )	S. M. SIKRI ( <i>India</i> )
BÜLENT N. ESEN ( <i>Turkey</i> )	ABDALLA SIKTA ( <i>Libya</i> )
PER T. FEDERSPIEL ( <i>Denmark</i> )	CHRISTIAN STRAY ( <i>Norway</i> )
JOHN H. FERGUSON ( <i>U.S.A.</i> )	KOHJI TANABE ( <i>Japan</i> )
THUSEW S. FERNANDO ( <i>Ceylon</i> )	JOSEPH T. THORSON ( <i>Canada</i> )
CHARLES J. HAMSON ( <i>United Kingdom</i> )	HIFZI TIMUR ( <i>Turkey</i> )
STEPHAN HURWITZ ( <i>Denmark</i> )	MIN-YUNG UM ( <i>Korea</i> )
EINAR JACOBSEN ( <i>Norway</i> )	FRANCISCO URRUTIA ( <i>Colombia</i> )
RUDOLF KATZ ( <i>Germany</i> )	N. B. VAKIL ( <i>India</i> )
LEE KUAN YEW ( <i>Singapore</i> )	UTHAI VISESSMIT ( <i>Thailand</i> )
LAURENCE M. LOMBARD ( <i>U.S.A.</i> )	DOUGLAS R. WOOD ( <i>New Zealand</i> )
SÉAN MACBRIDE ( <i>Eire</i> )	BOLESŁAW WIERZBIANSKI ( <i>Observer</i> )

## COMITTEE ON THE CRIMINAL PROCESS AND THE RULE OF LAW

Chairman: Mr. GERALD GARDINER (United Kingdom)  
Rapporteur: Professor RYUICHI HIRANO (Japan)  
Secretary: Mr. KAREL VASAK (France)

The list of registered members of the Committee and the full text of the conclusions reached by this Committee are given at the end of this summary. (pp. 125-129).

**Monday, January 5, 1959**

15.00—17.30

The CHAIRMAN opened the session by explaining that he was deputizing at short notice for Sir Hartley Shawcross of the United Kingdom who had been prevented by illness from attending the Congress. He pointed out that it was preeminently in relation to the way in which criminal trials are conducted in a country that it is possible to ascertain whether the Rule of Law is there being observed. He referred to the twelve headings under which the subject was discussed in the Working Paper (see pp. 248-253) — viz., 1. The substantive criminal law; 2. the presumption of innocence; 3. arrest and accusation; 4. detention pending trial; 5. preparation and conduct of the defence; 6. the minimum duties of the prosecution; 7. the examination of the accused; 8. an independent tribunal; 9. trial in public; 10. punishments; 11. the right of appeal; 12. remedies for the breach of rights involved in the foregoing topics. The CHAIRMAN thought the greatest difficulties might arise in the discussion of topics 4, 5, 6 and 7. He began by referring the Committee to the question of the certainty of the criminal law, mentioning by way of example the vagueness of the definition of "Communism" in the South African Suppression of Communism Acts. The second application of the principle of certainty in criminal law concerned retrospective criminal legislation.

Mr. HAIM COHN of Israel thought that the question of certainty was a broader one than that of retrospective criminal laws and that the two subjects should be kept distinct. He disapproved of the qualifying adjective "reasonable" applied in the Working Paper to the certainty of the law and put forward the view that certainty required that all criminal law should be statutory. Mr. OSMAN RAMZY of Egypt thought the word "reasonable" acceptable as referring to the various ways in which crimes are committed as distinguished from the material and moral elements constituting the definition of a crime which must be certain. Mr. KAZI M. ASLAM of Pakistan referred to the vagueness of recent criminal law in Hungary as shown in publications of the International Commission of Jurists and felt that in view of the importance of certainty, the

word "reasonable" should be eliminated. The CHAIRMAN suggested that, as even a statute has to be construed, what was meant by "reasonably certain" in the Working Paper was "as certain as possible" and this formula was approved by the Committee.

On the suggestion of Professor LIONEL A. SHERIDAN of Singapore the CHAIRMAN agreed that the question of preventive detention which might be discussed in relation to each of the topics to be raised before the Committee should be deferred and raised in relation to the fourth topic, i.e., detention pending trial.<sup>1</sup>

The Committee returned to the question of certainty as illustrated by the problem of retroactive legislation and agreed with Mr. Kazi M. Aslam of Pakistan that under no circumstances should a criminal offence be made retroactive.

When the Committee turned to consider the presumption of innocence, the CHAIRMAN suggested the question might be approached firstly from the point of view of possible exceptions, as, for example, in the case of possession of goods which in fact have been stolen, secondly, there was the category of guilt called "guilt by association" or "collective guilt". Dealing with the latter, Mr. KAZI M. ASLAM felt strongly that the time for such collective responsibility in criminal law was past. He gave as an example to be deprecated section 22 of the Frontier Crimes Regulation, introduced in 1901 but still in force in the former North-West Frontier Province of West Pakistan, which enables the Deputy Commissioner, the administrative head of a district, to impose a collective fine on a whole village. Mr. HAIM COHN of Israel, while admitting that special measures might be necessary in emergency conditions, felt that such measures should be kept apart from the criminal law, which should never be based on collective guilt. He was doubtful however about the prohibition in the Working Paper on "guilt by association", if thereby such crimes as conspiracy were to be excluded from a free society, a point of view strongly shared by Mr. S. M. AMERASINGHE of Ceylon. Sir DAVID CAIRNS of the United Kingdom thought that it was going too far to say that collective punishment was always, even in emergency conditions, inconsistent with the assumptions of a free society. Mr. JACQUES DRAY of France pointed out that in cases of violation of price or traffic laws, for example in France, it was frequently difficult to prove who had actually committed the offence. Subject to this, he was against collective responsibility, even in an emergency. Further, he did not think the person who has bought stolen property, if he did not know it was stolen, should be subject to the burden of proof of innocence. Mr. FORBES KEITH-SELLAR of Malaya illustrated the point made by Sir David Cairns by reference to collective fines on villages and small towns in that country with, he considered, salutary results, and a similar justification of collective punishments in Eastern conditions was made by Mr. K. C.

<sup>1</sup> See the concluding paragraph of this summary.

NADARAJAH of Ceylon in relation to riots in that country over the language question in May 1958, when regrettably, in his view, a statute permitting collective punishments was not applied. Mr. A. J. M. VAN DAL of the Netherlands suggested that collective guilt may be abhorrent to a free society but that in cases of emergency society is no longer fully free, and Mr. H. R. RAMANI of Malaya took a somewhat similar point of view in saying that in emergencies military law supersedes civil law. Mr. Justice STEPHEN P. THOMAS of Nigeria, in giving the example of a clan fined in that country under the Collective Punishment Act, asked whether a distinction should be made between collective fines and collective imprisonment, while the CHAIRMAN suggested a further distinction between the vicarious liability of a master and collective guilt. It was also suggested that the Committee should consider the question at the simple but revealing level of a schoolmaster imposing a collective punishment on a class because the true culprit would not own up to the wrong.

Professor JEAN GRAVEN of Switzerland first emphasised the distinction between collective responsibility and, as in the case of the schoolmaster example cited above, general solidarity. Secondly, it was necessary to keep apart associations of wrong-doers, constituting a conspiracy, which is made a specific crime under the law. As for collective punishment, it should be borne in mind that in international law collective responsibility had been established by the Nuremberg Tribunal. And there are countries where traditionally collective guilt is recognized. The question is whether the individual should be allowed to prove his non-responsibility and whether imprisonment as well as a fine can be imposed. The speaker doubted the propriety of the first, although he thought it might be permissible to confine, for example, a pillaging tribe to a particular area. On the other hand, he thought it dangerous to suggest that in times of emergency collective punishment might be permissible. A time of emergency requires the maintenance of the Rule of Law, even if the rules of law are stricter. Finally, he opposed the idea of collective responsibility, in as far as it purported to sanction criminal liability of the employer for (to give an example) a fatal accident committed by an employee driving his employer's lorry. Professor JEAN C. J. MORICE of Cambodia thought the criminal responsibility of the employer could be justified as implying personal fault (in the maintenance of the lorry, for example). He felt that collective responsibility, apart from the special cases mentioned by Professor Graven, should be limited to cases where the collective organization of a tribe or of a clan was in existence.

Miss FLORENCE KELLEY of the United States asked, if collective punishment was to be admitted in emergency situations, who was to determine when the emergency situation existed, and Professor LIONEL A. SHERIDAN of Malaya, in developing this point, said that in many countries the constitution makes an executive authority the judge of emergency conditions. He further drew attention to the



danger that an executive authority may use emergency powers when the ordinary processes of the criminal law would have been satisfactory. But Mr. KAZI M. ASLAM of Pakistan thought that ultimately it should be for the courts to decide whether the declaration of the emergency by the Executive was justified. Professor AHMAD HOUMAN of Iran, however, was against any concessions by the Committee in regard to conditions of emergency, which were always capable of being exploited. The committee ought to affirm that criminal responsibility is purely personal.

After the RAPPOREUR had invited the Committee to find more appropriate words than "collective guilt" or "guilt by association" to cover situations where a crime had been committed but where it was not possible to prove the guilt of a particular individual, the CHAIRMAN put the question to the Committee whether even in an emergency collective guilt should be recognized and the question was negatived by 20 votes to 10. However, Professor JEAN GRAVEN of Switzerland thought that the vital question was whether the conditions on which emergency laws might operate were laid down by statute or left to the common law; it might be possible to permit collective guilt provided that it was covered in advance by a legal text with limits preventing abuse. In answer to the Chairman's question, why was it better to punish someone in fact innocent by a written rather than an unwritten law, Professor GRAVEN replied that it was not a question of punishing an innocent man, but of dealing with a crime of an anonymous and collective character. He mentioned that as draftsman of the Ethiopian Code, in force since 1957, he had made provision for collective guilt in cases of crimes of a collective character, although in fact this provision was rejected by Parliament on the ground that responsibility ought to be personal, being a principle embedded in the Constitution. He drew attention to collective responsibility in international law, as for example in the case of the *Gestapo* or *S.S.* and to the more simple case of an affray where it is not known who has actually struck the blows. Swiss penal law has created a special crime of participation in an affray to cover this type of case.

The matter was finally left to the Chairman and Rapporteur to prepare a draft expressing the views of the Committee.

The CHAIRMAN then referred the Committee to the third heading in the Summary and Conclusions of the Working Paper, viz.,

"The circumstances in which an arrest may be made and the persons so entitled to act should be precisely laid down by law. Every arrested person should be brought before an independent court within a very short period, preferably 24 hours, before which the legality of the arrest is determined.

"Immediately on arrest an accused person should be informed of the offence with which he is charged and have the right to consult a legal adviser of his own choice. He should be in-

formed of this right in a way appropriate to his education and understanding. This right should continue up to and during trial and during the period when an appeal may be pending."

The CHAIRMAN suggested that the following questions were involved: 1. whether the power of arrest should be strictly regulated by law and whether it should be limited to cases where there is reasonable suspicion that the person has committed an offence? 2. whether arrest ought to be open to challenge before a court independent of the prosecuting power? 3. if so, how soon after arrest? 4. whether an accused ought to be told at once the offence for which he has been arrested? 5. whether the accused should be entitled on arrest to a legal adviser of his own choice and to be so informed?

Mr. H. R. RAMANI of Malaya said that in his country the police are authorized by law to arrest a person without preferring a charge against him and having brought him before a Magistrate in Chambers to keep him in detention for 7 days (which may be extended to 14). The person concerned is not, during this period, allowed to engage counsel or even to see his relatives and it is during this type of police custody that confessions are made and not when an order of remand to prison is made. Mr. KAZI M. ASLAM of Pakistan said that the practice of taking a person into police custody without explaining the charge against him for the purpose of interrogating him with a view to implicating others had been held to be unlawful by the Supreme Court of Pakistan and was against the Rule of Law.

The CHAIRMAN, having ascertained the general view that an arrest should be strictly regulated by law and only exercised on reasonable suspicion that the person concerned had committed an offence, asked whether the arrest should be open to challenge before an independent court. Mr. MAGID BENJELLOUN of Morocco considered that it was superfluous to speak of a "tribunal" as "independent", but Mr. ASLAM of Pakistan said in that country (and in India) the Magistrates are appointed by the Executive on which their careers depend; Mr. A. N. SAHAY of India said, however, that in a large part of his country there had been a separation of the Judiciary and the Executive, it being a directive principle of the Constitution that the Executive should be separated from Judiciary. Professor JEAN GRAVEN of Switzerland then reminded the Committee that the important point to be emphasised was that arrest should be authorized within 24 or 48 hours or some longer period by some authority independent of the prosecution. As to the length of time, he counselled caution to cover the difficulties arising in differing conditions, as well as the differing time limits in some countries, and to avoid fictitious releases after 24 hours and immediate re-arrest. Mr. ASLAM of Pakistan conceded that time must be allowed for bringing a man from the place of arrest to the magistrate but feared that any formula merely requiring that the man should be brought

before the magistrate at soon as possible would in practice lead to abuse. Mr. LOUIS PETTITI of France distinguished three types of cases: 1. *in flagrante delicto*, where the accused should be brought before the judge as quickly as possible; 2. the detention of a suspect (*garde à vue*) when the police must make enquiries during the detention, now giving under the new French Code of Criminal Procedure the accused the right to call in a doctor to ensure that he is not being subjected to violence (a right which may also be exercised by his family or by the public prosecutor); 3. where the guilt of the accused is clear to the police although it is not a case *in flagrante delicto*. In the last case, as in cases *in flagrante delicto*, the accused should be brought before a judge normally within 24 hours. In answer to a question from the CHAIRMAN, Mr. PETTITI said in the second type of case (*garde à vue*) the time limit might be 48 hours plus the time taken to bring the accused before a judge. Mr. MAGID BENJELLOUN of Morocco suggested two stages in the period of detention as in the recently drafted Moroccan Code of Criminal Procedure; a first period of 24 hours when the accused is kept by the police and a second period when the accused is also under the control of the police but only by permission of the public prosecutor. This second period might be 24 hours or might be extended another 48 hours, if satisfactory proof is not forthcoming. Professor JEAN GRAVEN of Switzerland emphasised the importance of finding a formula to fit accusatorial systems, where it is the magistrate who gives permission for the extension of the period of detention, and inquisitorial systems with their public prosecutors, who may be authorized to allow an extension of the period of detention. He mentioned the example of the Ethiopian Code of Criminal Procedure, which requires the permission of the magistrate to prolong the period of detention beyond 48 hours. The discussion on this aspect of detention of the accused ended with Professor LIONEL A. SHERIDAN of Malaya reminding the Committee that the problem was not merely to avoid keeping people under detention without ill-treatment but also to avoid ill-treatment by the police, as could happen, for example, in Singapore. As far as Common Law countries are concerned, in India, in Singapore or in England he saw no reason why the person accused should not be brought before the magistrate within 24 hours excluding the time of any necessary journey.

Having secured the agreement of the Committee to the principle that the accused should be told at once of the offence for which he has been arrested and to his right on arrest to the services of a legal adviser of his own choice,<sup>2</sup> of which he should be informed in a way appropriate to his education and understanding, the CHAIRMAN drew the attention of the Committee to paragraph 5 of the Summary and Conclusions of the section of the Working Paper dealing with the Criminal Process and the Rule of Law, viz.:

<sup>2</sup> But see further discussion of these questions, *infra*, pp. 109-111.

"Detention pending trial is only justified when exceptional circumstances are proved to the satisfaction of an independent court which should otherwise allow bail on reasonable security. Permission to detain beyond the period mentioned in para. 3 above (i.e., preferably 24 hours) should only be given by an independent court and such permission should be reviewed at reasonably short intervals."

The Chairman suggested that four issues were involved: 1. the right to bail; 2. the right to have it renewed at reasonably short intervals; 3. the grounds for refusal of bail, which might be the exceptionally serious nature of the charge, the danger of the accused not appearing at his trial, the danger that the accused if released may interfere with witnesses; 4. the question whether detention pending trial should be prison and not in the custody of the police. Mr. J. P. RAJASOORIA of Malaya expressed the fear that the reasons for refusing detention might give too much latitude to the police. On the other hand, Mr. HAIM COHN of Israel spoke of the danger, as in Israel, of persons on bail committing new offences, and Mr. S. M. AMERASINGHE of Ceylon pointed out that if the magistrate too readily believed the reasons put forward by the prosecution for opposing bail there was always the possibility of appeal, even to the Supreme Court. Professor JEAN GRAVEN of Switzerland added that he was satisfied with the three grounds suggested by the Chairman as justifying refusal of bail. He emphasised that the Court had to be satisfied that there was evidence that such grounds existed before refusing bail and, moreover, that at all events on the continent of Europe, and in particular in Switzerland, there was the possibility of simple and speedy appeal from the *Juge d'instruction* to the *Chambre d'accusation* which might take place within three or four days.

A further matter which was referred to the drafting committee was the question of the giving of security by persons when released on bail which may create special problems in the case of persons without means or friends without means. It was stated that this did actually give rise to difficulties, for example, in Iran.

**Tuesday, January 6, 1959**

09.30—13.30

The CHAIRMAN began by referring to points 6 and 7 in the Summary and Conclusions of the section of the Working Paper dealing with the Criminal Process and the Rule of Law (see p. 277). He suggested that they gave rise to four questions:

1. In order that an accused person should be able adequately to prepare his defence, is it necessary that he should at all times have access to a legal adviser of his own choice?

2. Should he have the right to produce witnesses for his defence and to be present when their evidence is taken?

3. Should he know at an early stage the nature of the evidence to be called by the prosecution?

4. Should he be entitled to be present when the prosecution's evidence is heard and to cross examine the witnesses for the prosecution?

Mr. KAZI M. ASLAM of Pakistan emphasised the importance of the presence of the accused during the preliminary stage of the investigation of a crime, pointing out that, if an enemy of the accused is produced, it is important that the accused should have an opportunity of putting forward his point of view at an early stage when it may be that the evidence of the witness will be discredited and the accused will not be sent forward for trial. Mr. OSMAN RAMZY of the United Arab Republic said that, at all events as far as his country was concerned, in the preliminary stage the accused is present when witnesses are examined and if for any reason he is not present what the witnesses have said must be reported to him.

The CHAIRMAN in order to clarify the differences which emerge in any comparison of Common Law and Civil Law procedures stated that there are in a criminal trial in effect three stages: firstly, the investigations of the police; secondly, preliminary proceedings before an examining magistrate to decide whether there is a *prima facie* case against the accused, or in the Civil Law systems corresponding preliminary proceedings before a *juge d'instruction*; thirdly, the trial proper.

Mr. J. P. RAJASOORIA of Malaya, describing criminal procedure in that country said that statements made in the course of investigation by the police are only admissible when the accused is brought before a magistrate for the purpose of testing the veracity of the witness. He suggested that such statements, in order to increase their reliability and accuracy should be signed by the person making them and countersigned by a senior police official or a magistrate – i.e., by someone other than the person who took down the statement.

The discussion then turned to the question of legal representation and the CHAIRMAN pointed out that the provision of legal representation for those without means could be left for detailed consideration by the Fourth Committee, i.e., the Committee on the Judiciary and the Legal Profession under the Rule of Law. He turned to the question when the right to such legal representation should arise and Mr. K. C. NADARAJAH of Ceylon considered that it was important to point out that the right to a legal adviser should become available from the moment of arrest, whereas Professor JEAN GRAVEN of Switzerland, speaking from the Civil Law point of view considered that such a right properly arose when the accused was brought before the *juge d'instruction*. On being questioned on this point of view by the CHAIRMAN, Professor GRAVEN said that in theory he was not against the extension of the right to legal

representation to an earlier point in time but questioned whether it was possible in practice. However, Sir DAVID CAIRNS of the United Kingdom thought it desirable that in both the Common Law and the Civil Law systems an arrested person should be told of his right to legal representation immediately on being taken into custody on the ground that it is precisely during the time before he has been brought before a magistrate that the accused person stands most in need of legal advice. On the further point concerning the right of the accused to be informed in due time of the evidence against him, he suggested that this was only practicable in regard to more serious crimes and could not be applied, for example, to all minor cases coming under the summary jurisdiction of Magistrates Courts in England or comparable courts in other countries. Reverting to a point earlier made by Mr. K. M. Aslam of Pakistan, Sir DAVID CAIRNS said that he agreed with a number of speakers that it was impracticable for the accused to be present during the police investigations. Attention should therefore be directed, as far as this point was concerned, to what the Chairman had called the second and third stage of the criminal procedure, namely, the proceedings before a magistrate and the trial proper. On this last question Mr. KAZI M. ASLAM of Pakistan, explaining his earlier intervention, said that he was not suggesting that it should be obligatory for the police to take the accused with them from place to place where they carried out investigations. What he was suggesting was that the accused himself, or through his counsel, should have the right to be present during the police investigations. He mentioned in this connection Section 172 of the Code of Criminal Procedure of Pakistan which gives the magistrate power to read the record of the police investigations although under Section 162 statements recorded by the police cannot be used for any purpose other than that of contradicting a witness.

A long discussion followed on the question already raised as to the point of time when the accused person should first have the right to legal representation. In this connection Mr. HAIM COHN of Israel, although expressing surprise that in the opinion of Professor GRAVEN an accused person should not have the right to legal representation at the moment of arrest suggested that, as they were seeking a minimum standard, it might be better to omit reference to the point of time at which the right to a legal adviser should become operative. Mr. J. P. RAJASOORIA of Malaya pointed out that often a man is summoned to a police station without being told whether he is being called as an accused person or even as a suspect. He considered that anyone who is being called as a suspected person should have the right to consult counsel. On the other hand Professor AHMAD HOUMAN of Iran pointed out that in many countries it was still true that there was no right to legal representation even in the phase of *instruction* before the magistrate and that such a right had only been accepted seven months previously by a special law in Iran. He thought it more important to concentrate on the right to legal

representation before the *juge d'instruction* and also to discuss the propriety of the provision in many criminal codes that the police report is to be considered as valid until the contrary is proved. Mr. JEAN-LOUIS AUJOL of France agreed with Professor Houman. The vital question was that probative value was attached to statements made by the police. If the police report is only an element in the enquiry which may be destroyed by a declaration of the accused when heard by a magistrate, he did not think that legal representation in the stage of police enquiries was strictly necessary. Mr. HERBERT W. CHITEPO of Southern Rhodesia agreed, however, with Sir David Cairns that the right to legal representation should not be abridged at all from the moment an accused person loses his liberty.

The RAPPORTEUR intervened to say that in Japan before the war a person arrested by the police did not have the right to counsel but that after the war by the Constitution a right to counsel was guaranteed from the beginning of the arrest. He considered that this was an improvement on the previous position and that it did not necessarily interfere with investigations by the police.

Various suggestions were made for effecting a compromise regarding the point of time at which legal representation should become available. For example, Professor JEAN GRAVEN of Switzerland made the distinction between provisional arrest and *mise en detention* in continental procedure, the latter only taking place, apart from cases *in flagrante delicto*, on the order of the *juge d'instruction*. He was quite ready to accept a formula which would cover the right to legal representation from the time of *mise en détention*. He further thought it important that statements made to the police should be read over to those making them and signed by them. On the latter point, however, the danger was pointed out by another member of the Committee that if the statements recorded by the police bear the signature of the witness they may be given an undue importance in the mind of the judge or magistrate. And Mr. OSMAN RAMZY of United Arab Republic felt that the purpose of the Committee was to state broad principles and that the question of whether statements of witnesses made to the police should be signed or not as also the question as to the point of time when legal representation should become available should be left to the discretion of each legislature.

The CHAIRMAN then turned to point 8 of the Summary and Conclusions of the section of the Working Paper dealing with the Criminal Process and the Rule of Law. This read as follows:

"The function of the prosecution at all stages of the criminal process is to investigate and lay before the Court all the evidence bearing on the case whether favourable or unfavourable to the accused. The prosecutor should in particular inform

the accused in due time of any evidence not being used by the prosecution which might benefit the accused."

The CHAIRMAN suggested that this gave rise to two questions: first, should it be the duty of the prosecution to secure a conviction at all costs or to lay all the evidence before the Court; second, if the prosecution has evidence favourable to the accused which it does not propose to use, ought it to put such evidence before the accused or his legal adviser?

Mr. KAZI M. ASLAM of Pakistan considered that the above mentioned paragraph of the Working Paper was particularly important. He said that in actual practice prosecutors do not always place before the magistrate or judge evidence which benefits the accused person. In Pakistan there is no right to ask for a copy of a police statement of a witness whom the prosecution did not intend to produce in Court and this may put the defence at a disadvantage. Professor JEAN GRAVEN of Switzerland pointed out that in Civil Law countries the *Ministère public* is not just an accuser but the representative of the public and it is therefore clearly his duty to put forward all the evidence favourable or unfavourable to the accused. He questioned however whether this was so easy to achieve in an accusatorial system if the two parties are to be regarded as equal before the judge and each entitled to make the best possible of his own case. However Mr. S. M. AMERASINGHE of Ceylon warned the Committee against the tendency unduly to pamper the accused at the expense of the due and speedy administration of justice. He thought that in most cases the defence itself would be in the best position to know what was the most favourable evidence from its point of view. Sir DAVID CAIRNS of the United Kingdom, while not agreeing with the previous speaker that it was showing excessive consideration for the accused to inform him of evidence in his favour (which might very well be unknown to the accused), considered that the duty of the prosecution was too widely stated in the formula suggested by the Working Paper. It would be unfair to suggest that the prosecution should produce evidence favourable to the accused when they clearly felt that it was unreliable. On the other hand, they should reveal the existence of such evidence to the accused so that he could use it if he so desired.

Mr. J. P. RAJASOORIA of Malaya referred to the difficulty in which the defence may be placed when at a late stage of a trial a number of witnesses for the prosecution are offered to the defence. If the defence accepts the offer of the witnesses the prosecution can take advantage of statements which they have made to the police in cross-examining these witnesses when called by the defence. Mr. A. N. SAHAY of India said that a great deal must depend on the integrity of the counsel conducting the prosecution and that what is expected of the prosecution is not that they should call evidence favourable to the defence in the reliability of which they do not believe but that they will give the defence adequate notice of any



evidence favourable to the accused in order that he may have the opportunity of using it.

Professor AHMAD HOUMAN of Iran pointed out that in Civil Law systems it is the *juge d'instruction* who conducts the inquiry and decides what witnesses shall be heard. Mr. JEAN-LOUIS AUJOL of France, also referring to the possible differences between the Common Law and Civil Law systems of criminal procedure, appealed to the Committee to concentrate on the broad general principles applicable to both systems. If a two minute enquiry was made into each system irreconcilable differences would emerge; for example, between the Common Law and Civil Law systems regarding the use made of the previous record of the accused. As far as the point under discussion was concerned it was clear that Civil Law systems fully accepted the principle that the duty of the prosecution was to present all the evidence favourable or unfavourable to the accused.

The CHAIRMAN then introduced a draft report of the conclusion of the Committee on the points which had been so far discussed. While most of the discussion which followed was concerned with technical problems of translation and expression, attention may here be drawn to one or two points which raised issues of substance. For example, whereas the draft expressed the view that "collective guilt" is incompatible with the assumptions of a free society except in cases of a national emergency. Professor JEAN GRAVEN of Switzerland emphasised the extreme difficulty of this question, as had already been found at the International Congress of Penal Law at Rome in 1953. Another matter which gave rise to some difficulty concerned the difference between the Common Law and Civil Law systems as to the authority before whom an arrested person must eventually be brought – the magistrate in the Common Law systems or the *juge d'instruction* or *Chambre de mise en accusation* in the Continental systems. The matter was eventually referred back for redrafting and as will appear below resulted, in the conclusions of the Committee, in a resolution to the following effect:

"Every arrested person should be brought, within a very short period fixed by law, before an appropriate judicial authority."

There was also some discussion initiated by Mr. HERBERT W. CHITEPO of Southern Rhodesia on the resolution that:

"on any arrest the accused should at once be told the offence for which he has been arrested".

Mr. CHITEPO considered that it was desirable to require more than the mere name of the offence to be given, but, after Mr. HAIM COHN of Israel had pointed out that no police officer could be expected at the moment of arrest to tell the accused all the details of the charges against him, a compromise was eventually reached

which found expression in a resolution set out in the Conclusions as follows:

"on any arrest the arrested person should at once be told the grounds of his arrest".

When the Committee came to consider the provisions of the draft dealing with bail it added at the suggestion of Mr. COHN a further condition governing release on bail, namely, that the accused person would not be likely during his period of freedom to commit further crimes. Mr. LOUIS PETTITI of France also brought up the importance of the principle that the right to bail should be the general rule and the grounds on which it could be refused should be the exception to that rule, and the draft was eventually amended in that sense.

The CHAIRMAN then turned to those matters in the Working Paper which had not yet been considered by the Committee, paragraphs 9 to 11 of the Summary and Conclusions of the section of the Working Paper dealing with the Criminal Process and the Rule of Law. The CHAIRMAN pointed out that the points covered in these paragraphs included a number which were not specifically dealt with in the Introduction to the appropriate section of the Working Paper. The paragraphs in question read as follows:

"9. No one should be compelled by the police, by the prosecuting authorities or by the court to incriminate himself. No person should be subjected to threats, violence or psychological pressure, or induced by promises, to make confessions or statements. It should not be possible to evade the obligations which arise from the foregoing principles by treating a person under suspicion as a witness rather than as an accused person. Information obtained contrary to these principles should not be used as evidence.

"10. The search for evidence in private premises should only take place under authorization from a competent court. It should only be permissible to intercept private communications such as letter and telephone conversations for the purposes of collecting evidence upon specific authority given in the individual case by competent court.

"11. The particular responsibilities of the police and prosecuting authorities during that part of the criminal process which precedes a hearing before a Judge require that the rights and duties of the police and prosecution should be clearly and unequivocally laid down by law. Different systems have evolved different ways of supervising and controlling the activities of the police and the prosecuting authority. Similar results may be achieved either mainly by the subordination of the police to the

prosecuting authorities which are in turn ultimately under the direction of the courts or mainly by the internal discipline and self restraint of the police and the traditions of fairness and quasi judicial detachment on the part of the prosecution; in the latter case the remedy of *habeas corpus* has proved an important procedural device for ensuring that detention is legally justified."

The CHAIRMAN said that he would direct attention to four questions, namely: first, should the accused have a right to protection against evidence, and particularly confessions, being obtained from him by force or threats, and does that include drugs and blood tests and lie detectors; second, should a search of the accused's premises be lawful only if made under an order of the court; third, should the prosecution be entitled to obtain evidence by interference with postal or telephone communications without an order of the Court and, fourth, should evidence obtained in breach of any of these rights be admissible.

Professor J. GRAVEN of Switzerland said that at the recent International Congress of Comparative Law at Brussels in August 1958, the only point on which there was absolute general agreement was that evidence should not be obtained by violence, threats, fraud or untruths. As far as modern methods of obtaining evidence are concerned a distinction was drawn between techniques which do violence to human personality, that is to say which deprive the person concerned of responsibility for his statements and those techniques which simply act as a check on the truth, such as lie detectors and the interception of telephonic communications. In Switzerland the lie detector is accepted in some courts and this has resulted in some cases in the acquittal of a man who might otherwise have been convicted. In a case before the Supreme Court at Berne a conversation, taken down on a tape recorder between two accused persons after the *juge d'instruction* had left the room was not admitted in evidence. Professor GRAVEN considered that this case was wrong, and he argued for an attitude of restraint towards those technical methods of collecting evidence which did not do violence to human personality, pointing out that this was a problem which was arising in many countries as, for example, in France and Italy. However, Professor AHMAD HOUMAN of Iran was in favour of a complete ban on any sort of device, such as telephone interception, which in a broad sense could be regarded as an invasion of human liberty. Sir DAVID CAIRNS of the United Kingdom thought that in exceptional circumstances it should be possible for communications to be intercepted. In England, this could be done with the permission of a reasonably high executive authority although he personally would prefer that permission should be given by the court.

**Tuesday, January 6, 1959**

15.00—17.30

In the resumption of the discussion on "wire-tapping", Professor JEAN GRAVEN of Switzerland referred to a recent case in Switzerland which had received much publicity in which it was revealed that the Federal Police had intercepted telephone communications. He pointed out that while there was the greatest public interest and concern in the matter, the conclusion reached was that in certain circumstances wire-tapping is justified, a conclusion which was also supported by Mr. KAZI M. ASLAM of Pakistan and Mr. BENJAMIN R. SHUTE of the United States.

The CHAIRMAN then suggested that it would probably meet with general approval to lay down that the prosecution should not be entitled to use as evidence any postal or telephone communication which has been intercepted without an order of a Court.

As it appeared to be generally agreed that an accused person's premises should only be searched under the order of a Court the CHAIRMAN passed to point 14 in the Summary and Conclusions of the section of the Working Paper dealing with the Criminal Process and the Rule of Law which read as follows:

"The trial of accused persons should take place before an independent court. Special courts created *ad hoc* for a particular case or series of cases endanger fair trial or at least create the suspicion that fair trial will be endangered."

It was however agreed that the question of the independence of the tribunal could be left to the Committee dealing with the Judiciary and the Bar and the Committee therefore turned to consider the question of trial in public which was dealt with in the Summary and Conclusions of the Working Paper in point 15 as follows:

"The trial of accused persons should take place in public. Exceptions must be justified by law, the burden of proof resting on the prosecution to show that the conditions envisaged by the law are satisfied. Publicity in preliminary proceedings, where allowed, should not endanger fair trial by public discussion of the issues before they are decided in court."

The CHAIRMAN suggested that there might be three permissible exceptions when trials need not be in public, namely, in preliminary proceedings, in cases involving military or security secrets, and in proceedings against juveniles. Mr. S. M. AMERASINGHE of Ceylon added that an exception should apply not only to proceedings against juveniles but also in cases where juveniles were witnesses. Mr. KAZI M. ASLAM of Pakistan said that in other types of proceedings, as

between husband and wife (which in Pakistan might, in regard to adultery, abduction and bigamy involve criminal as opposed to civil proceedings) it might also be desirable not to hold the trial in public in the interests of the future of the family concerned. He was therefore in favour of leaving the question whether the trial was to be held in public to the discretion of the court. Sir DAVID CAIRNS of the United Kingdom thought that it was better that the categories of case should be laid down by the law rather than that they should be left entirely to the discretion of the judge. It was eventually agreed that, in the words of the final resolution:

"The Rule of Law requires that criminal trials should ordinarily take place in public. We recognize, however, the proper existence of exceptions to this rule, the nature of these exceptions should be laid down by law and their application to the particular case should be decided by the court."

The Committee then turned to consider what had been described in the Working Paper as a distinction between "trial in public" and "trial by the public". Mr. MAGID BENJELLOUN of Morocco was against any mention in the resolution to be agreed of the rights and duties of the press in regard to criminal trials. It is not possible, he suggested, to prevent the newspapers from publishing what they like. It was not the task of the Committee to draw up a statute for the press. Mr. LOUIS PETITI of France said that a distinction should be drawn between the preliminary proceedings which the press should not publish and the publicity given to the actual trial. Miss FLORENCE KELLEY of the United States spoke of the difficulties in that country of choosing a jury in a case where the press has already reported that a confession has been made when it may turn out that the confession is inadmissible in evidence. Mr. OSMAN RAMZY of the United Arab Republic thought that the relevant distinction both with regard to criminal proceedings and the trial itself was between a report of what actually happened in court and a comment on the merits of the case or of the accused himself. In the speaker's country, for example, the *Ministère Public* has power to forbid even an account of what happened in the preliminary proceedings to be published and the court of trial also has this right, but what is absolutely forbidden in all cases is to comment on a case before the sentence of the court has been pronounced. He thought that it was always possible by a law in the country concerned to prevent such comments on the case. Professor JEAN GRAVEN of Switzerland thought that it was misleading to distinguish trial by the court and trial by the public. The public did not try the case. Admitting that in certain cases the proceedings must be wholly or partially in secret, Professor GRAVEN thought that when the trial becomes public freedom of information should be total. Mr. HAIM COHN of Israel however disagreed in this respect with Professor Graven. It was

useless to impose all sorts of precautionary measures on the police, on prosecutors and defenders and on the courts unless some restraints were placed upon the press. It may not be possible to influence the press but the Committee was under an obligation to express its views. There was nothing which so prejudiced an innocent accused as what is called trial by newspaper. A formulation put forward by the CHAIRMAN eventually met with the approval of all members of the Committee. This formulation was as follows:

"In our opinion criminal trials should be open to report by the press but we do not regard it as compatible with the Rule of Law that it should be permissible for newspapers to publish, either before or during a trial, matter which is likely to prejudice the fair trial of the accused."

The discussion then turned to point 16 of the Summary and Conclusions of the section of the Working Paper dealing with the Criminal Process and the Rule of Law. This was as follows:

"The Rule of Law does not imply a particular theory on penal reform but it must necessarily condemn cruel, inhuman and excessive punishments."

Professor GRAVEN doubted whether it was desirable to deal with this topic. In any event he doubted whether it was possible to say that the Rule of Law did not imply a particular theory of penal reform. Sir DAVID CAIRNS of the United Kingdom thought on the other hand that it was important to make clear that the conception of the Rule of Law accepted by the Committee was one that condemned cruel, inhuman and excessive punishments. Mr. MAGID BENJELLOUN of Morocco agreed with Professor Graven and in particular suggested that if the Committee stated that the Rule of Law did not imply any particular theory of penal reform there was a danger that it would be taken to mean that punishment rather than reform is the only treatment for crime. Mr. A. N. SAHAY of India thought, however, that it did lie within the competence of the Committee to deal with the question of punishment which in any event would arise in point of time before the question of appeal fell to be considered, and there could hardly be any doubt that the question of appeal fell within the sphere of the Committee's responsibilities. However, Mr. JEAN C. J. MORICE of Cambodia thought there was a distinction between measures of punishment and criminal procedure, whether concerned with the trial or an appeal resulting from that trial. He was therefore in favour of eliminating the reference to punishments from the conclusions of the Committee. Mr. S. M. AMERASINGHE of Ceylon found difficulty in the proposition before the Committee from another point of view. He asked what was to be understood by "cruel, inhuman and excessive punishment"

and referred to the position in Ceylon where contrary to his own personal view the Legislature considers that capital punishment is cruel. A similar difference as to what is inhuman punishment would arise in regard to flogging.

Professor AHMAD HOUMAN of Iran raised another difficulty in connection with the question. He asked whether a general declaration in the form contemplated might not be too wide; for example, measures such as sterilisation might be undertaken in different countries for very different purposes being in some cases undoubtedly cruel or inhuman and in other cases in the interests of public health or public order.

The Committee being equally divided on whether reference should be made to punishment in the resolutions, the CHAIRMAN asked Mr. N. S. Marsh as draftsman of the Working Paper to explain the thought underlying it. Mr. MARSH admitted that he had hesitated in including a reference to punishment in the Working Paper. He suggested, however, that, as appeared to be emerging in the discussions of all the Committees, the underlying conception of the Rule of Law implied recognition of the dignity of man. Punishments which are cruel, inhuman or excessive are in fact in clear conflict with this dignity. He illustrated his point by reference to recent cases in the United States where a death sentence was passed on a negro for an offence which in most countries would not be regarded as capital, an event which had induced the International Commission of Jurists, with many other international bodies, to make representation to the Governor of the State concerned. He suggested that it almost followed as a matter of logic that if the rule is based on the respect for the dignity of man it must rule out punishments which are cruel, inhuman or excessive. It was eventually decided to retain the paragraph on punishment but in deference to the views of Professor Graven and others to put it after the reference, if any, to the right of appeal.

The Committee then turned to the question of appeals, the relevant paragraphs of the Working Paper being thus expressed:

"In every case involving imprisonment or a substantial fine there should be a right of at least one appeal to a higher court against conviction and sentence."

Mr. HAIM COHN of Israel doubted whether the right of appeal should be limited only to cases involving imprisonment or a substantial fine. Mr. KAZI M. ASLAM of Pakistan was, however, in favour of limiting appeal in the way contemplated by the Working Paper. The CHAIRMAN pointed out that although he was personally in favour of the proposition as stated in the Working Paper it would not cover the position in England in regard to contempt of Court where there is no right of appeal. Mr. HERBERT W. CHITEPO of Southern Rhodesia agreed with Mr. Cohn that an appeal should be

possible in every case. Professor JEAN GRAVEN of Switzerland pointed out the difficulty which arises in continental countries which, having borrowed the English institution of the jury, do not admit the possibility of an appeal from the decision of the jury. To avoid this difficulty it was necessary to replace the word "appeal" in the resolution to include, for example, *cassation* when there has been a violation of the law. Sir DAVID CAIRNS of the United Kingdom also supported those who had argued in favour of an appeal in respect of all crimes and he also thought it important that there should be a possibility of appeal in all cases which had been tried by jury. The necessity for such an appeal had been shown by the record of the Court of Criminal Appeal in England over the last 50 years. After some further discussion on the phrasing in French and English of the resolution it reached its final form as follows:

"Every conviction and sentence and every refusal of bail should be challengeable before at least one higher court."

The Committee then turned to consider proposition No. 12 in the introduction to that section of the Working Paper dealing with the Criminal Process and the Rule of Law. This read as follows:

"An accused person should have a criminal and (where he has suffered damage) civil remedy against anyone who is personally responsible for his illegal arrest or improper treatment by omission or commission during detention. The State (or appropriate public authority) should further accept liability for wrongful arrest or improper treatment by individuals who act with its authority."

The CHAIRMAN pointed out that it might be difficult to reach agreement on this matter as different legal systems provide quite different forms of remedies. Professor GRAVEN of Switzerland said that it was impossible today to find a solution of the problem which would be generally acceptable. Some countries as, for example, Sweden, Germany, Austria and certain Swiss cantons do provide remedies but there are many other countries which say that the judge has the right to make a mistake. He referred in particular to the attitude of Belgium at the International Congress of Penal Law at Rome in 1953, namely that it would be impossible in the Belgian system to admit the responsibility of the State for the judge or the responsibility of the judge himself. All that was possible at the Congress at Rome was to put forward a modest hope that the States which do not accept legal responsibility would in fact make good the ensuing loss and that the States concerned would examine the possibility of introducing legislation to this effect. He did not think it was possible to go further. In France, for example, he understood that it was not possible legally to obtain damages after



a wrongful sentence if there had not been a full consideration of the case by way of a *révision* which recognized that there had been a judicial error. In a fairly recent case where a person had been wrongly sentenced and had spent a number of years in prison some payment had in fact been made but only as a matter of grace rather than law. It is true that in some Swiss cantons the constitution provides that every mistake made by a judge should be made good. It would be possible to express the hope in countries where there is no provision for reparation that either the State should provide it or that the judge in question when he has been guilty of negligence should be responsible; but the matter was an extremely delicate one. Mr. MAGID BENJELLOUN of Morocco said that it would be possible to express the hope that reparation would be made by the State in the case of judicial errors but not by the judge himself who required a certain tranquility of mind in order to fulfil his role properly. Professor AHMAD HOUMAN of Iran thought that it was desirable that there should be sanctions ultimately applicable against judges, police and prosecutors. Mr. GIOVANNI NOCCIOLI of Italy thought the judge should only be condemned to pay damages to the innocent accused when he had acted fraudently. The matter was different with regard to the liability of the State. As far as the State's liability was concerned the reversal of a sentence should imply the putting back of the accused into the position he was before his wrongful trial and detention took place, as far as money payments could have this result. Professor GRAVEN described the system of reparation in operation in the Swiss Federal Code of Penal Procedure. If the Federal Tribunal recognises that somebody has been wrongfully sentenced it can receive at the same time a claim for reparation and it decides whether reparation is due, that is to say whether a fault can be attributed to the official concerned or whether the wrongful verdict has been brought about by the fault of the accused person himself. This is a very simple system contrasting with the more complicated procedure in operation in France which recognises the claim for reparation to be made before a civil court.

A formulation of a resolution by the Chairman was eventually accepted by the Committee. This read as follows:

"It is essential that there should be adequate remedies for the breach of any of the rights referred to above. The nature of those remedies<sup>3</sup> must necessarily depend on the nature of the particular right infringed and the system of law which exists in that country concerned. Different systems of law may provide different ways of controlling the activities of the police and of the prosecuting and enquiring authorities."

<sup>3</sup> The resolution as formulated by the Chairman at this stage of the discussion included the following words: "including adequate compensation for those wrongfully convicted as a result of a proved wrongful act or omission." These words do not appear in the final resolutions of the Committee.

The remainder of the proceedings in the Committee were devoted to the consideration of the drafting of the final resolutions of the Committee as prepared by the sub-committee. Attention will only be drawn to those matters on which a discussion of some substance emerged.

In the consideration given to the presumption of innocence Mr. HAIM COHN of Israel felt that it was important not to give the impression that it might be permissible to punish a man who was a member of a group, one of whom had committed a crime, unless he was able to prove his personal innocence. In view of the difficulties Professor GRAVEN suggested that all references to collective responsibility should be eliminated and this was eventually agreed upon.

In connection with the presumption of innocence Mr. JEAN-LOUIS AUJOL of France also objected from the point of view of French law to any suggestion that in the case of the receiving of stolen goods the burden of proof is reversed and Professor GRAVEN suggested that any reference to this type of situation should be eliminated as it would be profoundly shocking to many civil lawyers. Sir DAVID CAIRNS of the United Kingdom pointed out that it was not strictly true even in English law to say that the mere possession of stolen goods reversed the burden of proof, as the goods had to have been recently stolen and in any event the effect was only to allow the jury to infer guilt if a proper explanation of their origin is not forthcoming. The resolution on the presumption of innocence was eventually agreed in the following form:

"The application of the Rule of Law involves an acceptance of the principle that an accused person is assumed to be innocent until he has been proved to be guilty. An acceptance of this general principle is not inconsistent with provisions of law which, in particular cases, shift the burden of proof once certain facts creating a contrary presumption have been established. The personal guilt of the accused should be proved in each case."

An interesting difference between the Common law and Civil law points of view arose in connection with the application, approved in principle by the Committee, that the arrested person should be told of the nature of the charge on being arrested. In the attempt to define more clearly what was meant by the nature of the charge civil lawyers such as Professor GRAVEN and Mr. JEAN-LOUIS AUJOL pointed out that a common law approach separating the charge and the evidence supporting it would appear extremely strange to civil lawyers who in this context would think only of the "dossier". Mr. AUJOL in particular warned against the temptation of turning the proceedings of the Committee into a conference of comparative lawyers; what they had to do was to find a common minimum standard avoiding the technicalities of either system. The form in the

English draft in which the relevant part of the resolution was eventually agreed was as follows:

"On any arrest the arrested person should at once be told the grounds of his arrest."

There was further discussion on the right of an arrested person to be informed that he is entitled to the assistance of a legal adviser of his own choice. Sir DAVID CAIRNS thought it important to emphasise that the accused person should be informed of his right "in a way appropriate to his education and understanding", a conclusion with which Mr. S. M. AMERASINGHE of Ceylon agreed; but Professor GRAVEN preferred a simpler formula pointing out that it was unusual in French speaking practice to enter into detail in resolutions of this kind. Eventually the phrase adopted read as follows:

"On any arrest the arrested person should at once and at all times thereafter be entitled to the assistance of a legal adviser of his own choice, and on his arrest should at once be informed of that right in a way which he would clearly understand."

In the consideration of that part of the resolution dealing with the examination of the accused, there was a prolonged exchange of views on the propriety of including in the banned practices the use of drugs and lie-detectors. Mr. COHN took the view that it would be wrong to impose an absolute bar on lie-detectors especially when they might be used to produce evidence in support of the defence. Lie-detectors were in a different category from drugs. Professor GRAVEN developed this point saying that psycho-chemical procedures as well as surgical operations if used as a method of obtaining information should certainly be banned but he drew attention to the fact that a cantonal tribunal in Switzerland had used the lie-detector to the benefit of the accused and that a number of Courts of Appeal in the United States had admitted the lie-detector by the agreement of the parties concerned. The form in which the point was eventually resolved was as follows:

"No one should be compelled to incriminate himself. No accused person or witness should be subject to physical or psychological pressure (including anything calculated to impair his will or violate his dignity as a human being)."

Some difficulty was experienced in finding a comprehensible formula, especially for a layman, which might cover the thought underlying the proposition in the Working Paper - "it should not be possible to evade the applications which arise from the foregoing principles by treating a person under suspicion as a witness rather than as an accused person". Mr. LOUIS PETTITI of France said that there

were two aspects of this question: the first was that a witness could not be treated in any of the ways in which it was prohibited to treat an accused person, and the second was that it should not be possible to evade guarantees given to an accused person for the conduct of his defence, in particular the right to a lawyer, by abstaining from charging him and treating him only as a witness. As appears from the final resolutions of the Committee, the second problem was not directly covered in those conclusions although it would be fair to say that the importance of the matter was recognised and that the difficulty of dealing with it was mainly a question of drafting in the limited time then available.

Mr. JOHN MORRIS of Southern Rhodesia finally made the suggestion that in dealing with appeals the Committee should include in their resolution a statement to the effect that "in jurisdictions where it is unlikely that persons convicted in lower courts would have the means or understanding to exercise their right of challenge, the conviction and sentence should be reviewed as of course by a higher judicial authority." Although the practical importance of the matter in certain areas was appreciated the Committee as a whole felt that it could not be included in a list of general recommendations intended to have universal validity.

It may be convenient to deal at the conclusion of this summary with an issue which was raised in the course of the discussion. Professor LIONEL A. SHERIDAN of Singapore asked the Committee to consider the position in regard to the minimum protection accorded to persons arrested and in custody in countries where exceptional conditions prevail. He mentioned the position in Singapore where Chinese secret societies are in some areas so powerful that the ordinary citizen's fear of them is greater than his confidence in the police to protect him. As a consequence victims of the activities of secret societies or witnesses of the activities of secret societies are not prepared, for fear of reprisals, to come forward and give evidence in court against people accused of this type of offence. This is the justification given for an ordinance which permits the government to detain persons whom they are satisfied are associated with activities of a criminal nature for up to 2 years. Professor SHERIDAN emphasised that this could hardly be considered as a question of emergency conditions as it was an abiding state of affairs. The Committee recognised the problem represented by preventive detention without trial and the possibility of conflict between the principles of the Rule of Law and the existence of such a system of preventive detention. It will be observed, however, that the matter is not referred to in the final resolutions of the Committee which formulated its resolutions as answers to the preliminary question "if a citizen of a country which observes the Rule of Law is charged with a criminal offence, to what rights would he consider himself entitled?"

## **CONCLUSIONS OF THE COMMITTEE ON THE CRIMINAL PROCESS AND THE RULE OF LAW**

The Third Committee has carefully considered the practical application of the Rule of Law (in accordance with the suggested definition of that phrase in the *Working Paper* on Page 197) in the field of the Criminal Process. We have also taken into consideration the resolutions of the Congress of the International Commission of Jurists on the same subject held at Athens in 1955.

We appreciate that the rights of the accused in criminal trials, however elaborately safeguarded on paper, may be ineffective in practice unless they are supported by institutions, the spirit and tradition of which limit the exercise of the discretions, whether in law or in practice, which belong in particular to the prosecuting authorities and to the police.

Bearing that qualification in mind, however, we have sought to answer the question: If a citizen of a country which observes the Rule of Law is charged with a criminal offence, to what rights would he properly consider himself entitled? We have considered this question under the heads which follow. In our opinion it is for each country to maintain and develop in the framework of its own system of law the following rules which we regard as the minimum necessary to ensure the observance of the Rule of Law.

### **1. Certainty of the Criminal Law**

In our view it is always important that the definition and interpretation of the law should be as certain as possible, and this is of particular importance in the case of the criminal law, where the citizens life or liberty may be at stake. We do not consider that such reasonable certainty in the criminal law can exist where the law, or the penalty for its breach, is retrospective.

### **2. The presumption of innocence**

The application of the Rule of Law involves an acceptance of the principle that an accused person is assumed to be innocent until he has been proved to be guilty. An acceptance of this general principle is not inconsistent with provisions of law which, in particular cases, shift the burden of proof once certain facts creating a contrary presumption have been established (e.g., a provision that on proof that the accused was found in possession of goods which have been stolen it shall be for the accused to establish that he did not know that the goods had been stolen). The personal guilt of the accused should be proved in each case.

### **3. Arrest and accusation**

- (1) The power of arrest whether in flagrante delicto or not ought to be strictly regulated by law, and should only be exer-

ciseable on reasonable suspicion that the person concerned has committed an offence.

(2) On any arrest the arrested person should at once be told the grounds of his arrest.

(3) On any arrest the arrested person should at once and at all times thereafter be entitled to the assistance of a legal adviser of his own choice, and on his arrest should at once be informed of that right in a way which he would clearly understand.

(4) Every arrested person should be brought, within a very short period fixed by law, before an appropriate judicial authority.

(5) After appearing before such judicial authority, any further detention should not be in the hands of the police.

#### **4. Detention pending trial**

(1) No person should be deprived of his liberty except in so far as may be required for the purposes of public security or the administration of justice.

(2) Every arrested person should have a right, renewable at reasonably short intervals, to apply for bail to an appropriate judicial authority. He should be entitled to bail on reasonable terms unless either:

(a) the charge is of an exceptionally serious nature, or

(b) the appropriate judicial authority is satisfied that, if bail is granted, the accused is not likely to stand his trial, or

(c) the appropriate judicial authority is satisfied that, if bail is granted, the accused is likely to interfere with the evidence, for example with witnesses for the prosecution, or

(d) the appropriate judicial authority is satisfied that, if bail is granted, the accused is likely to commit a further criminal offence.

We deal under head (7) with the conditions of such detention.

#### **5. Preparation and conduct of defence**

The Rule of Law requires that an accused person should have adequate opportunity to prepare his defence and in our view this involves:

(1) That he should at all times be entitled to the assistance of a legal adviser of his own choice, and to have freedom of communication with him.

(2) That he should be given notice of the charge with sufficient particularity.

(3) That he should have a right to produce witnesses in his defence and to be present when this evidence is taken.

(4) That at least in serious cases, he should be informed in sufficient time before the trial of the nature of the evidence to be called for the prosecution.

(5) That he should be entitled to be present when any evidence for the prosecution is given and to have the witnesses for the prosecution cross-examined.

#### **6. Minimum duties of the Prosecution**

The duty of the Prosecution should be fairly to place the relevant evidence before the court, and not to obtain a conviction at all costs. If the Prosecution has evidence favourable to the accused which it does not propose to use, it should put such evidence at the disposal of the accused or his legal adviser in sufficient time to enable him to make proper use of it.

#### **7. The examination of the accused**

No one should be compelled to incriminate himself. No accused person or witness should be subject to physical or psychological pressure (including anything calculated to impair his will or violate his dignity as a human being).

Postal or telephone communications should not be intercepted save in exceptional circumstances provided by law and under an Order of an appropriate judicial authority.

A search of the accused's premises without his consent should only be made under an Order of an appropriate judicial authority.

Evidence obtained in breach of any of these rights ought not to be admissible against the accused.

#### **8. Trial in public**

The Rule of Law requires that criminal trials should ordinarily take place in public. We recognise, however, the proper existence of exceptions to this rule. The nature of these exceptions should be laid down by law and their application to the particular case should be decided by the court.

In our opinion criminal trials should be open to report by the press but we do not regard it as compatible with the Rule of Law that it should be permissible for newspapers to publish, either before or during a trial, matter which is likely to prejudice the fair trial of the accused.

#### **9. Legal remedies, including appeals**

Every conviction and sentence and every refusal of bail should be challengeable before at least one higher Court.

It is essential that there should be adequate remedies for the breach of any of the rights referred to above. The nature of those remedies must necessarily depend on the nature of the particular right infringed and the system of law which exists in the country concerned. Different systems of law may provide different ways of controlling the activities of the police and of the prosecuting and enquiring authorities.

#### **10. Punishment**

The Rule of Law does not require any particular penal theory but it must necessarily condemn cruel, inhuman or excessive preventive measures or punishments, and supports the adoption of reformatory measures wherever possible.



# **LIST OF REGISTERED MEMBERS OF THE COMMITTEE ON THE CRIMINAL PROCESS AND THE RULE OF LAW**

## **Third Committee**

SIRIMEVAN AMERASINGHE (Ceylon)	FLORENCE KELLEY (U.S.A.)
KAZI M. ASLAM (Pakistan)	TAI HEE LEE (Korea)
JEAN-LOUIS AUJOL (France)	JEAN C. J. MORICE (Cambodia)
MAGID BENJELLOUN (Morocco)	JOHN MORRIS (S. Rhodesia)
HECTOR L. BRENTA (Argentina)	K. C. NADARAJAH (Ceylon)
SIR DAVID SCOTT CAIRNS (United Kingdom)	GIOVANNI NOCCIOLI (Italy)
HERBERT W. CHITEPO (S. Rhodesia)	BO PALMGREN (Finland)
HAIM H. COHN (Israel)	J. J. PANAKAL (Observer)
A. J. M. VAN DAL (Netherlands)	LOUIS E. PETTITI (France)
C. K. DAPHTARY (India)	DATO R. P. S. RAJASOORIA (Malaya)
JACQUES DRAY (France)	OSMAN RAMZY (United Arab Republic)
BASILEU GARCIA (Brazil)	A. N. SAHAY (India)
GERALD A. GARDINER (United Kingdom)	LIONEL ASTOR SHERIDAN (Singapore)
ABBAS GHOLI GOLSHAYAN (Iran)	BENJAMIN R. SHUTE (U.S.A.)
JEAN GRAVEN (Switzerland)	SAIZO SUZUKI (Japan)
M. HIDAYATULLAH (India)	HACHEM YAZDI TABATABAI (Iran)
RYUICHI HIRANO (Japan)	VIBUL THAMAVIT (Thailand)
AHMAD HOUMAN (Iran)	STEPHAN P. THOMAS (Nigeria)
FORBES KEITH-SELLAR (Malaya)	KAREL VASAK (France)

**COMMITTEE ON  
THE JUDICIARY AND THE LEGAL PROFESSION  
UNDER THE RULE OF LAW**

Chairman:	Mr. ERNEST ANGELL (United States)
Rapporteur:	Dr. ARTURO A. ALAFRIZ (Philippines)
Secretary:	Dr. SOMPONG SUCHARITKUL (Thailand)

The list of registered members of the Committee and the full text of the conclusions reached by this Committee are set out at the end of this summary. (Pp. 157-160).

**Monday, January 5, 1959**

15.00-17.30

The CHAIRMAN, having secured the agreement of the Committee to the consideration point by point of the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law, began by drawing the attention of the Committee to point 1 of those conclusions, namely:

"An independent judiciary is an indispensable requisite of a free society under the Rule of Law. Independence here implies freedom from interference by the Executive or Legislative with the exercise of the judicial function. Independence does not mean that the judge is entitled to act in an arbitrary manner; his duty is to interpret the law and the fundamental assumptions which underlie it to the best of his abilities and in accordance with the dictates of his own conscience."

Mr. CHARLES S. RHYNE of the United States referred to recent differences of opinion in the United States about the Supreme Court and said that the Bar had defended this institution very vigorously while respecting the right of anyone to criticise particular decisions provided they give their reasons therefor. He also mentioned the resistance of the Bar to the plan of the late President Roosevelt to pack the Supreme Court by the nomination of more judges. Mr. P. N. SAPRU of India dealing with the position of judges in his country said that by the Indian Constitution judges of the High Courts are appointed by the President and are retired at the age of 60. Judges of the Supreme Court are in a similar position although their age of retirement is 65. They can only be removed for misbehaviour or infirmity of mind or body and then only after an inquiry and a two-thirds vote of each House of Parliament. A problem is created by the employment of judges after retirement as, for example, as

chairmen of semi-judicial or administrative tribunals. Mr. SAPRU considered that the greatest security of independence provided is by life tenure. A tendency in systems where there is retirement before the end of a working life is to look to the Executive for preferment. Dr. K. M. MUNSHI of India thought that it might be going too far to say, as was stated in the Working Paper, that the "convention" had been to appoint the most senior member of the Supreme Court as Chief Justice. It would be more accurate to say that it had so far been the practice. Mr. VU VAN HIEN of Viet-Nam said that the independence of the Judiciary was unavailing if it could be in fact undermined by the creation of special tribunals.

Professor ALI BADAWI of the United Arab Republic thought that it would be better to eliminate the second part of the conclusion set out above. On the other hand Mr. HUGH O. B. WOODING of the West Indies was in favour of some reference to the matter mentioned in the final part of the conclusion, namely, the duty of the independent judge. He pointed out that there is a difference of opinion at the present time as to the proper functions of a judge in regard to his interpretation of the law, whether he is to interpret the law strictly or whether, even at the risk of some uncertainty of the law, he should interpret in accordance with the principles of justice and the changing needs of society.

Mr. H. R. RAMANI of Malaya, dealing in turn with the two questions so far discussed said that as regards the first question, the independence of the Judiciary, India had an advantage over some other countries in Asia in having inherited a tradition of British justice. In some countries, however, the recruitment and promotion of judges has, in the past, always been in the hands of the Executive. The problem was to secure respect for the independence of the judges in countries which had themselves newly acquired their independence. As far as the second question was concerned, namely, the duty of the judge in interpreting the law, he thought on the whole that it was for the Legislature to take into consideration the fundamental assumptions which underlie the society for which it legislates. He agreed that law cannot be static but he would prefer the law to lag behind provided that it maintained its continuity of history rather than to run ahead of time and misinterpret legislation. Mr. BETHUEL M. WEBSTER of the United States felt that any detailed examination of the problem could never be finished within the time available to the Committee and that the concluding part of the propositions under discussion, although somewhat vague, represented the maximum that could be achieved by way of agreement on this subject. Mr. B. N. CHOBE of India said that there were cases in which there were valid reasons for a decision on one side or the other but there should be certain limits within which a judge can move. Justice according to the Sanskrit word "aditi" literally means that which cannot be divided. The decision of the just judge, therefore, must do justice to both sides.

After the CHAIRMAN had suggested that the consideration of the first point in the conclusions of the Working Paper be accepted in principle, with the possibility of further discussion at a later stage, a number of amendments of substance and in the wording were suggested by Mr. LUCIAN WEERAMANTRY of Ceylon. As a matter of substance he preferred for the expression "the fundamental assumptions which underlie it (the law)" a reference to "the fundamental principles" and he added that the mention of the "conscience" of the judge with its connection by implication with the English Chancellor's conscience should be replaced by some other phrase. Dr. ARTURO ALAFRIZ of the Philippines wished to add a sentence to the Conclusion covering constitutional safeguards of the independence provided for. On the other hand, Dr. K. M. MUNSHI of India felt that the wording of the conclusion in the Working Paper was expressive and appropriate and should not be changed. In particular he thought there was a good deal of difference between the principles and the assumptions underlying the law; the courts assume rules of natural justice but they cannot be regarded as principles of the law.

The CHAIRMAN then directed the attention of the Committee to the ways in which the Judiciary are appointed or selected. The matter is dealt with in point 2 of the Summary and Conclusions of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law. The conclusion in question read as follows :

"There are in different countries varying ways in which the Judiciary are appointed, reappointed (where reappointment arises and promoted, involving the Legislative, Executive, the Judiciary itself, in some countries the representatives of the practising legal profession, or a combination of two or more of these bodies. In some countries judges are elected by the people but it would appear that this method of appointment, and particularly of reappointment, has special difficulties and is more likely to secure judges of independent character where tradition has circumscribed by prior agreement the list of candidates and limited political controversy. There are also potential dangers in exclusive appointment by the Legislative, Executive or Judiciary, and where there is on the whole general satisfaction with the calibre and independence of judges it will be found that either in law or in practice there is some degree of co-operation (or at least consultation) between the Judiciary and the authority actually making the appointment."

Mr. BETHUEL M. WEBSTER of the United States explained that the reference in the conclusion set out above to the difficulties which arise on the re-election of judges, where election is the method of selection, had particular reference to some of the States of the

United States. Mr. A. N. VEERARAGHAVAN of India raised the question whether the Committee should not express a more definite view as to the best method of selection. He would prefer a clear statement that judges should be appointed by the Executive in consultation with the Judiciary. On the other hand, Mr. P. N. SAPRU of India pointed out that in India although the Chief Justice is certainly consulted it is on the advice of the Home Minister that judges are actually appointed and where the views of the Chief Justice and the Home Minister might differ it would be the latter's view which would prevail. He did not think it would be possible for the Committee to suggest a uniform system of appointment. Mr. JEAN KRÉHER of France drew attention to the system of recruitment of the judges, as in France, by competition, the candidates being accepted according to the number of places available. He agreed however with the previous speaker that it was not possible for the Committee to lay down a single rule regarding the selection of judges. Mr. HUGH O. B. WOODING of the West Indies also thought it impossible to express a definite preference for a particular system. In the West Indies there is a tendency to set up Judicial Service Commissions on which are represented the Executive and the Judiciary. Some feel that the Bar should also be represented. In territories such as the West Indies an appointment by the Executive alone tends to make the judge subservient to the Executive more especially when his promotion depends on the Executive which appointed him. Mr. B. N. CHOBE of India also agreed with the conclusion as set out in the Working Paper. Mr. HENRY H. L. HU of Hong Kong, however referred to a division of powers, which had formerly existed in the Chinese Republic, into Legislative, Executive, Judicial, a department of examination and a department of control. The judges should be chosen by examination but the control should be exercised by the President.

The CHAIRMAN then put the matter to the vote of the Committee and it was agreed with almost complete unanimity to approve the substance of the second paragraph of the Working Paper. He then put before the Committee the question of the irremovability of the Judiciary which was dealt with in point 3 of the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law. This read as follows:

"The principle of irremovability of the Judiciary, and their consequent security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence he is, particularly if he is seeking reappointment, subject to greater difficulties and pressures than a judge who enjoys security of tenure for his working life."

The Committee approved the Conclusion set out above but Mr. HU of Hong Kong raised the question whether it was desirable that a Judge who had retired should be entitled to practise at the Bar. Sir PATRICK DEVLIN of England, now Mr. Justice, however, considered that this lay outside the purposes of the Committee which was concerned with the minimum requirements imposed by the Rule of Law. Mr. PHILIPPE BOULOS of the Lebanon agreed with this point of view and said that the question was one which concerned the regulations of the Bar rather than the Judiciary.

The Committee then turned to the consideration of the fourth point in the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law, which read as follows:

"The reconciliation of the principle of irremovability of the Judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be clearly laid down and that the procedure for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial. The grounds for removal should be only: (i) physical or mental incapacity; (ii) conviction of a serious criminal offence; (iii) moral obliquity. Where, as in a number of countries, there is a possibility of removal of a judge for some other reason or in some other way (e.g., by legislative vote or by impeachment) it is conceived that the independence of the judges is preserved only to the extent that such process of removal is seldom if ever exercised."

Mr. WEBSTER of the United States, while agreeing with the substance of the conclusion set out above, emphasised that in the United States impeachment meant impeachment for specific crimes or misdemeanours and not merely removal of a judge by legislative vote. Specific charges had to be made followed by trial with proof. Mr. SAPRU of India said that in India the removal of a High Court judge involved two stages: first, an enquiry and then a two-thirds vote of each House of Parliament. Mr. WOODING of the West Indies thought it important for the Committee to emphasise that a judge should not be removed except for a reason within the three grounds for removal mentioned in the Working Paper. He said there were some emerging countries in which the Legislature was taking far too great an interest in what the judges do and where governments with large majorities are seeking to influence judicial decisions by threats of having them removed. He would, therefore, be in favour of eliminating the last sentence in the conclusion set out above beginning with the words "where, as in a number of countries . . ."

However Mr. Justice DEVLIN of England while expressing sympathy with Mr. WOODING's proposal pointed out that in England removal of a judge can be effected by a resolution of both Houses of Parliament and that there are no specific grounds laid down on which such removal may be brought about. In fact, no judge had ever been removed and it was very unlikely that anyone would be. If the Committee were to lay down that the grounds for removal should be certain named offences or incapacities it would in effect be saying that there has not been a rule of law in England for at least two hundred years. To meet Mr. Wooding's and Mr. Justice Devlin's point of view Mr. LUCIAN WEERAMANTRY of Ceylon suggested that the last two sentences of the conclusion in the Working Paper should be eliminated, i.e., removing any reference either to specific grounds of removal of judges or to special procedures for removal, e.g., by legislative vote. Mr. WOODING suggested that the form of the conclusion should be left to a drafting committee. He thought, however, it was important for the Committee to show its disapproval of what, for example, had happened in one country known to him, namely that a judge had been forced to retire because he had given a decision offensive to the Executive.

After the CHAIRMAN had suggested that the drafting committee would require rather more guidance from the Committee Mr. Justice DEVLIN of England supported the suggestion already made by Mr. Weeramantry that the conclusion to be adopted should contain no reference to the specific grounds of removal or to particular methods of removal as, for example, by legislative vote. It would be sufficient to emphasise, as was stated in the first part of the Conclusion in the Working Paper, that "the procedure for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial". In the remote event of a resolution coming before both Houses of Parliament in England he thought that these conditions would in fact be observed. The grounds for removal should be left to the individual country concerned. It would be extremely difficult to lay down as a general rule what constituted a "serious criminal offence". In certain circumstances, for example, a judge who had to deal with motor car cases might be unfit for his post if he had himself been convicted for careless driving. Mr. VU VAN HIEN of Viet-Nam agreed with the point of view expressed by Mr. Justice Devlin. Mr. B. N. CHOBE of India, adding another reason for the exclusion of any specific reference to the reasons for removal, said that in the only case in which a judge of the High Court was removed the grounds would not have been covered by the reasons given in the Conclusion of the Working Paper; they were in fact that the judge in question had taken into consideration certain facts which were within his personal knowledge.

The CHAIRMAN then put to the vote the proposition of Mr. L. Weeramantry of Ceylon that the last two sentences of the conclusion in the Working Paper should be eliminated and it was carried by 19 votes to 11. It was also agreed with almost complete unanimity to accept the first sentence in the conclusion as set out in the Working Paper which has been cited above.

**Tuesday, January 6, 1959**

09.30—13.30

The Committee began by considering point 5 in the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law. This was as follows:

"The considerations set out in the preceding paragraph should apply to: (i) the ordinary civil and criminal courts; (ii) administrative courts or constitutional courts, not being subordinate to the ordinary courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other judicial functions (juries, assessors, Justices of the Peace, etc.) should only be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular position; all such persons have in any event the same duty of independence in the performance of their judicial function. As emphasised in the section of this working paper dealing with the Executive and the Rule of Law, such administrative tribunals should be under the supervision of the ordinary courts or (where they exist) of the regular administrative courts."

A prolonged discussion took place partly on the substance and partly on the wording of the above cited conclusion. Mr. CHARLES G. RAPHAEL of the United States asked, for example, what courts were intended other than the ordinary civil and criminal courts, whether the purpose of the conclusion was to make a distinction between regular administrative courts and administrative tribunals and finally whether there were in fact any constitutional courts subject to ordinary courts. Mr. CHAUDHRI NA-ZIR AHMAD KHAN of Pakistan thought it would be necessary to redraft the whole of the above conclusion to bring it into line with the changes made in the preceding conclusion (point 4 of the Summary and Conclusions in the section of the Working Paper dealing with the Judiciary and Legal Profession under the Rule of Law). Dr. ARTURO A. ALAFRIZ of the Philippines thought that the first question was to decide whether the principle of irremovability should apply not only to judges of courts in the strict sense but also to the members of administrative



tribunals or administrative courts. Mr. B. N. CHOBE of India, speaking from Indian experience, said that administrative appeals should only go to the higher ordinary courts. It could hardly be intended to lay down that they should have to pass through the whole hierarchy of ordinary courts. Mr. CHARLES S. RHYNE of the United States, on the other hand, thought that the conclusion under consideration was essential. So-called administrative judges or hearing officers, or whatever they might in different systems be called, must be independent and be protected from removal. But Mr. JEAN KRÉHER of France while agreeing with the underlying principle of the conclusion felt that it was obscure in its detail; it bore no relationship to French law. He thought it would be better merely to say that administrative judges as other judges should be independent and be guaranteed in their positions particularly with regard to their irremovability. Mr. VU VAN HIEN of Viet-Nam, agreeing with the last speaker, proposed the elimination of the conclusion under consideration and the substitution of a shorter proposition in which mention is made only of administrative judges or constitutional judges and not of tribunals. Dr. K. M. MUNSHI of India feared that the reference in the final sentence of the conclusion to the supervision over administrative tribunals by "ordinary courts or (where they exist) . . . regular administrative courts" might leave it open for governments to set up regular administrative courts taking away the jurisdiction of the ordinary courts. The French system of administrative courts was in a different position as it constituted a real system of administrative courts and not merely an administrative court to hear appeals from the ordinary tribunals. Mr. VICENTE FRANCISCO of the Philippines said that the principle of irremovability should apply to all courts exercising judicial power. Mr. RHYNE of the United States thought that the difficulties pointed out by various speakers might be met by saying that the principle of irremovability should apply to all courts exercising judicial power. apply to all judges or hearing officers who exercise judicial or quasi judicial powers or functions. Mr. ABDUS S. FARUQI of Pakistan pointed out, however, that in countries which do not have a very elaborate system of administrative tribunals, as exist in France, it is necessary to emphasise the importance of the judicial review of administrative tribunals by the ordinary courts.

Mr. V. K. T. CHARI of India said it would be going too far to say that the principle of irremovability should apply to every person exercising judicial or quasi-judicial functions as there were officials and ministers who had to perform quasi judicial functions in the course of their administrative duties.

Mr. WOODING of the West Indies thought that the underlying purpose of the conclusion in the Working Paper was to deal first with the irremovability of the Judiciary in all kinds of courts and then to deal with persons who are members of tribunals or who perform functions as jurymen, etc. The latter group require special

treatment. For example, a jury is empanelled to try a particular case. "The spirit of the considerations" regarding irremovability means with regard to the jury that you do not remove a jury from the panel because it gives a decision contrary to the wishes of the Executive. Mr. H. R. RAMANI of Malaya also defended the phrasing of the conclusion in the Working Paper under discussion. He thought it was necessary to conclude with a reference to the supervision of the ordinary courts over administrative tribunals and drew the attention of the Committee to a pertinent passage in the Working Paper. The passage drew attention to the varying quality of members of administrative tribunals and to the danger that those appointed to such bodies for relatively short periods might be unduly subservient to the Executive. Mr. A. N. VEERARAGHAVAN of India thought however that the supervision of administrative tribunals might as a subject be omitted from the conclusions of the Committee as it had been dealt with by the Second Committee of the Congress.

After the CHAIRMAN had suggested a possible line of agreement on the principle of irremovability as applied to judges and those who regularly exercise judicial or quasi-judicial functions Mr. Justice DEVLIN of England suggested that the word "quasi-judicial" might be eliminated as covering for example the functions of arbitrators who are, however, frequently removed by the Courts. In this connection Mr. JEAN KRÉHER of France emphasised the distinction between the irremovability of judges and the guarantees of independence given to those who exercise judicial functions on certain occasions as, for example, juries.

After it had been agreed not to adjourn the discussion on the conclusion, as had been suggested in view of its difficulty by Mr. LUCIAN WEERAMANTRY of Ceylon, it was agreed by 24 votes to 11 to eliminate the reference in the last sentence of the conclusion to the supervision of administrative tribunals by the ordinary courts; it was further agreed by 28 votes to 4, with one abstention, to leave the first part of the conclusion in the form in which it was expressed in the Working Paper. It may here be desirable for the sake of clarity to set out again that part of the conclusion which was approved by the Committee. It was as follows:

"The considerations set out in the preceding paragraph should apply to: (i) the ordinary civil and criminal courts; (ii) administrative courts or constitutional courts, not being subordinate to the ordinary courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other judicial functions (juries, assessors, Justices of the Peace, etc.) should only be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular position; all such persons have in any event the same duty of independence in the performance of their judicial function."

The Committee then turned to the sixth point in the Summary and Conclusions in the section of the Working Paper dealing with the Judiciary and Legal Profession under the Rule of Law. This read as follows:

"It must be recognised that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of Judicial business and that it may, subject to the limitations on delegations of legislative power which have been discussed in the first section of this working paper, delegate part of this responsibility to the Executive. Such measures however should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions."

Mr. WEERAMANTRY of Ceylon thought that the reference to the responsibility of the Legislative to "judicial business" was dangerously wide, a point of view with which Mr. SAPRU and Dr. MUNSHI of India agreed. But Mr. WEBSTER of the United States felt that the Committee was in danger of becoming unrealistic. Once the principle of the independence of the judiciary was recognised it was necessary to admit that there are matters affecting the business of the courts which are proper concern of the Legislature; thus, for example, in the State of New York the Legislature passes laws laying down where the courts shall be held, the terms which shall be kept and the "house-keeping" details of judicial organization. Mr. KRÉHER of France here suggested that the French version of the conclusion in question which mentioned the responsibility of the Legislature to determine "*le cadre général et les principes d'organisation de la fonction judiciaire*" appeared to be more restrictive in meaning than the English text and was in his opinion preferable.

Mr. VICENTE FRANCISCO of the Philippines said that the function of the Legislature should be limited to the determination of the courts vested with judicial power, the number of judges for these courts, the salaries of the judges and the places where these courts should meet. The business of the courts should be left entirely in the hands of the Judiciary. In the Philippines the Supreme Court had the rule-making power with regard to the procedures to be followed in all courts. He was therefore opposed to the conclusion under discussion. Dr. ALAFRIZ of the Philippines suggested for another reason that the conclusion under discussion could be eliminated. It was already covered by the first principle on which they had agreed (dealt with in the first point of the Summary and Conclusions of the Working Paper), namely, the freedom of the Judiciary from interference by the Executive or the Legislative. If necessary the first conclusion reached by the Committee could be amended by the addition to the word "interference" of some qualifying clause such as "whether direct or indirect".

Mr. WOODING of the West Indies said that the conclusion under discussion dealt with the organization of judicial business; it did not deal with the judicial function as such which was another matter. Mr. ABDUS S. FARUQI of Pakistan also supported the conclusion as it stood. Mr. CHOBE of India, while in favour of retaining the conclusion, wanted more specific reference to the principle of the independence of the Judiciary, the principle which had already been agreed upon by the Committee. Mr. KRÉHER of France considered that the conclusion had value. Judicial functions must be exercised in conditions of independence but the Legislature must necessarily be concerned with the organization of the judicial function. On the other hand it was important to emphasise that the Legislature should not by a sort of "détournement de pouvoir" indirectly interfere with the judicial function as, for example, by transferring a judge whose decisions were unpopular to some other part of the country. Mr. VEERARAGHAVAN of India thought that the first principle on which the Committee had reached agreement, namely the independence of the Judiciary and the conclusion under discussion, dealing with the organization of the courts, were complementary and both necessary. Dr. MUNSHI of India also was in favour of maintaining the conclusion. It was agreed to retain the conclusion which had been under discussion.

The Committee then turned to the question whether the responsibility of the Legislature for the organization of the courts could be delegated in part to the Executive. Mr. FRANCISCO of the Philippines said that apart from the possible appointment of judges by the Executive there was nothing which the Legislature needed to delegate to the Executive with regard to judicial organization, a point of view with which Mr. LUCIAN WEERAMANTRY of Ceylon agreed. However, Mr. V. K. T. CHARI of India pointed out that in that country the Constitution lays down that every High Court should consist of such number of judges as the President may fix and, as far as the States were concerned, it was the State Government which fixed the number of courts and their jurisdiction. The statement regarding delegation in the Conclusion under discussion therefore corresponded with the practice in India. Mr. Justice CHAN HTOON of Burma said that as far as judicial organization, as distinguished from judicial function, was concerned it was necessary to recognise the inevitability of delegated powers. Mr. P. N. SAPRU delegation. Mr. Justice DEVLIN of England, who was in favour of retaining the reference in the conclusion to the possible delegation of power to regulate judicial organization, expressed himself in favour of retaining the reference in the conclusion to the possible delegation of power to regulate judicial organization, pointing out that the Committee was concerned with a minimum standard and not with an absolute ideal. Although it was undesirable that there should be any extensive delegation of power to the Executive each country should be free to settle within what limits delegation may be

necessary. He gave an example from the experience of the United Kingdom, whereby the Lord Chancellor under powers given by Parliament, might transfer a judge from one Division of the High Court where there was not sufficient work to another more busy Division. It was finally agreed by 30 votes to 2 to retain the reference in the Conclusion to the possibility of the delegation of legislative power to regulate the organization of judicial matters. It was also decided by 22 votes to 11 to retain the terms in the Conclusion, "organization of judicial business". However a further point was raised by Mr. JEAN KRÉHER of France and elaborated by Mr. DUDLEY B. BONSAI of the United States to the effect that it was made insufficiently clear in the Conclusion as it stood that the independence of the judicial function should never be interfered with either directly or indirectly by the Legislative. It was therefore agreed by 24 votes to 7 to rephrase the last sentence of the conclusion to the following effect: "The exercise of such responsibility by the Legislative, including any delegation to the Executive, should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions."

Before the discussion turned to the Bar, Mr. Justice CHAN HTOON of Burma raised a number of other questions concerning the Judiciary. He was particularly interested in the status of the Judiciary vis à vis the Executive, as also with the question of their remuneration and the power which the Executive might have to vary such remuneration and to exercise influence over them by, for example, giving or withholding leave. Mr. BETHUEL M. WEBSTER of the United States felt that under the Rule of Law the Judiciary and the legal profession must win their status. It would be invidious, further, to make distinctions between judges of the High Courts and judges of other courts. Mr. WEBSTER was supported by Mr. Justice DEVLIN of England who said that he had given much thought to the matter but had come to the conclusion that it must be taken to be implicit in what had already been agreed about the independence of the Judiciary. Mr. HENRY HU of Hong Kong however pointed out that there was a considerable difference between the position of the judges in countries such as England and some other countries and that therefore the matters which had been raised by Mr. Justice CHAN HTOON deserved consideration. Mr. CHAUDRI NA-ZIR AHMAD KHAN of Pakistan, while sympathizing with the point of view put forward by Mr. Justice CHAN HTOON, said that something had of necessity to be left to the traditions and circumstances of each country. Mr. CHOBE of India, however, thought there should be some provision in the resolutions of the Committee dealing with the pay of the Judiciary. There were countries where the pay of the judges was likely to vary from time to time and Mr. HU of Hong Kong suggested that it should be possible to reach some general proposition regarding the dignity and remuneration of the judges, a suggestion with which,

provided it was kept to general terms, Mr. Justice DEVLIN of England would have been prepared to agree. Mr. CHARLES S. RHYNE of the United States, while also in sympathy with the suggestions of Mr. Justice CHAN HTOON of Burma, thought that it was better to leave the question of the status and pay of the judges to be implied from the proposition already accepted by the Committee, namely, that "independence here implies freedom from interference by the Executive or Legislative with the exercise of the judicial function."

Speaking to the suggestion that as a first step the Committee should consider the inclusion of some reference to the inviolability of a judge's salary during his term of office, Mr. HUGH O. B. WOODING of the West Indies said that he was opposed to any specific reference to this matter in the conclusions of the Committee. He approved of the sentiment but doubted the wisdom of any specific reference to the matter. Mr. ABDUS S. FARUQI of Pakistan said that in his country, as in India, the salary of the subordinate judiciary was meagre and that people of calibre were not attracted to it. If the Committee was in general sympathy with the suggestions which had been put forward they should not be shy of expressing their feelings. They were not, after all, a legislature and what they said would not be binding on any country. Mr. WEERAMANTRY of Ceylon considered however that the Committee was seeking to lay down certain rules which they hoped would be binding on those countries declaring themselves adherents of the Rule of Law. The Committee must be careful, therefore, in formulating its conclusions. The Committee eventually decided to defer action on the question of including any reference to judicial remuneration until a draft, to be prepared by Mr. Justice CHAN HTOON of Burma, had been laid before the Committee.

**Tuesday January 6, 1959**

15.00—17.30

The Committee had before it the seventh point in the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law. This read as follows:

"It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs under the general supervision of the courts and within such regulations governing the admission to and pursuit of the legal profession as may be laid down by statute."

Mr. R. V. S. MANI, as an observer for the International League for the Rights of Man, referring to the position of the Bar in India said that in 1951 an All-India Bar Committee had recommended a

single regime for lawyers. At present there were Bar Councils centred on the High Court of each State; furthermore at present there was a distinction between pleaders who practice in the ordinary courts, advocates who practice in the High Courts and advocates who after some years of practice are qualified to practise in the Supreme Court. Under the existing system, in the case of an advocate who is charged with some professional misconduct, the matter is first sent by the High Court to a Committee of the Bar Council; the Committee reports back to the High Court which makes the final order. Under the proposals now being considered an All-India Bar Council would hear appeals from decisions reached by the Bar Councils of the High Courts. The question was whether the Judiciary should be given the final power to adjudicate upon matters of professional conduct. He thought that questions of professional conduct should be left in the hands of the profession and distinguished such matter from conduct of the advocate amounting to contempt of court, with which the Judiciary would naturally be concerned. Mr. FRANCIS R. STEPHEN of Kenya pointed out that in England there is appeal from decisions of the Law Society with regard to solicitors to the High Court. In the dependent territories of East Africa it was usual to have an Advocates' Committee, consisting of the Attorney General, the Solicitor General and three practising Advocates of the Colony, which heard cases of professional misconduct. From the decisions of this Committee there was appeal to the Supreme Court of the territory. He thought the system worked well. Mr. WEBSTER of the United States said the position in the United States was not generally different from that of England or Kenya. He thought that it would be inconceivable that the final determination regarding the conduct of an advocate should not be made by a court.

Mr. A. N. VEERARAGHAVAN of India, dealing with the position in that country, said that complaints against advocates were made to the High Court and the High Court thereupon constituted a tribunal from among the members of the Bar Council. The Bar Council tribunal made an enquiry and submitted a report but it did not make recommendations for action. The High Court took whatever action might be appropriate. The All-India Bar Committee, referred to above, recommended that the Bar Council in each State should give a final verdict as to whether the advocate was guilty or not and determine the appropriate steps to be taken with an appeal to an All-India Bar Council. Mr. WOODING of the West Indies speaking in particular of Trinidad (where unlike some of the other islands there was differentiation between the Bar and solicitors) said that the procedure for disciplining solicitors was as in England. With regard to complaints made to the Bar Council about barristers there was no satisfactory machinery to deal with such complaints or even with their admission to the courts. Barristers who had been called to the Bar were by convention admitted to

practice. In some of the islands there had recently been formed a Federal Bar Association comprising barristers practising in any part of the newly Federated West Indies, and it had been sought to vest it with the power of discipline over its members. There was a predominant feeling among members of the Bar that they did not wish to be in the hands of the Courts on the ground that judges had in the past come more from the Civil Service than from among the practising members of the Bar. The speaker's own view was that in the first instance the disciplinary body should be the Federal Bar Council subject to appeal to the Federal Supreme Court. He was in agreement with the conclusion of the Working Paper set out above provided it meant either that the professional body itself was to decide questions of discipline subject to appeal to the Courts or that the professional body should make a preliminary enquiry with the right of the court to decide whether it would accept or reject the findings of the professional body. He did not think that the conclusion meant, and he would not agree, that the courts should in the first instance deal with the matter. He suggested to cover the peculiar position of the West Indies that the conclusion in the Working Paper should be supplemented by the addition of the words "or convention" so that the last part of the conclusion would read "free to manage its own affairs under the general supervision of the courts and within such regulations governing the admission to and pursuit of the legal profession as may be laid down by statute or by convention."

Mr. P. N. SAPRU of India thought it essential that there should be general supervision of the courts and said this was supported by his experience as President of a Bar Tribunal in his State. Mr. H. R. RAMANI of Malaya said that in that country there was a Bar Council and several Bar Committees in each of the States. The professions of barrister and solicitor were fused, the lawyer being called an advocate and solicitor. When a complaint was received against any member of the Bar it automatically went to the Chairman of the Bar Committee. If the Chairman felt there was some cause for enquiry he applied to the Chief Justice who appointed three senior members of the Bar as a Disciplinary Committee. If the Committee found that there was a case to be met it moved the High Court for an order calling upon the advocate to show cause why he should not be dealt with. This application came before three judges, the onus being on the Bar Committee to make out its case. He thought that the language of the Conclusion "under the general supervision of the courts" was satisfactory. Mr. V. K. T. CHARI of India was also in favour of retaining the Conclusion of the Working Paper and thought it impossible to go into the details of the organization of the Bar in each country. Mr. PHILIPPE BOULOS of the Lebanon said that in his country the control of advocates was by a Disciplinary Committee of their own organization with an appeal to the Court of Appeal. However, the Court of



Appeal in these circumstances consisted of three judges and two advocates, a system which ensured the representation of the point of view both of the Judiciary and the Bar.

On the other hand, Mr. VU VAN HIEN of Viet-Nam considered that the Conclusion in the Working Paper would be contrary to the principles of his country. They attached importance to the autonomy of the order of advocates in matters other than actual behaviour before the courts. The Council of the Order of Advocates sets up a Disciplinary Committee but from decisions of the Council there is a possibility of appeal to the full Court of Appeal comprised only of judges. Mr. NA-ZIR AHMAD KHAN of Pakistan asked whether the legal profession had not reached a stage when what without disrespect to the courts might be called the rather irksome provision of the general supervision of the courts could be eliminated. He was at all events in favour of changing the conclusion of the Working Paper in as far as it referred to "the general supervision of the courts" to some less active expression. Mr. TOTARO MIZUNO of Japan said that in that country all practising lawyers are members of the Japanese Federation of Bar Associations. The latter is entirely independent and subject to no government control. The Supreme Court is, however, vested with power to lay down the procedure in court.

Mr. Justice DEVLIN of England said that he understood the Conclusion in the Working Paper to emphasise firstly that in a society under the Rule of Law there should be a recognised legal profession free to manage its own affairs. Secondly, there are countries which impose by statute regulations of a general character covering admission to and pursuit of the legal profession and this too is not against the Rule of Law; he could not agree with the Conclusion in the Working Paper if it meant that the Bar had to be under the general supervision of the courts and subject to regulations by Statute in any society under the Rule of Law. It should be borne in mind that regulation of the legal profession by Statute was not peculiar, it extended to other professions. If the Committee laid down that the legal profession should never be under the general supervision of the courts or regulated by Statute its recommendations would be disregarded. If the conclusion in the Working Paper was to be altered he would suggest that it should be divided into two propositions, the first emphasising that the legal profession should be free to manage its own affairs and the second to the effect that no objection can be made to the general supervision of the courts and to some regulation by statute.

There was a unanimous vote in favour of the propositions put forward by Mr. Justice DEVLIN. There followed some discussion on the equivalent words in French to cover the phrase "an organized legal profession free to manage its own affairs" in the English text of the Conclusions. After the intervention of Mr. JEAN KRÉHER of France and Mr. VU VAN HIEN of Viet-Nam it was agreed that

reference to the "freedom" of the legal profession in the English text could better be conveyed in French by a reference to a legal profession "capable d'exercer librement" than by the original French text which read "...libre d'exercer leur activité". The French speakers were anxious to emphasise that the "freedom to manage its own affairs" referred to in the English text included liberty of association.

The Committee then turned to consider point 8 of the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law. This read as follows:

"The lawyer should be free to accept any case which is offered to him, unless his acceptance of the brief would be incompatible with his obligation not to mislead the Court or give rise to a personal conflict of interest."

Mr. WEBSTER of the United States drew attention to practical considerations which were changing the nature of the legal profession. In the United States, for example, lawyers have become highly specialised. It might be desirable therefore to say that a lawyer should be free to accept any case within his competence which is offered to him. Mr. NA-ZIR AHMAD KHAN of Pakistan said that for the last four years the International Bar Conference and its Committees had been considering the Conclusion under discussion and had found it impossible to reach a clear conception of the duty of the lawyer as far as the acceptance of a case is concerned. He considered that if the Committee was prepared to leave it to a particular judge to decide a case fairly according to the dictates of his own conscience a lawyer should be in the same position. He therefore suggested that the proposition to be approved by the Committee should read "a lawyer should be free to accept any case which is offered to him and to conduct it to the best of his ability and in accordance with the dictates of his own conscience". He found it distasteful to refer to the obligation of a lawyer not to mislead the court, a warning to the lawyer which he thought offensive and unnecessary.

Mr. HUGH O. B. WOODING of the West Indies said that the intention of the Working Paper, as he understood it was to deal under point 8 (as set out above) with the minimum restrictions to be placed upon a lawyer in accepting a brief if he is offered one. The lawyer's obligation not to mislead the Court and circumstances giving rise to a personal conflict of interest might create situations when a lawyer would not be free to accept a brief. Apart from these special situations no extraneous authority - public opinion or the State - should prevent a lawyer from accepting a brief. Mr. VU VAN HIEN of Viet Nam said that in the Civil Law world, while a lawyer was free to refuse a brief which came to him in private

practice, he was under an obligation to accept a brief which had been given to him by the President of the Bar or by the Court. In his country in the past year in 12,000 cases the lawyer had been designated either by the Leader of the Bar or by the Court. He wished to suppress the proposition under discussion on the ground that it did not reflect an internationally recognised custom.

Mr. B. N. CHOBE of India felt that the proposition under discussion was satisfactory and unobjectionable. On the other hand Mr. JEAN KRÉHER of France thought that it was offensive to refer to the possible misleading of the Court by a lawyer or to such an elementary duty as that which might arise when there was a personal conflict of interest. He also thought that paragraph 8 took no account of what Mr. VU VAN HIEN had referred to, namely, the designation of a lawyer by the Leader of the Bar or by the Court. Intervening in the discussion Mr. MARSH, as draftsman of the Working Paper, agreed that in the proposition in the Working Paper now under discussion there was no mention of the special position arising when a lawyer is appointed by the Court or by the Bar. He suggested, however, that there was some misunderstanding of the arrangement of the propositions in the Working Paper. In proposition No. 8 in the Working Paper it was a question of whether a lawyer was free to accept a case. The next proposition, No. 9, dealt with the question whether a lawyer might have a positive duty to accept. It might be valuable to add a sub-paragraph to the next proposition dealing with the case where a lawyer was requested by the court to take up a case, but it was out of place in the proposition now being discussed.

Mr. VU VAN HIEN of Viet-Nam again proposed that proposition 8 should be eliminated but this motion, on being put to the Committee, was rejected. The Committee then turned to consider possible amendments to the proposition suggested by Mr. Na-Zir Ahmad Khan of Pakistan and by Mr. Webster of the United States, as already mentioned above. After some doubts had been expressed as to the desirability of the original reference in Mr. Na-Zir Ahmad Khan's amendments to the conscience of the lawyer, Mr. NA-ZIR AHMAD KHAN put forward a shortened amendment to the following effect that the 8th proposition in the Working Paper should read simply: "the lawyer should be free to accept any case which is offered to him." This amendment, however, was lost by 17 votes to 11.

Mr. JEAN KRÉHER of France suggested a further amendment to the following effect: "subject to the considerations set out in paragraph 9 the lawyer should be free to accept or to refuse a brief which is offered to him. His acceptance or his refusal thereof being a matter only for his own conscience." This matter was left over for discussion on the following day.

Wednesday, January 7, 1959

09.30—13.30

The Committee turned to paragraph 9 (already referred too) of the Summary and Conclusions in the Working Paper and which it may be here convenient to set out in full:

“While there is some difference of emphasis between various countries as to the extent which a lawyer may be under a duty to accept a case it is conceived that;

“(i) wherever a man’s life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;

“(ii) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client unless his obligation not to mislead the Court and not to become involved in a personal conflict of interests so requires;

“(iii) a lawyer should be free without fear of the consequences to press upon the Court any argument of law or fact which does not involve a deliberate deception of the Court.”

Mr. NA-ZIR AHMAD KHAN of Pakistan felt that the whole of paragraph 9 was redundant. It was a matter of professional ethics. The Committee was concerned with the minimum requirements of a society which claimed to live under the Rule of Law; it was not necessary for the Committee to concern itself with the minutest details as to how that ideal was to be achieved. Turning to the more particular consideration of paragraph 9, he said that he was not sure that “a man’s life, liberty, property or reputation” raised the only issues where legal advice and representation might be involved. He further objected in sub-paragraph (ii), for reasons already given in connection with paragraph 8, to a reference to “misleading the Court”. If a lawyer in the course of a case came to know that a man was guilty either through someone acting on his behalf or through the accused person himself, or if in a civil case it transpired that a document on which he was relying was forged, the question of the lawyer’s duty was a matter for the legal profession in each country. The lawyer was a responsible member of the community; he knew his duty; it was not necessary to re-emphasise it. The speaker took strong objection to the language and the sentiment of paragraph 9.

Mr. CHARI of India said that in both paragraphs 8 and 9 what was being emphasised were the rights and duties of the lawyer in

general not a particular lawyer. A client should not find himself in a situation in which he goes from lawyer to lawyer and finds that everyone refuses to handle his case. He mentioned the case of an assault upon a Prime Minister where the assailant had no difficulty in finding legal representation. No one thought the worse of the lawyer who defended the man. On the other hand, there were countries where a lawyer would have hesitated to accept such a brief for fear of the consequences and he understood this to be the situation to which sub-paragraph (iii) of paragraph 9 was referring. Mr. A. M. VEERARAGHAVAN of India was in favour of retaining paragraph 9 subject to modifications. It was made clear in the Working Paper that in certain countries legal assistance is denied in very important cases affecting a person's life, liberty, property or reputation and it was to deal with such situations that paragraph 9 had been written. The other problem with which paragraph 9 dealt with was the danger of restrictions by the government on the obtaining of legal assistance in such cases.

Mr. BETHUEL M. WEBSTER of the United States, reverting to paragraph 8, suggested that this paragraph should be preceded by a qualifying clause to this effect: "subject to his professional obligation to accept assignments in appropriate circumstances, the lawyer should be free, etc." Mr. HUGH O. B. WOODING of the West Indies said paragraphs 8 and 9 were complementary. The former dealt with matters which are permissible, that is to say with the attitude of the lawyer, and the latter dealt with matters of obligation, having its eye on the public and the Judiciary. Sub-paragraph (i) of paragraph 9 was concerned to emphasise that the public should understand that it is the duty and obligation of a lawyer to defend the persons who are associated with unpopular causes and minority views. Similarly in sub-paragraph (ii) the purpose was to explain to the public under what circumstances a lawyer should continue to defend a man who is thought to be guilty. He appreciated the misgivings of Mr. Na-Zir Ahmad Khan of Pakistan regarding the reference to misleading the Court and to personal conflicts of interest and suggested that these specific matters should be omitted and the sub-paragraph redrafted to the following effect: "once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause." In this connection he mentioned an oath taken on admission to the Bar in Trinidad which ran: "I swear that I shall practice the profession of an Advocate faithfully, zealously and to the best of my ability, that I shall not undertake any unjust cause, and if ever I find myself engaged in one that I shall desert it, taking care not to accuse the Queen's subjects unjustly." As far as sub-paragraph (iii) of paragraph 9 was concerned the purpose was to make it clear to the public and to the Bench (who sometimes needed to be reminded of the fact) that a lawyer had a duty which should be carried out without fear of consequences. To meet the various susceptibilities

which had already emerged he suggested that sub-paragraph (iii) should read: "It is the duty of a lawyer, which he should be able to discharge without fear of the consequences, to press upon the Court any argument of law or of fact which may be necessary for the due presentation of the case by him."

Mr. VU VAN HIEN of Viet-Nam agreed with Mr. Webster of the United States who had suggested that paragraph 8 should be preceded by a qualification covering the professional obligation to accept assignments in appropriate circumstances. As for paragraph 9, he was in favour of suppressing the last two sub-paragraphs. He suggested eliminating in the first sub-paragraph any reference to the freedom of the lawyer to accept or refuse a brief as this was a matter dealt with in paragraph 8. The only matter to be referred to in sub-paragraph (i) therefore should be as follows: "Lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves might be entirely out of sympathy." Mr. A. S. FARUQI of Pakistan said that rights implied obligation and that applied to the legal profession. One had to consider popular opinion of the lawyer as evidenced by various anecdotes at the lawyer's expense. To impose upon themselves as lawyers certain obligations would strengthen the legal profession and raise it in the esteem of the public. Mr. H. R. RAMANI of Malaya said that paragraph 8 sought to clarify the rights of the lawyer while paragraph 9 spoke of the minimum duty that a lawyer bears to society. In this connection it was to be borne in mind that the Committee were considering rights and duties in the context of the observance of the Rule of Law. If the Rule of Law was to be observed it was essential to have a well-organized legal profession and able to arrange its own affairs; it was further necessary to indicate what should be the rights and duties of such a legal profession under the Rule of Law. In the Constitution of India as in the Constitution of Malaya individual liberty is guaranteed and that guarantee is given form and substance by the provision that a person arrested shall have the right to legal consultation and to legal representation. That right would become illusory if the lawyer at the same time was under no duty normally to accept a brief which was offered to him.

Mr. LUCIAN WEERAMANTRY of Ceylon supported the suggestion of Mr. HUGH O. B. WOODING of the West Indies that sub-paragraphs (ii) and (iii) of paragraph 9 should be retained with the omission of the words which had caused some concern. Mr. P. N. SAPRU of India spoke to the same effect, saying that it was necessary from the point of view of the Rule of Law that litigants and the community generally should know what were the obligations of the lawyer. Sub-paragraphs (ii) and (iii) did not relate merely to professional ethics; they had a wider significance.

The CHAIRMAN thereupon put paragraph 9 to the vote. The motion to restrict sub-paragraph (i) to the words "wherever a man's

life, liberty, property of reputation are at stake he should be free to obtain legal advice and representation" was lost. Further motions to delete sub-paragraphs (ii) and (iii) were also lost.

On the motion of Mr. BETHUEL M. WEBSTER of the United States paragraph 8 was amended to read:

"Subject to his professional obligation to accept assignments in appropriate causes, the lawyer should be free to accept any case which is offered to him."

The motion was carried by 13 votes to 6.

On the motion of Mr. WOODING, sub paragraph (ii) of paragraph 9 was amended by the overwhelming vote of the Committee to read:

"Once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause."

On the further motion of Mr. WOODING it was agreed to substitute for sub-paragraph (iii) of paragraph 9 the following:

"It is the duty of a lawyer, which he should be able to discharge without fear of the consequences, to press upon the Court any argument of law or of fact which may be appropriate for the due presentation of the case by him."

The Committee then turned to the possible amendment of sub-paragraph (i) of paragraph 9 and Mr. Justice CHAN HTOON of Burma suggested, to meet the criticisms of Mr. Na-Zir Ahmad Khan of Pakistan, that the words "for instance" should be added in the second part of the sub-paragraph so that it would read: "if this principle is to become effective, it follows for instance, etc." The suggestion was, however, negatived by 10 votes to 6. Mr. VU VAN HIEN of Viet-Nam asked whether it was not necessary to refer to some practical measures to protect a lawyer in carrying out his duties and the CHAIRMAN suggested that this point of view might be met by an additional sub-paragraph in paragraph 9 to the following effect: "professional organizations and courts should take all necessary measures to avoid the consequences envisaged in the preceding sub-paragraph". With regard to the last suggestion, however, Dr. K. M. MUNSHI of India thought that neither the courts nor the Bar had themselves control over the consequences referred to in sub-paragraph (iii) of paragraph 9, as for example over the refusal of a political party to adopt an unpopular advocate as a candidate or of a government not to give briefs to such an advocate.

The CHAIRMAN intervened to say that in the United States he knew of two recent instances in which the court went out of its way to commend lawyers for having taken and presented un-

popular causes, which was as far as a court could go to avoid the consequences of such action. By a large majority however Mr. VU VAN HIEN's motion to add an extra sub-paragraph to paragraph 9 was lost.

Paragraph 9, as amended above with regard to sub-paragraphs (ii) and (iii), was thereupon unanimously adopted by the Committee, the CHAIRMAN having ruled as not germane to the immediate discussion the question of the raising of court fees by the Legislature for revenue purposes, which had been mentioned by Mr. B. N. CHOBE of India.

The final topics discussed by the Committee involved consideration of paragraph 10 in the Summary and Conclusions of the section of the Working Paper dealing with the Judiciary and the Legal Profession under the Rule of Law. This read as follows:

"An obligation rests on the State to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This obligation may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience, a question which cannot be altogether disassociated from the question of adequate remuneration for the services rendered."

Mr. ROBERT G. STOREY of the United States suggested that the reference to the word "State" should be replaced by the phrase "the organized legal profession". Speaking of conditions in the United States he said that a reference to State activity in connection with legal aid would prejudice some of the desirable measures and principles on which agreement had already been reached by the Committee. Legislation to provide legal assistance and advice, based on the allegation that two-thirds of the people of the United States were not receiving such assistance or advice, had failed in Congress. The issue is still being fought in one of the large States of the Union. He thought that the position in England was interesting, in so far as the Bar and Law Society had evolved a system of legal aid which, although it had State sanction, was administered by the Law Society. In any event he did not think that the Judiciary and the organized legal profession should fail to accept their responsibility for the provision of legal aid. Mr. JOHN R. NICHOLSON of Canada supported the point of view presented by the previous speaker which he said corresponded with the needs of his own country.

On the other hand Mr. CHAUDRI NA-ZIR AHMAD KHAN of Pakistan said there were some countries where the organized Bar



was not in a position to give free assistance to those who wanted it but he was prepared to agree with Mr. Storey in substituting the "organized legal profession" for the word "State". Mr. BETHUEL M. WEBSTER of the United States said that it might be possible to say that the obligation rested "on the organized Bar and the community or on the State", but Mr. STOREY considered that it was important to emphasise the primary responsibility of the legal profession which would not be done if the "State", "community" or "municipality" were mentioned.

Dr. K. M. MUNSHI of India said that the conditions in America did not apply to other countries or at all events not to India. He gave the example of legal aid required for land-owners whose land might be expropriated by legislation in one of the States of India or again of the defence of a person charged with drunkenness in a State which has strict prohibition. In such questions the State must under pressure of public opinion accept the obligation to pay for legal aid. It had already recognised that the State must provide a lawyer for those charged with murder. He suggested that the views put forward could be met by stating that "the obligation rests on the State and the community to help the organized profession to provide . . ."

Mr. R. V. S. MANI, as an observer for the International League for the Rights of Man suggested, that the Committee, while laying full responsibility on the legal profession with regard to legal aid, should include the possibility of obtaining the necessary financial support from private agencies as well as from the State. Mr. P. N. SAPRU of India said that from the Indian point of view it was essential that the State should play a part in legal aid. He would strongly support the modification suggested by Dr. Munshi. Mr. V. K. T. CHARI of India said that the important thing was to emphasise that legal aid should be provided, then later the means could be suggested whereby it could be effected.

Mr. CHARLES S. RHYNE of the United States agreed with the previous speaker suggesting that the paragraph might begin with the statement to the effect that, "equal access to law for rich and poor alike is essential to the maintenance of the Rule of Law". Mr. ROBERT G. STOREY of the United States was prepared to accept the amendment suggested by Mr. Chari and Mr. Rhyne although he considered that the conclusion of the matter should be simply, "the primary responsibility is upon the legal profession to accept this obligation". However, Dr. K. M. MUNSHI of India said that from the point of view of India it would be a useless proposition unless the obligation to provide funds was laid on the State. Mr. TOTARO MIZUNO of Japan said that in the Japanese Constitution a person accused in a criminal case had the right to choose his own lawyer. If he was unable to pay for such advice and assistance then the State would provide the accused with such advice and assistance. It was considered in Japan that it was a necessary obligation of the State to provide legal advice and assistance for the

maintenance of fundamental human rights. In civil cases the Federation of Bar Associations provide legal advice and assistance for those who cannot pay for them. He was not in favour, therefore, of eliminating the word "State" from the text. To solve the difficulties which had arisen Mr. FRANCIS R. STEPHEN of Kenya suggested that any reference to the way in which legal aid should be provided, whether by the State or the profession or otherwise, should be eliminated.

After an adjournment to resolve the differences of opinion which had arisen, the CHAIRMAN put before the Committee a proposed draft of paragraph 10 on which an agreement had been reached by the main speakers in the previous discussion. This read 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, threatened as to their life, liberty, property or reputation who are not able to pay for it. This may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience. This is a question which cannot be altogether dissociated from the question of adequate remuneration for the services rendered. The primary obligation 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."

The revised paragraph 10 was approved unanimously.

The Committee then considered points of drafting in connection with the matters which had already been discussed. One of the more substantial issues which was raised concerned the question of the remuneration of the Judiciary. Mr. Justice DEVLIN of England said that the furthest which he would be prepared to go would be to add a conclusion to the following effect:

"It is implicit in the concept of independence set out in paragraph 1 (of the conclusions of the Committee) that provision should be made for the adequate remuneration of the Judiciary and that a Judge's right to the remuneration settled for his office should not, during his term of office, be altered to his disadvantage."

He would prefer not to deal specifically with the question of leave of absence, which in any event was implied by mention of adequate remuneration. He was not in favour of dealing with the status of judges. It was a difficult matter to deal with in any event and it was not rightly to be regarded as one of the things fundamental to the independence of the Judiciary. If the Committee were to deal with the question of status they would have to consider other matters much more important as, for example, that a judge should be free from the danger of being personally attacked in the press. He would not be happy with the reference in the draft before them (in paragraph 6 of the Conclusions in the Working Paper) which referred to the responsibility of the legislative for regulating the remuneration of judges, if in this matter the legislative only fixed the general framework. He had been in favour of permitting delegation to the Executive of certain matters concerning the Judiciary but did not think that remuneration of the judges should be included among those matters. The remuneration of the judges ought to be settled by the Legislature.

Mr. HUGH O. B. WOODING of the West Indies speaking of Mr. Justice Devlin's proposals said that "adequate remuneration" was a difficult phrase to construe. Further he asked what would happen if in a period of economic difficulty there was a general reduction of remuneration of all persons paid out of government funds. Must the judges be excepted? Finally, the proposals of Mr. Justice Devlin did not cover the problem, particularly in regard to the minor Judiciary, of pressure being exercised not by a decrease but rather by an increase of pay. In all the circumstances he would prefer to omit any reference to remuneration and allow it to be implied in the general provisions about the independence of the Judiciary which had already been agreed. Mr. B. N. CHOBE of India, developing another aspect of a question raised by Mr. Wooding, said that in conditions of emergency a judicial post might be abolished by the Legislature.

Answering Mr. Wooding, Mr. Justice CHAN HTOON of Burma said that by the Constitution of that country there was provision for the voluntary reduction in the salary of a judge in the event of measures to economise generally in regard to all government services. It was not necessary to make any specific provision regarding any increase in judicial salaries as they were concerned only with the danger of the virtual dismissal of a judge by reducing his salary to an impossibly small amount.

Mr. Justice Devlin's proposal was put to the vote and was carried by 15 votes to 2.

Mr. Justice CHAN HTOON of Burma thereupon proposed a further addition to the first paragraph of the conclusions of the Committee to the following effect:

"That all matters relating to the status, rights and privileges of a judge should be so regulated as to ensure that the Judiciary is not placed in a position subordinate or inferior to the Executive or Legislative."

Mr. V. K. T. CHARI of India considered that the proposal was vague and unworkable. He did not think there was common agreement on the principle underlying the proposal and only some doubts as to the advisability of expressly including it in the conclusions of the Committee (as Mr. Justice Chan Htoon had suggested in introducing the proposal).

The CHAIRMAN put Mr. Justice Chan Htoon's proposal, as set out above, to the vote but it failed to win the support of the majority of the Committee.

On the motion of Mr. FRANCIS R. STEPHEN of Kenya the remaining portions of the draft conclusions were adopted *in toto* by the Committee by a unanimous vote.

Mr. P. N. CHOBE of India and Mr. HUGH O. B. WOODING of the West Indies expressed the thanks of the Committee to the Chairman for the way in which he had conducted the proceedings.

**CONCLUSIONS OF THE COMMITTEE  
ON THE JUDICIARY AND THE LEGAL PROFESSION  
UNDER THE RULE OF LAW**

1. An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Such independence implies freedom from interference by the Executive or Legislative with the exercise of the Judicial function, but does not mean that the judge is entitled to act in an arbitrary manner. His duty is to interpret the law and the fundamental principles and assumptions that underlie it. It is implicit in the concept of independence set out in the present paragraph that provision should be made for the adequate remuneration of the Judiciary and that a judge's right to the remuneration settled for his office should not during his term of office be altered to his disadvantage.

2. There are in different countries varying ways in which the Judiciary are appointed, reappointed (where reappointment arises) and promoted, involving the Legislative, Executive, the Judiciary itself, in some countries the representatives of the practising legal profession, or a combination of two or more of these bodies. The selection of judges by election and particularly by re-election, as in some countries, presents special risks to the independence of the Judiciary which are more likely to be avoided only where tradition has circumscribed by prior agreement the list of candidates and has limited political controversy. There are also potential dangers in exclusive appointment by the Legislative, Executive, or Judiciary, and where there is on the whole general satisfaction with the calibre and independence of judges it will be found that either in law or in practice there is some degree of co-operation (or at least consultation) between the Judiciary and the authority actually making the appointment.

3. The principle of irremovability of the Judiciary, and their consequent security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence, particularly if he is seeking reappointment, he is subject to greater difficulties and pressure than a judge who enjoys security of tenure for his working life.

4. The reconciliation of the principle of irremovability of the Judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial.

5. The considerations set out in the preceding paragraph should apply to: (i) the ordinary civil and criminal courts; (ii) ad-

ministrative courts or constitutional courts, not being subordinate to the ordinary courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other judicial functions (juries, assessors, Justices of the Peace, etc.) should only be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular positions. All such persons have in any event the same duty of independence in the performance of their judicial function.

6. It must be recognised that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of Judicial business and that, subject to the limitations on delegations of legislative power which have been dealt with elsewhere, it may delegate part of this responsibility to the Executive. However, the exercise of such responsibility by the Legislative including any delegation to the Executive should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its Judicial functions.

7. It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs. But it is recognised that there may be general supervision by the courts and that there may be regulations governing the admission to and pursuit of the legal profession.

8. Subject to his professional obligation to accept assignments in appropriate circumstances, the lawyer should be free to accept any case which is offered to him.

9. While there is some difference of emphasis between various countries as to the extent which a lawyer may be under a duty to accept a case it is conceived that:

(i) wherever a man's life, liberty or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;

(ii) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;

(iii) it is the duty of a lawyer which he should be able to discharge without fear of consequences to press upon the Court any argument of law or of fact which he may think proper for the due presentation of the case by him.

10. Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is therefore, essential to provide adequate legal advice and representation to all those,

threatened as to their life, liberty, property or reputation who are not able to pay for it. This may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience, a question which cannot be altogether dissociated from the question of adequate remuneration for the services rendered. The primary obligation 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.

**LIST OF REGISTERED MEMBERS OF THE COMMITTEE  
ON THE JUDICIARY AND THE LEGAL PROFESSION  
UNDER THE RULE OF LAW**

**Fourth Committee**

C. B. AGARWALA ( <i>India</i> )	TOTARO MIZUNO ( <i>Japan</i> )
SAFIYA AGHA ( <i>Pakistan</i> )	DR. K. M. MUNSHI ( <i>India</i> )
STEN BERTIL AHRNBORG ( <i>Sweden</i> )	CHAUDRI NA-ZIR AHMAD KHAN ( <i>Pakistan</i> )
PHRA PIBUL AISAWAN ( <i>Thailand</i> )	JOHN R. NICHOLSON ( <i>Canada</i> )
ARTURO A. ALAFRIZ ( <i>Philippines</i> )	HUCK LIM ONG ( <i>Malaya</i> )
ERNEST ANGELL ( <i>U.S.A.</i> )	THIENN POC. ( <i>Cambodia</i> )
ALI BADAWI ( <i>United Arab Republic</i> )	RADHA KRISHNA RAMANI ( <i>Malaya</i> )
STEPHEN BASSILI ( <i>United Arab Republic</i> )	CHARLES G. RAPHAEL ( <i>U.S.A.</i> )
N. H. BHAGWATI ( <i>India</i> )	CHARLES S. RHYNE ( <i>U.S.A.</i> )
DUDLEY B. BONSAI ( <i>U.S.A.</i> )	P. G. WALTHER ROSENTHAL ( <i>Germany</i> )
PHILIPPE BOULOS ( <i>Lebanon</i> )	RENAULT ST. LAURENT ( <i>Canada</i> )
V. K. T. CHARI ( <i>India</i> )	P. N. SAPRU ( <i>India</i> )
N. C. CHATTERJI ( <i>India</i> )	DONG WOOK SHINN ( <i>Korea</i> )
B. N. CHOBE ( <i>India</i> )	FRANCIS R. STEPHEN ( <i>Kenya</i> )
U CHAN HTOON ( <i>Burma</i> )	ROBERT G. STOREY ( <i>U.S.A.</i> )
VITHUN DEBPHTAKS ( <i>Thailand</i> )	PORN SUCAROMANA ( <i>Thailand</i> )
SIR PATRICK DEVLIN ( <i>United Kingdom</i> )	SOMPONG SUCHARITKUL ( <i>Thailand</i> )
ABDUS S. FARUQI ( <i>Pakistan</i> )	PURSHOTTAM TRIKAMDAS ( <i>India</i> )
VICENTE FRANCISCO ( <i>Philippines</i> )	A. N. VEERARAGHAVAN ( <i>India</i> )
JOHN W. GAUNTLETT ( <i>United Kingdom</i> )	VU VAN HIEN ( <i>Viet Nam</i> )
HENRY H. L. HU ( <i>Hong Kong</i> )	BETHUEL M. WEBSTER ( <i>U.S.A.</i> )
JEAN H. KRÉHER ( <i>France</i> )	ALFRED L. WEEKS ( <i>Liberia</i> )
R. V. S. MANI ( <i>Observer</i> )	LUCIAN G. WEERAMANTRY ( <i>Ceylon</i> )
	HUGH O. B. WOODING ( <i>West Indies</i> )



**SUMMARY OF THE PROCEEDINGS  
AT THE CLOSING PLENARY SESSION**

## PLENARY SESSION

Friday, January 9, 1959

09.30—13.00

The Chair was taken by Mr. Vivian Bose of India.

The CHAIRMAN reminded the Plenary Session that the participants were not legislating and that their final conclusions did not have to have the exact precision of an Act of Parliament. Furthermore, amendments to the conclusions which might be suggested in the course of the discussion would not be voted on in the Plenary Session but would be put before the Drafting Committee.

### THE REPORT OF THE FIRST COMMITTEE

The CHAIRMAN directed the attention of the Plenary Session to the Report of the First Committee which was read in French by Professor GEORGES BURDEAU of France, the Rapporteur of the First Committee, and in English translation by Mr. JOSÉ T. NABUCO of Brazil.

Mr. NABUCO explained that he did not arrive in time at the Congress to preside as Chairman of the Committee. Considering the conclusions reached by the Committee he suggested that exceptions to rules should be avoided. The Fifth Commandment merely said "Thou shalt not kill" and did not specify the exceptions when killing might be justified. Thus he was not in favour of any exception to the principle that there should be no discrimination between individuals. In Brazil for many years it was laid down that the law could not discriminate between Brazilians and foreigners residing in Brazil; thus in Brazil they were in advance of the resolution adopted by the First Committee.

The CHAIRMAN intervened to suggest that a compromise might be reached by such a phrase as "subject to all just exceptions". Mr. FRANCISCO URRUTIA of Colombia, who in the absence of Mr. Nabuco had acted as Chairman of the First Committee, agreed with Mr. Nabuco in his dislike of exceptions. He further thought that it would be better to remove altogether the list of prohibited spheres of activity of the Legislature which were set out in the third paragraph of the third clause of the First Committee's conclusions. Every enumeration of rights was incomplete; to specify certain rights endangered the sacred principle of the equality of all rights, and in any event the matters referred to in paragraph 3 of the third clause were covered by the reference in paragraph 1 of that clause to the Universal Declaration of Human Rights. However, the best was often the enemy of the good. The conclusions as reached by the First Committee represented a remarkable achievement in inter-

national understanding. From his experience at the United Nations he could say that the Sixth Committee of the United Nations had worked two or three years without achieving a tenth part of the results that private initiative had achieved in two or three days. He appealed, therefore, for general support for the conclusions as reached by the First Committee, taking into account the observations made by Mr. Nabuco.

Sir DAVID CAIRNS of the United Kingdom, referring to the ban on retroactive legislation mentioned in sub-paragraph (a) of paragraph 3 of clause (iii) of the First Committee's conclusions, said that retroactive legislation could be beneficial; what could be objected to was retroactive penal legislation, which had been dealt with in the conclusions of the Third Committee.

Judge R. P. MOOKERJEE of India, supporting in general the observations of Mr. Nabuco, said that paragraph 2 of the fourth clause of the conclusions of the First Committee greatly weakened the conclusions as a whole. This paragraph read as follows:

"It is recognised, however, that in some countries and territories the nature and condition of the people, or some of them, is such that it is not practicable to give effect to all these principles in relation to such countries and territories."

Judge MOOKERJEE also said that possible exceptions to a ban on retroactive legislation, as, for example, in regard to taxation, had been discussed in the First Committee; he considered, however, that the Congress should lay down a general rule against retroactive legislation.

Mr. G. G. PONNAMBALAM of Ceylon said that the conclusions represented a compromise. He himself would like the complete deletion of every proviso in the conclusions of the First Committee. He said that with regard to delegated legislation he did not think there was sufficient distinction in the conclusions between the rule-making powers of some Executive or administrative bodies that might be created by the Executive and subsidiary legislation comparable to Orders in Council in England. He thought that the rule-making power should be subject to review by a Committee of the Legislature and by a competent independent judicial tribunal and that this principle should be embodied as an entrenched clause in a constitutional document. He further drew the attention of the Congress to the possibility of a Legislature passing legislation denying fundamental rights to minorities and in this connection mentioned the problem of the language rights of minorities in Ceylon. He thought that certain matters should be altogether outside the competence of the Legislature and that this should be embodied in written constitutions.

Professor BÜLENT N. ESEN of Turkey also thought that it was not for the Congress as a legal body to make exceptions to its

general rules. In particular he objected to the final words of the conclusions of the First Committee which appealed to the Legislatures and Governments of the world to advance the principles of the conclusions "by progressive steps directed to that end". Senator LORENZO TANADA of the Philippines, supporting the previous speakers, said that it was precisely in countries under the administration and rule of other countries that the Rule of Law was most required. If it was decided to retain paragraph 2 of the fourth clause of the conclusions (cited above), it would in any event be necessary to eliminate the word "nature" which would suggest that there were peoples who by nature were different from other people. He agreed with Mr. Esen that the reference to the principles laid down by the Committee "by progressive steps" should be eliminated. He thought, however, with Sir David Cairns that the ban on retroactive legislation should be limited to penal legislation.

Mr. E. ST. JOHN of Australia, explaining that he had been the draftsman of the fourth clause of the conclusions of the First Committee, agreed that there was much force in the criticisms which had been directed against it. On the other hand if the propositions of the Committee were left without qualification some startling results would follow. Thus, in Australia there are laws which in a sense discriminate against the Australian Aborigines, although he would prefer to say that they distinguished between different classes of persons in the genuine endeavour to improve the lot of more backward peoples. He would be quite prepared to support the deletion of the second paragraph of the fourth clause of the conclusions of the First Committee but he himself thought it was essential. He also thought that in the first paragraph of the fourth clause the final statement to the effect that Legislatures and Governments "should take steps to abrogate any existing laws which are inconsistent" with the principles set out in the conclusions should be qualified by the phrase "as soon as possible".

Mr. VU VAN HIEN of Viet-Nam spoke in the same sense as other foregoing speakers. He said that there was an historic conflict between governing minorities and the people who were governed; the former always admitted in theory the right of the governed to freedom but maintained that they were not yet mature enough to be given such freedom. It was not for the International Commission of Jurists to take part in such a controversy.

Mr. F. ELWYN JONES of the United Kingdom thought that the main importance of the conclusions of the First Committee was that it reaffirmed their function as lawyers in the system of Parliamentary representative government. He admitted to some reluctance to discuss even judicial checks upon the sovereignty of Parliament. He personally would have preferred only a broad reference to the Universal Declaration of Human Rights. He appealed however for acceptance of the conclusions of the Committee in general principle but he felt that paragraph 2 of the

fourth clause (which has been set out above) should be eliminated.

Professor JEAN GRAVEN of Switzerland said that it was essential to retain the substance of the fourth clause of the conclusions of the First Committee, but that its second paragraph should be eliminated and that the third paragraph should be redrafted. If an appeal was to be made to the governments of the world it would be inadvisable from a psychological point of view to put some in the pillory for violating the Rule of Law without taking account of the differences which unhappily existed between different countries.

Mr. RAMON DIAZ of Venezuela said that he had noticed that it was preeminently those from countries with a long tradition of liberty who tended most to emphasise the importance of restrictions on human rights, whereas those from other countries maintained that it was important not to admit exceptions to such rights. What dictators wanted was an excuse to put restrictions on liberty and such an excuse was provided by the kind of exceptions to the rights of the individual which had been included in the conclusions of the First Committee. He particularly emphasised the danger of rights being made contingent upon vague expressions of "general interest", "general policy" or the "interests of society".

The discussion of the First Committee concluded with the observation of Miss R. S. QARI of Pakistan to the effect that no mention had been made of discrimination on the grounds of sex. The speaker submitted that if discrimination on the grounds of race or religion were to be specifically banned such a ban should extend to sex as well.

#### **THE REPORT OF THE SECOND COMMITTEE**

Mr. Justice T. S. FERNANDO of Ceylon, the Chairman of the Second Committee, read the report of that Committee in English. It was followed by a French translation. Commenting on the report, Mr. Justice FERNANDO said there was much discussion on its first proposition, particularly with regard to the extent of delegation of powers in time of public emergency. He wished to say, however, that the proposition as set out in the Report had the support of the large majority of the Committee. In regard to proposition 8, i.e., "It will further the Rule of Law if the Executive is required to formulate its reasons when reaching its decisions and at the request of a party concerned to communicate them to him", he said that the majority of the Committee felt that the reasons should only be disclosed if the party concerned or affected so required.

LORD DENNING of the United Kingdom said that working in the Second Committee had caused him to alter his ideas about the Rule of Law. When he came to the Congress he thought of the Rule of Law as concerned with the protection of the individual from

arbitrary power, whether of the government or from any other quarter. In Common Law countries the Rule of Law had, he thought, been achieved, as far as personal freedom was concerned, by the writ of habeas corpus, by control over new tribunals, by the writ of *certiorari* and by other devices maintaining the control of the judges and the law over the Executive.

Reading the opening paragraphs of the Committee's Report he asked himself the question: "Can the Rule of Law only exist in a fully developed society with its institutions of the Legislature, Executive and Judiciary?" He was impressed in the Committee to hear the views of participants from emerging countries who emphasised that the Rule of Law was of concern in societies which were not fully developed. He felt, therefore, that the Rule of Law was a wider conception than that which he had first thought. It was not confined to the negative aspect of preventing the Executive from abusing its power. It has a positive aspect involving the duty of governments, not only to respect personal rights but to act positively for the well-being of the people as a whole. This positive aspect cannot perhaps be enforced by courts of law. It might be said that it is a political objective but he was not sure that it did not come within the sphere of law, of English law for example. There was no written law in England against the abolishing of the law courts or of free speech, but the people would not allow it to happen and the government knew that it could not do it. Similarly there was a wider law, written or unwritten, requiring governments and legislatures to work for the well-being of the people as a whole. This could only be achieved, not by courts of law or judges but by the healthy sense and public opinion of a maturing society where individuals were ready to realise their responsibility to the State and the State its responsibility to individuals.

On the suggestion of Mr. DUDLEY B. BONSALE of the United States it was agreed to omit the word "war" from the first point in the Report of the Committee (the sentence reading: "war or other public emergency threatening the life of a nation may require extensive delegation of power").

Dr. K. M. MUNSHI of India expressed doubts about the second point of the second paragraph in the Introduction to the Report. He feared that it might suggest that the Rule of Law was not a sacred and paramount principle. It had to be borne in mind that there was at the present time a swing against the Rule of Law in the hope that by abrogating the Rule of Law economic development would immediately follow. This was the danger if the assumptions underlying the Rule of Law were emphasised at the expense of the Rule of Law itself.

Mr. RAMON DIAZ of Venezuela, returning to the question of the mention of war in the first proposition of the Committee's Report, felt that it did at least indicate how serious an emergency had to be. There was a danger in some Latin American countries

of regarding any time of political conflict as one of public emergency. Mr. SÉAN MACBRIDE of Eire explained that the reason for the inclusion of the word "war" or "other public emergency" in the Report was that the words were taken from Article 15 of the European Convention of Human Rights which provided that in the event of war or other public emergency threatening the life of a nation certain rights might be abrogated. On the whole he thought it better to leave in the word "war" so that it could not be said that the Report did not deal with war-time situations, which in some countries had been extended to include the existence of armed conflict in any part of the world.

Mr. P. TRIKAMDAS of India said that the Report did not suggest that there could be no Rule of Law except in the perfect society carrying out to the full the fundamental assumptions to which the Report referred. It was necessary, however, to draw the attention of the new democratic societies to these fundamentals if they were to achieve the Rule of Law.

Dr. ARTURO A. ALAFRIZ of the Philippines drew attention to the final sentence of paragraph 5 in the Report of Committee the Second, which read as follows: "Save for sufficient reason to the contrary adequate representation should include the right to legal counsel". He would wish to omit the qualifying phrase, "save for sufficient season to the contrary".

Mr. N. C. CHATTERJI of India, approving the suggestion made in paragraph 3 of the Report of the Committee that "judicial review of delegated legislation may be supplemented by procedure for supervision by a Committee or a Commissioner of the Legislature or by another independent authority either before or after such delegated legislation comes into effect", said that the Committee or Commissioner in question should not be drawn from the Cabinet or Ministry in office. Turning to paragraph 5 of the Committee's Report he said that it was essential, especially in the case of India, that judicial review of the High Courts and of the Supreme Court of India over administrative tribunals should be maintained. He would therefore be in favour of omitting the qualifying phrase ("where specialised courts do not exist") of the second sentence of paragraph 5 of the Second Committee's Report. The relevant passage of the Report would then read: "It is essential that the decisions of *ad hoc* administrative tribunals and agencies, if created, which include all administrative agencies making determinations of a judicial character, should be subject to ultimate review by ordinary courts."

Mr. Justice T. S. FERNANDO of Ceylon, the Chairman of the Second Committee, emphasised that, as one who himself came from an under-developed country, he thought it important to make explicit the assumptions underlying the propositions they had formulated regarding the Executive and the Rule of Law. As far as the point raised by Mr. Chatterji was concerned, with regard to

paragraph 5 of the Report, all that the Committee was doing was to recognise the existence in many Civil Law countries of an organized system of administrative courts.

Mr. E. ST. JOHN of Australia said that the First Committee in its discussions had, in the same spirit as Lord Denning, emphasised not only the negative duty of the Legislature to refrain from interference with basic rights but also its positive duty to secure the conditions on which men might reach their highest development. It was with this in mind that the First Committee had agreed in the first paragraph of its Report that:

"The function of the Legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political right but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality."

Mr. ST. JOHN also drew attention to paragraph 3 of the Report of the First Committee, which stated that every Legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights. It was satisfactory to find that two Committees had been working along the same lines. As far as the Report of the Second Committee was concerned, he felt that it would be better to describe what the Committee had called "assumptions" as "assumed goals". He thought it important not to convey the impression that the Rule of Law is only required, or can only be applied, where the assumptions to which the Committee referred had been fully achieved. It would for the same reason be better not merely to "assume the earnest endeavour of government" to achieve social and economic justice but also to "call for" such endeavour; and finally he thought that the conclusions of the Second Committee should not be made "in the light of these assumptions" of social and economic justice but also "in conjunction with them".

#### **THE REPORT OF THE THIRD COMMITTEE**

The Plenary Session then considered the report of the Third Committee, the text of which was read by its Chairman, Mr. GERALD GARDINER of the United Kingdom and in French by Professor JEAN GRAVEN of Switzerland.

Commenting on the conclusions of the Third Committee Mr. GARDINER said that he did not put forward the conclusions as a perfect composition either in English or in French. Great difficulty was found in translating the views of the Committee into words which would make sense both to those familiar with the Common



Law and those trained in the Civil Law systems. For example, a Common Lawyer would readily say that an accused person should be brought before a court but the *juge d'instruction* was not a court; similarly in different systems of law there are different kinds of appeal and this accounted for the use of the word "challengeable" in the section of the conclusions dealing with appeals. Most of the oddities of terminology were in fact the result of a compromise to find a word applicable in both the Common Law and Civil Law systems.

Professor HENRIK MUNKTELL of Sweden said that the Scandinavian view was that the institution of bail was undemocratic. He considered that even where the bail set was low it was easier for wealthy people to obtain bail than for others. There were many alternatives to a system of bail. He was not going to press for an amendment but he objected to that section of the report which dealt with bail. He was supported in these criticisms of bail by Professor GUSTAV PETREN, also of Sweden.

Judge GIOVANNI NOCCIOLI of Italy said that he was in agreement with the conclusions of the Third Committee but he wished to submit two further resolutions. The first would prohibit the re-trial of a man who had been previously found guilty or acquitted on identical facts. The second would provide that an accused person who had been the victim of a judicial error and whose innocence had been ultimately established by a court decision should have the right to demand compensation, with the further right of the State within limits fixed by the law to recover against the judge or official responsible.

Mr. MAGID BENJELLOUN of Morocco, referring to the question of bail, suggested that the English text to the conclusions of the Third Committee did not bring out what was certainly possible under some systems, namely, that the accused might be released without the actual production of monetary bail. Sir DAVID CAIRNS of the United Kingdom explained that under English law release pending trial was always on the terms of a person being put "on bail", that is to say that he was to forfeit a sum of money if he did not attend his trial. It did not mean that he had to deposit a sum of money. The question of money never arose if he in fact attended the trial. The word "bail" was a convenient expression in English when dealing with release pending trial, but another suitable term would be quite acceptable.

Mr. LOUIS PETTITI of France supported the resolutions proposed by Mr. Nocchioli of Italy which have been mentioned above. Referring in particular to the provision of a pecuniary remedy for accused persons who have been wrongly convicted he said they should be careful not to subscribe to resolutions the guarantees of which were purely formal.

Senator PARVIS KAZEMI of Iran, speaking with reference to paragraph 4 of the third clause of the conclusions of the Third

Committee ("every arrested person should be brought, within a very short period fixed by law, before an appropriate judicial authority") said a definite time ought to be fixed. In one country of which he had heard a delay of up to 14 days was permissible, whereas in Iran the period was 24 hours. Mr. K. L. DEVASER of Malaya also thought that the time within which an accused person must be brought before a court should be fixed. By one of the laws in his country an accused person could be detained for 28 days. The expression "a very short period" which was used by the Third Committee was too vague and loose.

**Friday, January 9, 1959**

15.00—17.30

Mr. JEAN-LOUIS AUJOL of France speaking of the eighth clause of the conclusions of the Third Committee said that it was only right and proper to emphasise the freedom of the press but such freedom had its limits, as when the interests of the accused were endangered. He thought that the phrase stating that "it should (not) be permissible for newspapers to publish, either before or during a trial, matter which is likely to prejudice the fair trial of the accused" was too vague and general. The press should be absolutely forbidden to speak of a trial before the trial had commenced.

Professor STEPHAN HURWITZ of Denmark said in connection with the second clause of the conclusions of the Third Committee that it was dangerous to suggest so shortly and without qualification that the burden of proof might in certain circumstances rest on the accused. He would favour the deletion of the whole of that clause except for the opening proposition that an accused person should be assumed to be innocent until he had been proved to be guilty.

Miss R. S. QARI of Pakistan said that she did not think that the Congress would be within its rights in suggesting that the press should be prohibited from reporting a trial. The public has a right to know the proceedings of the court. All that might be recommended was that the press in particular cases where the Judiciary thought it appropriate should not be allowed to comment on a case.

Professor JEAN GRAVEN of Switzerland said that from his experience of presiding in the Committee of Criminal Law at the Congress at Athens he was in a position to appreciate the difficulties raised by some of the previous speakers, especially in so far as they involved differences between the Common Law and the Civil Law. Dealing with the suggestion of Mr. Hurwitz concerning the burden of proof, he said that it was impossible not to recognise that there were cases where the presumption of innocence is overthrown provisionally by proof of certain facts. He was in agreement with the suggestion put forward by Mr. Noccioli of Italy and by Mr. Pettiti of France that some mention should be made of the principle

that a man should not be judged twice on the same facts. As far as the free choice of an advocate in all cases was concerned, he thought that this was an ideal but asked whether it was really intended to impose the choice of an advocate in even the most minor matters. In regard to the period of time within which an accused person must be brought before a court he thought it impossible to lay down a uniform period. Concerning bail he wished to emphasise that the Committee had been thinking not only of release on the production of a certain sum but also by personal undertaking (*une garantie personnelle*).

#### THE REPORT OF THE FOURTH COMMITTEE

The CHAIRMAN of the Plenary Session then called upon Mr. ERNEST ANGELL of the United States, as Chairman of the Fourth Committee, to read the conclusions of that Committee. The French text was thereafter read by Mr. JEAN KRÉHER of France.

Mr. SÉAN MACBRIDE of Eire, referring to the first clause of the Fourth Committee's conclusions and in particular to the phrase, "independence (of the Judiciary) . . . does not mean that the judge is entitled to act in an arbitrary manner", doubted whether it was desirable to make this statement. It might give the Executive the excuse for interfering without justification with a judge.

Miss FLORENCE KELLEY of the United States said that the tenth clause of the Committee's conclusions, referring to legal representation, was necessarily vague. In the United States in criminal matters in some states, Public Defenders were charged with the responsibility of representing persons who cannot engage Counsel for themselves. In other jurisdictions the Bar Associations have set up panels of lawyers prepared to defend persons charged with crimes and so called upon by a court. There was also a type of organization, with which the speaker was associated, begun by the Bar but now supported financially not only by the Bar but also by the community at large. This type of organization was called a Legal Aid Association. In the year 1958 the Legal Aid Association for the City of New York handled 34,000 criminal matters. This figure gave some idea of the size of the problem. The speaker suggested that the International Commission of Jurists might at some future Congress deal with this question in greater detail and with a background of specific knowledge and experience from different countries.

Mr. Justice POC THIENN of Cambodia, speaking as a judge, expressed his satisfaction with those clauses of the report of the Fourth Committee which dealt with the appointment and dismissal of judges and, in particular, with the necessity for collaboration and consultation between the Judiciary and the authority responsible for such appointments or dismissals. He said that in his own country

the judicial organization which was concerned with these problems was called the Superior Council of the Judiciary. He thought it extremely important that the Judiciary should play its part in the nomination of judges.

Mr. DOUGLAS R. WOOD of New Zealand thought that in connection with the independence of the Judiciary it was desirable to provide an adequate pension or retiring allowance for retired judges and possibly for the continuance of a part of that pension to their widows. Mr. KAZI M. ASLAM of Pakistan said that however judges might be appointed he thought that once appointed their promotion, demotion, leave, suspension, etc. should be entirely divorced from the Executive and rest with the Judiciary itself. In his own country, at the lower judicial levels, a judicial career might be hindered because the judge in question had displeased the Executive and even at the higher levels promotion might depend on the recommendation of the Executive to the Bench of the High Court.

Mr. A. VEERARAGHAVAN of India informed the Plenary Session that the question of the pensions as well as the status, leave, etc. of judges had been discussed in the Fourth Committee but it was felt that, together with the question of judicial remuneration, it would be sufficient to state that there should be an independent Judiciary. He also explained, with regard to legal aid, that in the course of the discussions of the Committee the systems operating in various countries had been explained; the contrast had been pointed out between systems such as that of the United States and Canada where the Bar undertook the main responsibility for providing legal aid and countries, such as India, where it would not be possible for the legal profession to undertake the burden without government assistance.

Mr. Justice DEVLIN of England while agreeing that the drafting of the conclusions of the Fourth Committee might in various respects be improved thought that it was important to emphasise that a judge was not entitled to act in an arbitrary manner. The clause in question (i.e., the first clause) sought to bring out that the Rule of Law is binding upon judges themselves. They must not decide cases according to their own ideas of justice. It was a wise Englishman who had said: "The discretion of the judge is the first instrument of tyranny."

Mr. H. D. BANAJI of India welcomed the statement that the conception of the independence of the Judiciary set out in the first clause of the Committee's conclusions implied adequate remuneration for the judges. In India some 85 years ago the remuneration of a High Court judge was 4,000 rupees a month when the purchasing power of the rupee was much higher than it was today. The present salary was 3,500 rupees a month, which he considered inadequate. He also thought that there should be some different statement that the Judiciary and Executive should always be separate in all countries. He finally drew attention to the danger to judicial

independence in the practice of offering judges shortly before, or on retirement, well paid government posts.

Professor JEAN GRAVEN of Switzerland wished to see the elimination of the third clause of the conclusions of the Fourth Committee dealing with the appointment of judges. He particularly took exception to a passage in the clause which stated that "the selection of judges by election and particularly by re-election, as in some countries, presents special risks to the independence of the Judiciary which are more likely to be avoided only where tradition has circumscribed by prior agreement the list of candidates and has limited political controversy". He considered that the foregoing was a purely theoretical observation quite inapplicable in fact to the position, for example, of the judges in Switzerland. He himself had some years ago been re-elected by the people for six years and he had never been subjected to any pressure or experienced any difficulty. On the contrary a judge in order to ensure re-election has to carry out his task in the best way possible.

Mr. P. N. SAPRU of India supporting in general the conclusions of the Fourth Committee said that while varying opinions might be held on the election of judges he preferred in the case of the higher Judiciary life tenure or something approximating to life tenure. Without life tenure a retired judge tends to find a job for himself whether in government or in commerce.

#### **GENERAL COMMENTS ON THE WORK OF THE INTERNATIONAL COMMISSION OF JURISTS**

The rest of the Plenary Session provided an occasion for the participants in the Congress to make general suggestions for the future work of the International Commission of Jurists without necessary reference to the Agenda of the Congress at New Delhi.

Mr. JACQUES-MARIE FOURCADE of France introduced a resolution signed by a number of the participants in the Congress<sup>1</sup> to the following effect:

"Whereas it is necessary to define the minimum rules and procedures for the protection and guarantee of the rights and fundamental liberties of the individual as set out in the Universal Declaration of Human Rights,

"Whereas it is equally necessary to plan in advance on an international basis the means of control required to insure respect for these rights by the member States of the United Nations,

<sup>1</sup> Messrs. Jean-Louis Aujol, L. Bentivoglio, D. B. Bonsal, P. Boulos, G. Burdeau, A. J. M. van Dal, J. Dray, B. Esen, J.-M. Fourcade, G. Gardiner, J. Graven, A. Houman, J. Kréher, W. Martens, J. Morice, G. Noccioli, M. Persiani, L. Pettiti, Poc Thienn, B. V. A. Röling, P. Schneider.

"Whereas the notion of crime against humanity has been incorporated in international positive law by the International Convention on Genocide,

"Whereas at present the institution of a Permanent International Criminal Court is impracticable,

"Whereas the creation of an International Commission of Enquiry on crimes against humanity could constitute a stage in the setting up of such a Court,

"Recalling the effective work done by the International Commission of Enquiry which functioned at London until 1945 for the purpose of obtaining information on the crimes against humanity committed by the totalitarian States during the second world war, expresses the wish that the International Commission of Jurists, taking advantage of its consultative status with the United Nations, will study the possibility of taking the necessary steps with a view to setting up within the framework of the United Nations an International Commission of Enquiry on crimes against humanity."

Mr. H. R. RAMANI of Malaya suggested that the participants at the Congress on returning to their different countries should report to the Secretary General of the International Commission of Jurists on the extent to which the Rule of Law as set out in the conclusions of the Fourth Committee was being observed in their respective countries. He thought this was particularly important with regard to the politically less advanced countries of Asia and Africa. He also hoped that it would be possible for the Commission to set up a branch office somewhat closer to the areas of Asia and Africa to which he had referred.

Mr. M. R. SENI PRAMOJ of Thailand appealed for some statement by the Congress which would be more understandable to the general public. He hoped in the future the Commission would lay greater emphasis on its positive rather than its negative work. Finally, bearing in mind the sense of isolation of many of those who were fighting for justice against government persecution, he hoped that the Commission would pay special attention to the human factors which move men to sacrifice themselves in the course of justice.

The CHAIRMAN intervened to say that a general statement of the outcome of the Congress at New Delhi was being prepared to be called *The Declaration of Delhi*.

Mr. SÉAN MACBRIDE of Eire thought that the Congress had served a useful purpose in setting a standard of democratic conduct under the Rule of Law. He asked whether it might be possible to achieve Conventions on a regional basis or otherwise which would come to be accepted by nations as part of the Rule of Law applicable

to their particular countries. In this connection he referred to the work already done under the European Convention of Human Rights. He suggested that the International Commission of Jurists might formulate in the course of the next year or two a draft Convention setting out the proposals made at New Delhi and providing for an International Court to which complaints could be made. Whatever the outcome of such a draft Convention might be, it might be possible to achieve regional conventions guaranteeing certain fundamental rights. The weakness of the Universal Declaration of Human Rights of 1948 was its omission of any machinery for the enforcement of such rights.

Mr. HLA AUNG of Burma said that for a country such as his own at the crossroads between democracy and totalitarianism, the holding of the Congress had been of great importance and the conclusions reached could help to guide his country towards Parliamentary democracy and the Rule of Law.

## CLOSING PLENARY SESSION

Saturday, Januari 10, 1959

09.00—12.30

### CONCLUDING REMARKS

The Chair was again taken by Mr. VIVIAN BOSE of India. Explaining the procedure to be followed, the CHAIRMAN said that meetings were summoned for different purposes. On the one hand, Parliaments enacted legislation where a vote and precision of language are required; on the other hand, friends might gather to discuss some problem of common interest. In the latter case the host might draw up a simple statement embodying the general sense of the meeting but a vote would not be taken and there would be no clause by clause or word by word examination of propositions. He thought that the Congress was closer to the second type of meeting than to the first.

The International Commission of Jurists, Mr. BOSE stated, consisted of a small body of men with limited funds at their disposal. The limited nature of these funds made it impossible, as some enthusiasts had suggested, apart from all the other practical difficulties, for a Congress to be held twice or even once a year. He compared the position of the Commission to that of a group of persons interested in a particular world problem such as malnutrition. Such a group, realising that malnutrition is a complex problem involving an unbalanced diet as much as actual under-nourishment, might invite a number of experts from different countries to meet together to define the nature and causes of malnutrition and to advise means for its cure. In the same way the Commission had invited – and he would emphasise the word “invited” – a number of legal experts to meet in New Delhi. The reports by the different Chairmen of Committees represented the sense of their respective Committees. The general discussion in Plenary Session suggested necessary changes in the reports of the different Committees and these changes had now been made. The *Conclusions* as finally issued were those which the Steering Committee of the Congress felt to represent the general sense of the Congress as a whole. These *Conclusions* were for the future guidance of the International Commission of Jurists and were not intended to bind each and every Participant at the Congress in detail.

Returning to the analogy of a conference of nutrition experts, the CHAIRMAN said that the final stage would be for the convener to inform the experts of the lines along which he proposed to work in the light of their advice. Following this procedure he therefore intended to read to the Plenary Session the text of a declaration



which was an attempt to embody the spirit of the Congress and which formed what he might call the operative part of their deliberations. He called on the Plenary Session to accept the declaration in principle and to signify their acceptance by general acclamation. The CHAIRMAN thereupon read the text of the *Declaration of Delhi*<sup>1</sup> which was received with applause.

Mr. JEAN-LOUIS AUJOL of France, being called upon by the CHAIRMAN as a lawyer from a Civil Law country to make a farewell speech, began by thanking the Indian jurists for their magnificent hospitality. He also wished to mention the generosity of those jurists whose financial support had made the Congress possible. With regard to the discussions in which he had participated he would like to say that they had given him great encouragement. He was particularly moved by the statement by a participant from Burma who had said on the previous day that the holding of the Congress had been of the greatest importance for his own country. Mr. AUJOL concluded by comparing the role of lawyers to that of the builders of roads. Achilles, according to a Greek poet, had said that it was for them to tame the world. The lawyers, too, in a certain sense, were builders of roads and could not have a nobler aim.

The CHAIRMAN then asked the former Secretary General of the International Commission of Jurists, Mr. N. S. MARSH, as the one largely responsible for the Working Paper, to address the meeting. The CHAIRMAN explained that Mr. Marsh had returned to his College in Oxford shortly before the Congress and his remarks therefore would be in the nature of a farewell. Mr. MARSH said that just as it had been difficult to find effective words to express the deep and far reaching principles underlying the conclusions of the Congress it was equally difficult to express adequately gratitude to all those who had been concerned with the Congress and with the work of the International Commission. He mentioned in particular the Indian hosts of the Congress, those who had been responsible for the splendid programme of hospitality for the ladies who had come to New Delhi and also that small body of workers at the Commission's Secretariat who had been responsible both for the technical organization and what might be called the intellectual preparation for the Congress. In this connection he wished to mention further the co-operation of literally hundreds of lawyers in many countries who had provided the information which had made the Working Paper possible. Finally he paid a special tribute to his successor, Dr Jean-Flavien Lalive, who with extraordinary good grace and generosity had co-operated so loyally with a predecessor in office.

Dr. JEAN-FLAVIEN LALIVE, the Secretary General of the International Commission of Jurists, then addressed the Plenary Session

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<sup>1</sup> See p. 3.

on the future work of the Commission. Dr. LALIVE said that they were greatly privileged to meet in the capital of a nation whose great leader was recognised as one of the most outstanding spiritual forces of our world and whose presence and eloquent address at the opening of the Congress had been a memorable feature of their stay. It had also been a wonderful opportunity to make some acquaintance with the treasures of India's past and the achievements of her present. He paid tribute to the Indian Section of the International Commission, the Indian Commission of Jurists, for the laborious but wonderfully successful work which they had contributed to the organization of the Congress, and he was thinking not only of the legal sessions of the Congress but also of many public and private social functions which had been so hospitably offered by their hosts. There had too been many memorable and cultural experiences including the visit to the Taj Mahal and in particular the fascinating Indian village erected in the garden of the Chairman of the Congress, Mr. Vivian Bose, which had delightfully illustrated the varied culture of India's rural life. He also wished to thank for the most generous interest of the Indian press and broadcasting services in the proceedings of the Conference.

This was the first occasion on which the Commission had had at one of its meetings a majority of Asian and African guests. He was sure that their presence had contributed an element of ability and enthusiasm which was essential for the future work of the Commission. He had tried to meet personally all the participants from the 53 countries represented at the Congress. He thought that it was one of the most satisfying results of the Congress that it had promoted a spirit of close friendship and common mission among lawyers of many countries.

Under the inspiring phrase of the Prime Minister of India, Mr. Nehru, that the Rule of Law must conform to the Rule of Life, the Committees had settled down to their work with remarkable speed and efficiency. The practical approach and achievement of the Committees compared favourably with that of many other comparable international meetings. It was encouraging, for example, to see the former Attorney General of a great country and the former Foreign Secretary of another country equally great in spirit, if smaller in size, quickly agreeing on a compromise between amendments which they had individually proposed.

It was not only that the proceedings had been efficient, something new had been achieved. It was significant that Lord Denning had said that at the Congress he had learnt something new about the Rule of Law. The Rule of Law had been shown to have not only the negative task of protecting the individual against the State but also to be a dynamic and expanding concept recognising that the State itself had positive duties to achieve conditions in which the Rule of Law could be effective.

The work of the Congress was not completed. Indeed it had

only just begun. It was the beginning of a new task of world wide significance, of particular importance to independent countries. The importance of the latter point was emphasised by the common feeling of all at the Congress that the Commission should in future co-operate especially with lawyers supporting and promoting the Rule of Law in those new communities which were emerging into a life of independence and freedom. Finally, Dr. LALIVE thanked his predecessor, Mr. Marsh, the Secretariat of the Commission and the colleagues and friends of the Secretariat, both in India and outside, who had offered much valuable assistance and co-operated so well in the difficult task of organising a Congress of such magnitude.

The CHAIRMAN intervened to express his personal thanks firstly to the President of the International Commission of Jurists, Mr. Justice Thorson of Canada, to Mr. Marsh and to Dr. Lalive. He emphasised the self-effacing and admirable way in which Dr. Lalive had worked behind the scenes at the Congress and he looked forward with confidence to his handling of the Commission in the coming years. He wanted too to thank all the participants in the Congress for the good temper which had been displayed, the readiness to understand other points of view and the practical way in which business had been effected. Much praise in this connection must be conceded to the Chairmen of the four Committees. He also wished to thank most warmly all those, secretaries, typists and technicians who had been working behind the scenes at the Congress for long hours and without complaint. In this connection he particularly mentioned the Administrative Secretary of the International Commission of Jurists, Mr. Edward S. Kozera, and his wife, Mrs. Janet Kozera, who had been working equally hard with him.

The CHAIRMAN called on Mr. HERBERT BROWNELL JR., of the United States who, speaking on behalf of participants from the Western Hemisphere, expressed their appreciation for the reception which they had received. The Congress would not have been such a success had it not been for the excellence of the preliminary work which had gone into the Working Paper and into the technical arrangements. It had been a most memorable introduction to the Congress to hear the Prime Minister and the Attorney General. He would confess to a certain feeling of shock on hearing the Prime Minister say that it was impossible to have the Rule of Law in a world which was at war or even in an atmosphere of cold war; but after taking part in the discussions of the Congress he felt confident that the work on which they had been engaged was itself a major contribution to international understanding and world peace. He concluded by saying that they could all best repay their sense of obligation to the International Commission of Jurists on returning to their home countries by taking the lead as lawyers and jurists in developing a public opinion which would put into effect the Rule of Law

Mr. N. C. CHATTERJI, the Vice-President of the Indian Commission of Jurists, said that the Indian Commission had only been recently formed and that friendly critics had been afraid that the Congress would be beyond its capacity but had been silenced by its success. Two factors had contributed to that success; one was the efficiency of the microphones, the other was the way in which the ladies had worked and in this connection he mentioned particularly Mrs. Trikamdas and Mrs. Bose. He also thought, agreeing with what Dr. R. Katz, Vice President of the Constitutional Court of Germany had said to him, that any Congress would be a success with so remarkable a Chairman as Mr. Vivian Bose. He thanked the participants who had come to India, he thanked Lord Denning who had said before them that he had learned much from the Congress; he hoped that the participants would accept his apologies for any shortcomings in the arrangements. As they had been saying in India on parting for the last 5,000 years so now he would say to the participants on returning to their countries: "Let this parting lead to the bliss of your country, your community, the entire legal fraternity, the bliss of the world and complete establishment and vindication of the Rule of Law."

The proceedings of the Closing Session were brought to an end with a speech by the President of the International Commission of Jurists, Mr. Justice Thorson of Canada. Mr. Justice THORSON said that the Commission had been fortunate in its two Secretaries General, Mr. Marsh and Dr. Lalive. Dr. Lalive had a wide experience of international affairs and he much admired his equanimity under the strain of the preparation for and conduct of the Congress. He also wished to express on behalf of the Commission his gratitude to the officers and members of the Indian Commission of Jurists. After so much kindness and hospitality they would leave the ancient land of India with a deep feeling of admiration and the confident hope that it would meet and solve its great problems of the present and the future with the steadfast courage which had characterized it in the past. He also wished to mention the work done by the Administrative Secretary, the brilliant and capable secretaries and the devoted staff.

He had only two comments to make on the substance of their deliberations. The first was that they were all concerned to see that the Rule of Law operated everywhere and not only in those countries which had a long experience of freedom with a Legislature that represented the people an Executive in which the people had confidence, an independent Judiciary and a trained and determined legal profession; it should also operate in those countries where freedom had been newly acquired or had not yet been acquired and where those desirable conditions did not yet exist.

The second point which he wished to emphasise was that a great advance had been made from the position taken at the Congress of Athens. It was recognised that there had to be an orderly

society in which the sacredness of human personality would be maintained and social and economic justice done to all the members of that society. It was not enough to hold out the prospect of freedom to persons who had never known freedom but had experienced and were still experiencing fear and want. Provision must be made for the establishment of social, economic and cultural conditions that would enable the members of society to enjoy the individual freedom to which they were entitled and to realise to the full their personalities.

The lawyers who had attended the Congress had made an advance from their traditional position as technicians of the law and defenders of the existing order. They must now play their important part in the advancement of the Rule of Law in an orderly society, based on individual freedom and social and economic justice for all, a society based on the sacredness of human personality and the brotherhood of man.

## A QUESTIONNAIRE ON THE RULE OF LAW

### A. Administrative Authorities and the Law

#### 1. Legislative Power

a. Have any administrative authorities the right to make laws by virtue of their own authority?

b. Have any administrative authorities the right to make laws (or ordinances, decrees or regulations) by virtue of authority delegated to them by some other organ or organs of the State? If so, by what organ or organs of the State is such authority delegated?

c. By what procedure (if any) and before what body (if any) can the legality of a law, ordinance, decree or regulation made by an administrative authority be determined?

#### 2. Activities (other than legislative) of Administrative Authorities

a. By what procedure (if any) can an administrative authority be compelled to carry out a duty which is imposed upon it by law?

b. By what procedure (if any) can an administrative authority be restrained from carrying out acts:

(i) in excess, or misapplication, of powers vested in it by law?

(ii) which would, if committed by a private individual, constitute a legal wrong?

c. What remedies (if any) are available to the individual who has suffered damage as a result of acts of omission or commission falling under A(2)a and b above? In particular:

(i) against whom (e.g., the wrong-doing agent, the responsible organ or the State)?

(ii) if against or concerning the State or a State organ, does the complainant have the same facilities for making good his case that he would have against another private individual or where the State or a State organ was not concerned (e.g., compulsory production of State documents as evidence)?

d. By what body or bodies are the remedies available under A(2)c above determined?

### 3. Administrative Authorities and Criminal Prosecutions

- a. What person or body is ultimately responsible for the initiation or discontinuance of criminal proceedings?
- b. Does such a person or body enjoy a discretion in the exercise of the powers given under A(3)a above?
- c. For what period can the authority responsible for criminal prosecutions hold an accused person in confinement without recourse to the court?
- d. In the procedure applicable to criminal trials, does the prosecutor have the same rights and duties, as regards presentation of the case and production of evidence, as the accused person?
- e. What person or body (if any) can pardon or suspend the sentence of a convicted person?

### 4. The legal position of the Police

- a. What organ of the State is ultimately responsible for the conduct of the police?
- b. What powers of arrest and confinement of accused persons are available to the police which are not accorded to the ordinary citizen?
- c. What powers of search and other means of gathering evidence (e.g., wire tapping) are available to the police which are not accorded to the ordinary citizen?
- d. What limits, directly by a legal prohibition or indirectly by exclusion of the evidence so obtained, are imposed on the methods employed by the police to obtain information or extract confession?
- e. To what extent are the remedies dealt with in the answer to A(2)c above applicable in particular to the illegal acts or omissions of the police?

## B. The Legislative and the Law

1. What legal limitations (if any) restrict the power of the legislative to make laws? In what instrument are these limitations defined? To what extent do you consider these limitations essential to the Rule of Law?
2. By what procedure and before what body can laws of the legislative which are inconsistent with the limitations discussed in B(1) above be declared invalid?
3. Is a particular procedure laid down for the revision of the limitations mentioned in B(1) above? Can this procedure be circumvented (e.g., by increasing the size of the legislative to provide a 2/3 or 3/4 majority)?
4. What powers has the legislative to punish (a) its own members (b) members of the general public?

5. What powers has the legislative to examine under oath:  
(a) its own members (b) members of the general public?
6. In what respects does the procedure adopted under B(4) and (5) differ from the procedure followed in the ordinary courts?

### **C. The Judiciary and the Law**

1. By whom are the judges appointed?
2. Under what conditions can they be dismissed? Have any judges in fact been dismissed in the last ten years? (Give particulars, if possible.)
3. By whom are the judges promoted?
4. What personal qualifications are required of judges? To what extent do laymen participate in the judicial process? What professional guidance are they given?
5. By what legal instruments are the conditions laid down in C (1-4, inclusive), guaranteed? Is any special procedure required to change them?

### **D. The Legal Profession and the Law**

1. What person or body is responsible for admission to, supervision of and expulsion from the practising legal profession?
2. What factors (if any), other than the professional ability and moral rectitude of the lawyer in question and the extent to which the supply of lawyers is adequate to the demand, are allowed to influence the decisions made by the person or body mentioned in D(1) above?
3. Subject to what limitations, directly imposed by the law or indirectly (as, for example, by the threat of a diminution in his future practice) is a lawyer free to advise his client and to plead on his behalf in judicial proceedings?
4. Under what circumstances is a lawyer permitted to refuse, to accept or to relinquish a brief from a client?

### **E. The Individual and the Legal Process**

1. To what extent has the individual citizen a right to be heard on all matters, however determined, in which his life, liberty or property are concerned?
2. To what extent has the individual citizen the right to legal advice and representation in the matter mentioned in E(1) above?
3. To what extent is the right (if any) under E(2) affected, if the individual has not the material means to secure the legal advice or representation necessary?

### **F. General Question**

(to be answered separately in respect of A-E above)

To what extent (if at all) do you consider that the answers to



this questionnaire reveal a situation in which the fundamental principles of the Rule of Law, as you understand them, are endangered or ignored?

**G. Additional Information**

What other questions should in your opinion be asked in order to give a complete picture of the way in which the Rule of Law is understood and observed in your country?

# **A WORKING PAPER\***

## **ON**

### **THE RULE OF LAW IN A FREE SOCIETY**

#### **INTRODUCTION**

##### **Preparations for the Working Paper**

The main purpose of the International Congress of Jurists which met at New Delhi, India, from January 5-10, 1959, was to clarify and formulate in a manner acceptable to different legal systems, operating in varying political, economic and social environments, the basic elements of the Rule of Law. The Congress was, however, only the culmination of a long process. It is the purpose of this Introduction to describe the course of the work preparatory to the discussions at New Delhi. Such a description, it is believed, may add weight to the conclusions reached at the Congress itself and may also be of some interest to all those who are concerned with the techniques of voluntary international bodies. This section concludes with an explanation of the plan on which the Working Paper has been arranged.

The International Commission of Jurists has been primarily concerned with the Rule of Law ever since its foundation. Article 4 of its Statute states that:

"The Commission is dedicated to the support and advancement of those principles of justice which constitute the basis of the Rule of Law."

The Article concludes with the following statement of the Commission's intentions:

"The Commission will foster understanding of and respect for the Rule of Law and give aid and encouragement to those peoples to whom the Rule of Law is denied."

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\* The Working Paper has been printed substantially as it was presented in New Delhi, in order to make comprehensible the references to it in the proceedings of the Committees at the Congress. Minor alterations of style and corrections of fact have been made, and some notes added.

At a world Congress organized by the International Commission of Jurists at Athens in June 1955, which was attended by some 150 leading jurists from 48 countries, the Commission was requested in a final resolution of the Congress:

"To formulate a statement of the principles of Justice under Law and to endeavour to secure their recognition by international codification and international agreement."

To carry out this request the Commission in 1956 requested the then Secretary General and present writer to prepare a Questionnaire on the Rule of Law<sup>1</sup> which in the course of 1957 was widely distributed to lawyers and legal institutions in many parts of the world. Answers to this Questionnaire were received from distinguished individual jurists or committees of jurists in Australia, Austria, Belgium, Canada, Ceylon, Chile, Cuba, Denmark, England, Finland, France, German Federal Republic, Japan, India, Iran, Italy, Malaya, Netherlands, Philippines, Singapore, Sweden, Switzerland, Thailand and the United States. In addition the Commission obtained through the courtesy of the Mid-European Law Project of the U. S. Library of Congress information on the relevant law in the Soviet Union and on other countries with allied legal systems. It should be noted that those who co-operated with the Commission in providing answers to the questionnaire constituted a cross-section of the legal profession in the widest sense of the term and although there was a most valuable contribution from academic lawyers, it was probably an unprecedented feature of the project as a whole that it particularly roused the interest and secured the co-operation of those engaged, whether as judges or as advocates, in the practical application of the law. Moreover, within different countries, although the method by which the national answers were drawn up showed some difference in detail, there was generally a wide distribution of the work among a number of experts and a final approval of the completed work either by the appropriate national section of the Commission or by an *ad hoc* authoritative committee.

Answers to the questionnaire began to be received by the Commission in the latter part of 1957 and in the first half of 1958. On the basis of the information received and views expressed, a draft *Working Paper on the Rule of Law* was prepared for the Commission by the present writer with the assistance of George Dobry, M.A. (Edinburgh), of the Inner Temple, Barrister-at-Law; Sompong Sucharitkul, M.A. D.Phil. (Oxford), Docteur en Droit (Paris), LL.M. (Harvard), of the Middle Temple, Barrister-at-Law, formerly Professor in the Universities of Chulalongkorn and Tammasart, Bangkok and R. van Dijk, Ph.D. (Cambridge), LL.M. (Leyden).

In the compilation of the draft *Working Paper* it was possible to take into account not only the answers to the questionnaire and

<sup>1</sup> See pp. 162-165 *Supra*.

the evidence afforded by the Statutes, legal decisions and leading text books of the relevant countries but also the work done in the course of a number of rather similar international projects.<sup>2</sup>

The draft *Working Paper* consisted at this stage of a mainly factual summary of information concerning different legal systems, arranged under five headings. These were: the Legislative and the Law; the Executive and the Law; the Criminal Process and the Law; the Judiciary and the Law; the Legal Profession and the Law. To these summaries was attached a tentative list of questions which appeared suitable for international discussion. It will be noted that it was thought inadvisable to attempt immediately to draw up any practical and concrete conclusions from the great mass of material which had been submitted to the Commission. And it was indeed true that in the answers to the Questionnaire originally sent out by the Com-

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<sup>2</sup> First, in point of time, should be mentioned a Conference held at the Harvard Law School in 1955 on the occasion of the Bi-Centennial of John Marshall, Chief Justice of the United States, 1801-1835, the proceedings of which were published under the editorship of Professor A. E. Sutherland by the Harvard University Press as *Government under Law*. Valuable use was also made of papers submitted to the *Chicago Colloquium on the Rule of Law* held in September 1957 under the general title of "The Rule of Law as Understood in the West". This was a legal contribution to a general UNESCO project to promote intellectual contact between Communist and non-Communist countries. The Colloquium gave an opportunity for the reading of papers and discussion on the Rule of Law in a number of non-Communist systems, with particular emphasis on England, France, Germany and the United States. Lawyers from Poland and the USSR were also invited and took part in the discussion. The Commission was represented at the Colloquium by Mr. Ernest Angell, the general editor of the Committee of Jurists who compiled the United States answer to the Commission's Questionnaire on the Rule of Law. The present writer would like to take this opportunity of thanking Professor C. J. Hamson of Cambridge University, the rapporteur of the Colloquium, for making available his report and Mr. J. A. Jolowicz, Fellow of Trinity College, Cambridge, for the opportunity of reading his digest of the discussions. He also had the advantage of consulting an unofficial transcript of the discussions prepared by Mr. V. M. Kabes, an observer for the International Commission of Jurists, now of the legal staff of the Commission at Geneva. The proceedings at the Chicago Colloquium were published by the Faculty of Law of the University of Istanbul in their *Annales*. It should be added that the Chicago Colloquium was followed in 1958 by a Conference in Warsaw on "The Rule of Law as Understood in Communist Countries". Unfortunately it was not possible, owing to the time element, to take account in the preparations for New Delhi of the interesting report on the Warsaw Conference given by Dr. A. K. R. Kiralfy in the *International Comparative Law Quarterly*, Volume 8, p. 465 under the title of "The Rule of Law in Communist Europe". A third international project which should be mentioned in this connection was the *United Nations Seminar on the Protection of Human Rights in Criminal Law and Procedure* held in Baguio City, Philippines, in February 1958. The International Commission of Jurists was represented at this Seminar by the present writer, its then Secretary General, who would wish to express his gratitude to John P. Humphrey, Director General of the Human Rights Division of the United Nations, for making available the report on the proceedings of the Seminar.

mission there had been on the whole a natural reluctance to answer the final and perhaps most vital questions, namely:

(a) To what extent (if at all) do you consider that the answers to this Questionnaire reveal a situation in which the fundamental principles of the Rule of Law, as you understand them, are endangered or ignored?

(b) What other questions should in your opinion be asked in order to give a complete picture of the way in which the Rule of Law is understood and observed in your country?

It was therefore felt desirable to submit the draft *Working Paper* to a small group of jurists, representing different legal systems and capable of expressing an authoritative opinion not only on the facts but also on the values necessary to give the facts meaning and practical relevance. This group, in the form of a Seminar, met at Oxford in September 1958.<sup>3</sup> The work of the Seminar resulted in two major changes in the construction of the *Working Paper*. In the first place, it was decided to entrust discussion of the fourth and fifth subjects mentioned above, namely the Judiciary and the Legal Profession, to a single Committee at the Congress at New Delhi. This change was made partly for the reason that the discussion of these two topics appeared likely to give rise among lawyers to rather less controversy than might be expected with regard to other subjects.<sup>4</sup> It was also felt at the Seminar that the status of the legal profession was closely related to, and to a large extent dependent upon, the position of the Judiciary. A second and a more important decision at the Seminar was to turn the tentative questions for discussion

<sup>3</sup> The jurists in this Seminar were: Sir Carleton Allen, Q.C.; formerly Professor of Jurisprudence in the University of Oxford; Mr. Ernest Angell of the New York Bar, Chairman of the Special Committee of the International and Comparative Law Section of the American Bar Association to Co-operate with the International Commission of Jurists; Mr. A. K. Brohi, Barrister-at-Law, formerly Law Minister, Pakistan now the Pakistan High Commissioner in India; Professor Georges Burdeau, University of Paris; Mr. C. K. Daphtary, Solicitor General of India; Mr. Gerald Gardiner, Q.C., Chairman of the Bar Council of England and Wales; Professor F. H. Lawson, University of Oxford; Professor Gustaf Petren, University of Stockholm, Secretary-General of the Swedish Delegation to the Nordic Council; Professor B. V. A. Roling, University of Groningen; as well as Dr. Jean-Flavien Lalive, Attorney-at-Law, formerly General Counsel of UNRWA (United Nations Relief and Works Agency in the Near East) and formerly First Secretary of the International Court of Justice, now Secretary-General of the International Commission of Jurists; Mr. Edward S. Kozera, former Lecturer in Government, Columbia University, now Administrative Secretary of the International Commission of Jurists; and Messrs. Dobry and Sucharitkul, who have been mentioned in the text above.

<sup>4</sup> An expectation justified by the event. Committee No. 4 at the New Delhi Congress reached agreement on its *Conclusions* in close correspondence with the suggested principles set out in the *Working Paper*.

appended to the draft *Working Paper* into a firm set of conclusions which could at least form the preliminary basis for discussion in the different Committees at New Delhi.

The *Working Paper* finally presented to the New Delhi Congress was revised and largely rewritten by the present writer in the light of the observations made at the Oxford Seminar. This new version of the *Working Paper* was finally approved by the Executive Committee of the International Commission of Jurists in November 1958 and was immediately distributed to the invited participants in the New Delhi Congress.

### **The Meaning of the Rule of Law as Understood by the Commission**

The conception of the Rule of Law is complex. The conventionally accepted equivalent to the English term "Rule of Law", as first expounded by Dicey in his *Law of the Constitution* (1885), may in the legal terminology of other countries denote a rather different body of ideas or lay emphasis on particular principles or institutions which are unfamiliar to England. Thus the "Rule of Law" in England carried different implications from the more generally used phrase in the United States, "Government Under Law", or from "le Principe de la Légalité" or "la Règle de Droit" in France or from "der Rechtsstaat" in German-speaking countries. All these conceptions differ to a much more fundamental degree from the communist idea of "Socialist Legality".

The Commission has taken into account these different conceptions of the Rule of Law but it does not completely identify itself with any of them. It has taken the Rule of Law as a convenient term to summarize a combination on the one hand of certain fundamental ideals concerning the purposes of organized society and on the other of practical experience in terms of legal institutions, procedures and traditions, by which these ideals may be given effect. The Commission believes that over a wide part of the world there is – although in embryonic form – a consensus of opinion, particularly among the legal profession, as to the nature and importance of the Rule of Law in the sense described above. It was the purpose of this paper and still more of the Congress for which it was prepared to clarify and give expression to this conception of the Rule of Law.

It is thus convenient to consider the Rule of Law as here understood from two aspects. In the first place, it is necessary to define the *substantive* content of the Rule of Law, in terms of the conception of society which inspires it. Secondly, it is necessary to determine by a comparative study the legal institutions, procedures and traditions – in a broad sense the *procedural* machinery – which in the experience of many countries has proved necessary to give practical reality to this conception of society. Yet it should immediately be said that such a sharp distinction, although convenient for purposes of exposition, has serious dangers. It may tend to minimize,

for example, the continuing interaction of the ideals of a society, as expressed in the fundamental rights clauses of a constitution, and the presence or lack of effective administrative machinery to realize such ideals in practice. In fact, the consideration of rights without remedies leads to sterility and of remedies without regard to the rights they are supposed to protect to empty formalism.<sup>4</sup>

### 1. The Rule of Law as a Rule of Substance

No conception of the Rule of Law which has secured any measure of support is entirely without substantive content. Any established society may come, in the course of its development, to appreciate the value of legality, in the narrow sense of adherence by all its members to the law laid down by the ultimate authorities, and to the importance of regularity and consistency in the enforcement of the law by those subordinate to such authorities. Thus, a description of "Socialist Legality" in communist countries as "a strict and persistent execution of law and all other legal acts, resulting in the establishment of a firm legal regime in the country"<sup>5</sup> reveals one aspect underlying the Rule of Law which, so far as it goes, would find acceptance in all countries which have repudiated anarchy as a principle of government. But unless he is prepared to admit that any state which efficiently and correctly enforces the law – irrespective of its content – may claim to exist under the Rule of Law, a lawyer who expresses concern for the Rule of Law must be prepared to make plain his view of the purpose of organized society and the fundamental principles which will govern the content of the law in such a society. This does not mean that it is for the lawyers to usurp the function of the theologian, philosopher, political scientist or economist but only that they should themselves understand and make clear to the community the framework of values within which their own technical skill and experience may serve society. It is therefore necessary in this exposition of a particular conception of the Rule of Law to state clearly that it is based on the values of a free society, by which is understood a society providing an ordered framework within which the free spirit of all its individual

<sup>4</sup> See, for a current example of the limitations of remedies without rights, the remarks of Erwin N. Griswold, Dean of the Harvard Law School, on the "South African Treason Trial" *The Times* (London), September 25, 1958: "No question can be raised about the competence or capacity of the court. Each of the judges named is a member of the Supreme Court of South Africa for one of the Provincial Divisions. South Africa has long had excellent Courts, maintaining high standards of fairness and justice, and this Court will, of course, fit into the South African judicial tradition. Nevertheless however fair and competent a court may be, if the underlying legal situation is deeply unsound the court may, simply because it must act according to law, be compelled to unsound results."

<sup>5</sup> Nedbailo, *Vehenye Zapiski*, Vol. XXVII (1954), Juridical Series (Lvov University), No. 2, p. 12.

members may find fullest expression. A free society is one which recognizes the supreme value of human personality and conceives of all social institutions, and in particular the State, as the servants rather than the masters of individual.

A free society is thus primarily concerned with the rights of the individual. It is important however to emphasise that such rights may be of two kinds. Broadly speaking, in the historical development of free societies the main emphasis has been laid on the right of the individual to assert his freedom from State interference in his spiritual and political activities, a freedom which finds expression in such classic rights as freedom of worship, speech and assembly. The recognition that rights of this kind without a certain standard of education and economic security may for large sections of the population be more formal than real has led to greater emphasis being put on a second kind of individual rights. These latter are concerned with the claim of every individual on the State to have access to the minimum material means whereby he may at least be in a position to take advantage of his spiritual and political freedom. Both kinds of individual rights are essential to that free society, which is the embodiment of the values underlying the conception of the Rule of Law put forward in this paper. But when a lawyer, in a specific capacity as such, turns from the values implied in the Rule of Law, i.e., from its *substantive* content, to the legal machinery – i.e., to the *procedure* – by which he may assist in the realization of such values, he becomes aware of an important practical distinction between the two kinds of rights. The problem of devising machinery whereby in specific fields of individual activity the interference of the State may be controlled or prohibited, although difficult enough and varying in its character from one country to another, is one with which the lawyer has long been familiar and to deal with which he feels competent. To provide, however, the means for enforcing social rights is a task which the lawyer is apt to regard as political rather than legal and one for which, bearing in mind the differing economic and social situation of the peoples of the world, the lawyer may think it impossible to prescribe general rules.

Yet it is important to emphasise that a lawyer who accepts the ideal of a free society as the basis of his conception of the Rule of Law cannot ignore that aspect of men's dignity and worth which finds expression in a demand for a minimum standard of material well-being in addition to the bare maintenance of political freedoms within a framework of law and order.

## **2. The Procedural Machinery of the Rule of Law**

In the selection of legal institutions, procedures and traditions which the general experience of lawyers has found to be important in giving practical effect to the ideals underlying the Rule of Law, a



dogmatic approach is out of place. It is only possible to say that in most countries the need for certain broadly similar legal institutions, procedures and traditions has been felt. On the other hand it was one of the clearest conclusions of the exploratory Seminar held by the International Commission of Jurists in Oxford in preparation for the Congress in New Delhi that the importance to be attached to any particular institution, procedure or tradition within the context of its society may vary greatly as between one society and another.<sup>6</sup>

Furthermore, a lawyer must be modest in the claims which he makes for the legal machinery necessary to realize the values underlying the Rule of Law. In the first place it should be borne in mind that no legal institutions, procedures or traditions can eliminate at many points the judgement of individuals within and outside the legal system; and that the exercise of that judgment will to a large measure depend on the standards of the society as a whole in which they move. Whatever truth there may be in the saying that a country gets the government it deserves, it is certainly not less true that it gets the legal system which it deserves. Secondly it may be said that in many countries, where political consciousness and political machinery are highly developed, the rights of the individual are as much safeguarded through political channels as through his legal remedies in the courts.<sup>7</sup>

For the particular purposes of the Congress held at New Delhi, it was also necessary to keep in mind the interests of the different participants and to devise broad subjects of investigation which would as far as possible bring together the specialists – constitutional, administrative and criminal lawyers, as well as those concerned with the personnel of the legal system (i.e., judges and lawyers) – within the broad field of public law.

With these considerations in mind, four facets of the procedural machinery involved in the practical application of the Rule of Law were singled out for discussion. These were the Legislature, the Executive, the Administration of Criminal Law, and as a single

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<sup>6</sup> Thus a country such as Sweden, which has developed to a remarkable degree a rule that all governmental documents are in principle open to public inspection, may find in this rule the greatest safeguard against administrative abuses and be less inclined to develop a comprehensive system of legal remedies against the State in respect of the acts or omissions of its officials.

<sup>7</sup> Thus, in the Chicago Colloquium on the Rule of Law (referred to above), Dr. A. L. Goodhart, Master of University College, Oxford, emphasised the importance of "Question-Time" in the British Parliament, more than six hundred members of which write on the average ten letters per day asking questions of various ministries. Mr. Justice Devlin thought however that it was important not to overemphasise the effectiveness of this control exercised by the legislature over the executive.

topic, the Courts and the Legal Profession.<sup>8</sup> The distribution of subject matter under these four headings was to a large extent determined by the interest of the specialists who were likely to be attracted to the committees to which the broad topics had been assigned. It is easy therefore to criticize the arrangement on logical grounds; for example, the administration of the criminal law is in a sense one aspect of the activities of the Executive, but it falls in most countries within the field of a more or less specialized ground of criminal lawyers whereas the control of the Executive in noncriminal matters is the particular concern of administrative lawyers. There is however, apart from the practical advantages of discussion, a more substantial justification underlying the arrangement. It will probably be agreed – without commitment to any dogmatic theory of separation of powers – that the proper distribution of power is a cardinal problem for a free society which wishes to preserve the initiative and responsibility of its individual members. While recognizing that the lawyer, in co-operation with the economist and social scientist, cannot be unconcerned with centres of power in the economic and social field, we are entitled to draw the lawyer's particular attention to those centres of power within his own sphere of competence which have the greatest potential for good or evil in the attainment of the ideals of a free society.

### **The International Significance of the Rule of Law**

It is in one sense a platitude to say that the peaceful conduct of international relations requires a greater respect for the Rule of Law. The Rule of Law is in this sense understood to mean the observance by States of international law as it exists today. But the Rule of Law in the wider sense in which it is used in this paper is equally if not more important in international relations. Any realistic observer must admit that the way in which national States treat the individuals under their control is an important factor in maintaining or undermining confidence between States. On the other hand, international law has as yet only partially recognized, and international practice has most inadequately developed, machinery to protect the rights of the individual which underlie the function of the Rule of Law in free societies.

Even where international law has imperfectly developed obligations regarding the administration of justice in different national jurisdictions, lawyers of different countries have an exceptional opportunity to express a professional and moral concern with the administration of justice in general. Indeed, where governments

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<sup>8</sup> It was originally intended to divide the work of the Delhi Congress between five committees, but as mentioned above, following suggestions made at the exploratory Seminar in Oxford in September 1958 the consideration of the Judiciary and Legal Profession was entrusted to a single committee, thus reducing the total number of committees to four.

may be to some extent inhibited by political considerations from dealing with matters of actual international concern an exchange of views across the frontiers by lawyers of free societies in their private capacity may prove helpful; such interchange based on allegiance to common professional standards and shared traditions may minimize the national and political difficulties which often undermine the official relations of States. This may in time create a world-wide climate of opinion which will facilitate the full and unquestioned incorporation into international law of common principles underlying the administration of justice in all countries. This was conceived to be the underlying purpose of the Delhi Congress and it was with this end in mind that this Paper was written.

### **The Necessary Limitations of the Working Paper**

It should be finally emphasised that this was only a Working Paper. It did not purport to be a comprehensive and authoritative statement of the basic principles of theory and practice underlying the Rule of Law, even within the special meaning here assigned to that term. It aimed only to provide a guide to what would appear to be some of the major problems for discussion and to indicate in a tentative fashion the general nature of the conclusions which might reasonably be hoped to emerge from the Delhi Congress. Moreover it was prepared within the limitations of knowledge of the writer and the information available at the time of writing from different countries. It could not and – even if this had been technically possible – would not have been attempted to give a comprehensive survey of all legal systems, it sought merely to illustrate by a few convenient examples the nature of the problems to be investigated. On the other hand, the conclusions tentatively set out at the end of each section were reached in the light of information not national statements on the Rule of Law submitted to the International Commission of Jurists as well as the records of past conferences of the Commission and of other international organizations.

### **Summary and Conclusions**

(1) The Rule of Law is a convenient term to summarize a combination of ideals and practical legal experience concerning which there is over a wide part of the world, although in embryonic and to some extent inarticulate form, a consensus of opinion among the legal profession.

(2) Two ideals underlie this conception of the Rule of Law. In the first place, it implies, without regard to the content of the law, that all power in the State should be derived from and exercised in accordance with the law. Secondly, it assumes that the law itself is based on respect for the supreme value of human personality.

(3) The practical experience of lawyers in many countries suggests that certain principles, institutions and procedures are important safeguards of the ideals underlying the Rule of Law. Lawyers do not however claim that such principles, institutions and procedures are the only safeguards of these ideals and they recognize that in different countries different weight will be attached to particular principles, institutions and procedures.

(4) The Rule of Law, as defined in this paper, may therefore be characterized as: "The principles, institutions and procedures, not always indetical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men."

## FIRST COMMITTEE

### The Legislative and the Rule of Law

#### Introduction

The underlying conception of the Rule of Law, which is put forward in this Working Paper, presupposes that the law serves the people. The "people" is not necessarily identical with the will of the majority, but it is equally or even more true that the will of a minority cannot represent the people. In a society under the Rule of Law both majority and minority alike accept minimum standards or principles which represent the basic duties of society to every member thereof. Whatever the law-making authority, and whatever formal restrictions may or may not be placed on its legislative powers, it will in a society under the "Rule of Law", in the sense implied in this paper, respect the minimum rights of the individual and the corresponding duties of society as a whole. Any other conclusion will in the last analysis lead to the unacceptable result that a society, in which the will of a dictator, an oligarchy or an oppressive majority can find expression in formal law, may claim to live under the Rule of Law, however shocking such law may be to the conscience of civilized humanity.

The Rule of Law therefore implies certain limitations on legislative power. The lawyer has a direct interest in the *form* of such limitations; whether, for example, they form part of the enforceable law of a written constitution or whether at the other extreme they constitute only a set of more or less defined principles of abstention tacitly accepted by the legislature. He has further a duty, as has been emphasised in the Introduction to this whole Working Paper, to understand and make clear to the community the essential *framework of values* which he considers to underlie these limitations and in the light of which he carries out his professional tasks. It is these two aspects of legislative power which are suggested as the main subjects of discussion for the First Committee.

On the other hand it must be recognized that it would be logically possible to bring within the field of the First Committee, at all events in the form of implied restrictions on the Legislature expressed in negative propositions, consideration of practically the whole conception of the Rule of Law. If, for example, the independence of the judges is a principle of the Rule of Law, then this might be expressed in the form that the Legislature must not interfere with the Judiciary. It has seemed convenient however, with due

recognition to the relevance to the Rule of Law of what in the law of the United States would be called "procedural due process", to refer detailed consideration of its implications to the Committees dealing with the Executive, the Administration of Criminal Justice and the Judiciary and the Legal Profession.

### **The Form of Limitations on the Law-Making Functions**

It would be obviously beyond the practical possibilities of this paper to review any large number of countries as far as the form of limitations on the law-making functions of their Legislatures is concerned. In some countries the Legislative is in strict constitutional theory supreme by simple expression of a majority; in others it is supreme, provided it carries out a special procedure, of greater or less practical difficulty, generally involving a majority decision of pre-determined size with or without a referendum. In yet a third category there are in law absolute limits on the legislative power. Where there are limits, conditional or absolute, there may or may not be a power of judicial review by the Courts to ensure that these limits are observed.

The statement submitted to the International Commission of Jurists from *England* is relatively simple and categorical and may provide a useful point of departure. It may be summarized as follows.

There are no legal limitations on the power of the Legislature. The principle is that Parliament is sovereign. This means:

- (1) that an Act of Parliament cannot be altered by any judicial or executive authority;
- (2) that no decision of any judicial or executive authority can restrict the power of Parliament to legislate;
- (3) that no other organ can legislate without authority from Parliament;
- (4) that an Act of Parliament may alter the Common Law or any previous Act of Parliament, and there is no distinction in this respect between constitutional law and any other law; it follows from this that each Parliament is sovereign as against all previous Parliaments.

Parliament is not by nature permanent. It is summoned and dissolved at the will of the Crown on the advice of the Prime Minister or head of the elected government. The Bill of Rights, 1688, provides that Parliaments shall not exceed 5 years. There is, of course, no limitation upon the power of a Parliament by legislation to extend its duration for an unlimited time; it was extended to eight years in World War I and to ten years in World War II.

It is a concept of English constitutional law that the Constitution is continually developing. At the present time it is also a concept that Parliament represents the will of the people. To both these concepts

any limitation upon the legislative power of Parliament would be repugnant. It would seem from the standpoint of English lawyers that the question whether or not limitations upon legislative power are essential to the Rule of Law is one involving political rather than legal considerations. Nevertheless the English report adds the important qualification that practical limits are imposed on the theoretically unlimited powers of Parliament by the freedom of the press, the freedom of association, the power of public opinion and the habit of responsible government under the party system. It is suggested below that it may be necessary for lawyers, even in a system with the same basic recognition of the sovereignty of Parliament as in England, to give closer attention to what may be called the "practical" or "extra-legal" limitations on the legislative power of Parliament.

The *United States*, which in many respects follows the pattern of English law, nevertheless emphasises limits on legislative power both in respect of values of substance and subsidiary legal values considered necessary to give the former effective protection. Such limits are not inviolable but their alteration involves a change in the Constitution, which, with its Federal form and tradition, cannot easily or lightly be effected. These characteristics are emphasised in the following citations from the American report to the International Commission of Jurists:

*(a) Fundamental Legal Rights of Substance as Limitations on Public Authority*

"The most effective means devised by the American system to protect the fundamental legal rights of the individual are the guarantees, commands and prohibitions expressed in our written constitutions which limit the scope and exercise of government power. These constitutions are held by us to be the title deeds of individual liberty under law; their enduring strength lies in the fact that they are flexible documents. The dual nature of American government should be constantly borne in mind; it consists of a division of legislative, executive and judicial powers between state and nation, and between the three branches within each government.

"Thus Art. 1, Sec. 9 of the original federal Constitution expressly denies to Congress certain powers: 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it;' and 'No Bill of Attainder, or ex post facto Law, shall be passed.' As to the judicial power, Art. III, Sec. 2 provides: 'The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.'

"In addition, there are certain restrictions on the lawmaking powers of state governments: 'No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts' (Art. I, Sec. 10), and: 'The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States' (Art. IV, Sec. 2).

"There were in 1789, and are now, many other rights which the people and their representatives hold sacred. Accordingly, only two years later in 1791 the first ten amendments, known as the Bill of

Rights, were added to the Constitution. They are designed to make wholly secure, as far as adverse action by the federal government is concerned, such basic rights of individual liberty as: the free exercise of religion which includes complete separation of church and state; freedom of speech and of the press; the right of peaceable assembly and petition for a redress of grievances; the right to bear arms; freedom of the home from the quartering of soldiers in time of peace; security of the people in their persons, houses, papers, and effects against unreasonable searches and seizures; indictment by a grand jury; prohibitions against double jeopardy, self-incrimination, deprivation of life, liberty or property without due process of law, and the taking of private property for public use without just compensation; a speedy and public trial of all criminal prosecutions by an impartial jury in the locality wherein the crime shall have been committed; the right of the accused to be informed of the nature of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining his own witnesses, and to have the assistance of counsel for his defense; freedom from excessive bail and excessive fines, and from cruel and unusual punishments.

"Similar provisions are generally found in the constitutions of the various states. Moreover, following the Civil War, new restrictions were imposed upon the state governments by the broad language of the Fourteenth Amendment of the federal Constitution: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' In addition, the due process clause of this Amendment is considered by the courts to encompass a number of the Amendments of the Bill of Rights which were originally applicable to the federal government alone. These embrace notably the substantive freedoms protected by the First Amendment."

The constitutional limitations on legislative powers laid down in the different State constitutions, as well as in the Constitution of the United States, are enforceable through the courts. This power of the courts is deemed to be inherent in the judicial process and does not derive from a legislative grant. However a rather fine distinction has emerged on the one hand between the laying down of procedures, or the narrowing of the scope of appellate review, in such cases by legislation, and on the other the total denial by legislation of access to the courts of first instance or appeal. The former is possible, the latter is considered to be inconsistent with the general principles underlying the constitution.

It is of course possible to amend the Federal and State Constitutions. The procedure for amendment of the Federal Constitution is described in the American report to the International Commission as follows:

"Under the federal Constitution Congress itself must propose amendments whenever voted by two-thirds of each House. It must call a convention whenever requested by the legislatures of two-thirds of the states. In practice, all proposals have been by Congress, by joint resolutions not requiring presidential approval. To obtain ratification of proposals, Congress must choose one of two methods - either by the legislatures of three-fourths of the states, or by conventions



in three-fourths of the states, in either case with approval within such time limit as Congress may prescribe. Once Congress has made this choice, neither a state legislature nor the people can change the method or the proposed text. However, if Congress specifies ratifications by convention, each state may provide under its own law for the selection of its convention members."

The procedure of amendment of State Constitutions varies, but for our present purpose it is sufficient to emphasise that the amendments themselves must meet the requirements of the Federal Constitution, and in particular with regard to the basic liberties therein guaranteed.

Apart from amendments, the possibility of devices circumventing the constitutional guarantees as interpreted by a Supreme Court have to be considered. The comments of the American reports are in this connection particularly interesting and have an importance which is by no means limited to the United States:

"Various methods could probably be devised to achieve the effect of an amendment to the federal or a state constitution without adhering strictly to the amendment procedures above discussed. There are no instances of genuine 'circumvention' at the federal level; very few, if indeed any, at the state level. We do not recall any instances of increase in size of the legislature in order to facilitate adoption of an amendment.

"When there are flexible numerical limits on the number of judges in a court of last resort, the legislature and executive may combine to increase the number of places and may fill the resultant vacancies with appointees known or supposed to support previously rejected or strongly desired theories of constitutional interpretation. This was done by Congress as to the Supreme Court in connection with the 'Legal Tender Cases' after the Civil War, and was unsuccessfully attempted in 1937. There is the possibility of action by Congress, under its power to control the appellate jurisdiction of the Supreme Court, to prevent judicial review by that Court of matters decided favorably to congressional action by inferior federal tribunals; no such action has ever been taken. A bill is pending in Congress, with considerable support indicated, to remove existing appellate jurisdiction in certain specified areas.

"The principal protective guarantee clauses of the federal Constitution were deliberately couched in such broad, general language as, by known intention of the draftsmen, to allow for flexible adaptation to later conditions and demands which were not present then and could not be foreseen. Judicial interpretation finds new meanings in these clauses. Throughout our history there have been times when decisions of the Supreme Court have stimulated some critics, who disagreed with the reasoning of the written opinions of the Justices explaining these decisions, to assert that the Court had achieved an amendment by indirection; but even here there is no suggestion from responsible men that such decisions have been motivated by bad faith, ulterior motive or a purpose to circumvent the requirements for orderly, formal amendment. Criticism and disagreement are inevitably by-products of the doctrine of judicial supremacy.

"Congress or a state legislature could make constitutional guarantees of individual rights ineffective by exercising its control over the jurisdiction of the courts, so as to deny or withhold any judicial

remedy. During the early period of our history Congress withheld from the federal courts any jurisdiction over claims against the United States, so that claimants of just compensation for a taking of private property for a public purpose had no recourse except to Congress, in spite of the guarantee of judicial review contained in the "due process" clause. Even today the federal courts do not have jurisdiction to entertain a money claim against the United States founded upon or arising out of a treaty although recourse may still be had to Congress, *ex gratia*, and an owner who has been deprived of property by the effect of a treaty may sue in damages or seek an injunction against the officer taking the property."

It is instructive to compare another legal system, that of *India*, which has also close affinities with English Law, with that of the United States.

The Indian Constitution is a federal one and the powers of Parliament, as between the Union Legislature and the State Legislature, are set out in certain Articles and legislative lists *viz.* (1) Union, (2) State and (3) Concurrent. The Constitution by Chapter III guarantees Fundamental Rights. There are: Art. 14 – Equality before law; Art. 15 – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth; Art. 16 – Equality of opportunity in matters of public employment; Art. 17 – Abolition of Untouchability; Art. 19 – Protection of the right of the freedom of speech and expression, peaceful assembly, formation of associations or unions, free movement, the right to reside and to settle in any part of India and to acquire, hold and dispose of property and to practice any profession, or to carry on any occupation, trade or business; Art. 20 – Protection against conviction except for the violation of a law in force at the time of the commission of the offence and prohibition against punishment for the same offence more than once; Art. 21 – Protection of life and personal liberty except according to procedure established by law; Art. 22 – Protection against illegal arrest or detention and the right to consult and to be defended by a legal practitioner of his choice and prevention of detention in police custody without being placed before a magistrate within 24 hours; Art. 23 – Prohibition of traffic in human beings and forced labour; Art. 24 – Prohibition of employment of children under 14 in factories, mines or hazardous occupations; Art. 25 – Freedom of conscience and free profession, practice and propagation of religion; Art. 29 – Protection of interests of minorities; Art. 31 – Right to property.

All laws, whether made by the Central or a State legislature must be "subject to the Constitution" [Art. 245 (1)] and laws that are inconsistent with it are "void" (Art. 13).

Because of this any law can be challenged in the ordinary courts as *ultra vires* the Constitution. The final arbiter of this is the Supreme Court (Arts. 141, 142 and 144).

Many laws have been declared *ultra vires* and unconstitutional by the courts.

The laws can be challenged:

- (1) By writs in the High Courts; also
- (2) By writs in the Supreme Court if a fundamental right is involved.
- (3) In the ordinary civil courts; and
- (4) On a reference by the President to the Supreme Court, e.g., (1951) S.C.R. 747.

The Constitution can be amended under Art 368 by the special procedure and the enlarged majorities set out there. This has been done several times to get round the effect of certain Supreme Court decisions. The function of the courts in India is, as in England, to declare what the law is and not to legislate. If laws are to be altered that must be done by the legislature. If they go beyond the powers conferred on them by the Constitution the courts step in and declare the laws *ultra vires* the Constitution. But if the Constitution itself is amended, as it can be, then any fresh law made in line with the amendment would be good even if it would have been bad before the amendment.

With the legal systems which have been mentioned above may to some extent be contrasted a legal system such as that of the *German Federal Republic* in which there is absolute limit set to the law-making power. The position as set out in the Report submitted to International Commission of Jurists is as follows.

According to Article 20(3) of the Constitution the Legislative is restricted by the *constitutional order* laid down in the constitution; this applies particularly to the *fundamental rights* set out in the Constitution and *separation of powers* as between Executive, Legislature and Judiciary. The Constitution can only be changed (by a  $\frac{2}{3}$  majority in both Houses of the Legislature) in so far as such a change does not contradict the principle of Article 79(3) of the Constitution, which forbids alteration thereof in respect of the Federal structure, the participation of the *Länder* in legislation, or the basic principles laid down in Articles 1 and 20. This latter limitation is for our present purpose highly relevant and it may therefore be useful to cite the articles in question.

#### Article 1.

- (1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledges inviolable and unalienable human rights as the basis of every human community, of peace and justice in the world.
- (3) The following basic rights shall be binding as directly valid law on legislation, administration and judiciary.

[There follow Articles 1–17 dealing with the right to “free development of personality, life and physical inviolability” (Art. 2); equality before the law (Art. 3); freedom of religion and conscience (Art. 4); freedom of expression (Art. 5); marriage and family rights (Art. 6); educational rights (Art. 7); freedom of assembly (Art. 8); freedom of association (Art. 9); secrecy of communications (Art. 10); freedom of movement (Art. 11); freedom of choice of work (Art. 12); inviolability of the dwelling (Art. 13); the right to property and inheritance; and the conditions of nationalization of resources (Arts. 14 and 15); rights of citizenship and freedom from extradition; and the right to asylum (Art. 16); right of petition and complaint (Art. 17); Article 18 permits on the finding of the Federal Constitutional Court the forfeiture of rights under Arts. 5, 8, 9, 10, 14, 16 where they are used to attack the “free democratic basic order”. Art. 19 (2) provides that “in no case may a fundamental right be affected in its basic principles”.]

Article 20.

- (1) The Federal Republic of Germany is a democratic and social federal state.
- (2) All state authority emanates from the people. It shall be exercised by the people in elections and plebiscites and by means of separate legislative, executive and judicial organs.
- (3) Legislation shall be limited by the constitution, the executive and the administration of justice by legislation and the law.

It should be added that an amendment of the Constitution of March 26, 1954 lays down that the agreement of a treaty in certain circumstances with the provisions of the constitution is sufficiently established by a statement to this effect in the treaty. The validity of this amendment, which might be said to limit the functions of the Constitutional Court assigned to it under the separation of powers, is a matter to be decided by the Constitutional Court.

The invalidity of laws passed by the Legislature may be taken up by the Constitutional Court in four ways:

(a) by a reference of the Federal or *Land* Executive or by a third of the members of the *Bundestag* (Lower House of the Federal Legislature);

(b) by a reference from a Court which has to decide a case brought under the law in question;

(c) where the compatibility of legislation with the Constitution is disputed in respect of the rights and duties of Federal Organs or of the *Bund* and the *Länder*;

(d) by a direct constitutional complaint to the Federal Constitutional Court on the part of an individual who has been deprived of a fundamental or similar right (“similar” here includes the equal status as citizens of all Germans, the right to vote, freedom from extraordinary courts, the right to a legal hearing and the legal safeguards in cases of liberty).

It may be useful to consider another type of legal system in which the legislative power, although to some extent limited by the *form* of law-making, is not or is not seriously restricted as to the *substance* of law-making. Thus, the legislative power in *Sweden* is vested in principle in the King and the *Riksdag* jointly. A joint decision by both is required in order that a law may come into being. In the case of ecclesiastical laws a joint decision is also required of an ecclesiastical body (*synod*). For the legislator the only generally accepted limitations are that legislation shall follow the forms prescribed in the constitution. The Constitution of 1809 thus contains relatively detailed rules regarding the procedure to be followed in making laws.

One paragraph in the Constitution, Form of Government (paragraph 16), contains certain provisions expressed in archaic language on the principles which the King is to follow in exercising his functions. These general principles provide, for example, that no one may be expelled from one place to another, that nobody's conscience shall be coerced, that everyone shall be allowed freely to practise his religion, that no one may be deprived of property, fixed or movable, without trial and judgment, etc. This section is at times regarded as restricting the King's ability to participate in, e.g., legislation relating to the confiscation of property. In practice, however, these archaic constitutional rules are not of any great importance and are of limited significance in maintaining the "Rule of Law".

There is no specially established procedure for declaring laws to be inconsistent with the Constitution. It is a disputed problem as to whether the courts can set aside laws which in due order have been accepted by the King and Parliament as inconsistent with the Constitution. The general opinion, now, however, is that the courts are entitled to examine the constitutional validity and the legality of laws made jointly by the King and Parliament.

The rules of the Constitution may be altered without great difficulty by two resolutions by simple majorities in different *Riksdagar*, elections to the new *Riksdag* having, however, taken place between the adoption of the two resolutions. This means in reality that there is nothing to prevent a majority of the *Riksdag* altering the Constitution provided the majority survives a subsequent election. There is no protection for the minority.

In other countries the legislative power is limited to a greater extent than in Sweden, although the restrictions may fall short of a comprehensive guarantee of fundamental rights. Thus in *Ceylon* there is a written constitution as set out in the *Ceylon (Constitution) Order in Council, 1946*. This instrument contains the basic limitations on the legislative power of the House of Representatives and the Senate which form the legislature of the country. Section 29 of the Order in Council restricts the powers of Parliament to make laws.

It may be useful to quote in its entirety the relevant part of this section.

*"Section 29/2*

No law shall –

- (a) Prohibit or restrict the free exercise of any religion.
- (b) Make persons of any community or religion liable to disabilities or restrictions to which persons of the other communities or religions are not made liable.
- (c) Confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions.
- (d) Alter the constitution of any religious body except with the consent of the governing authority of that body.

*"Sub-Section (3)*

Any law made in contravention of Sub-Section (2) of this section shall to the extent of such contravention be void."

The restriction of legislative power imposed by this section has, however, been expressly excluded from application to the law creating separate electorates for the representation of persons registered as citizens under the Indian and Pakistani Residents (Citizenship) Act. This was achieved by an amendment to the Constitution in 1954.

The limitations contained in Section 29 are intended to be safeguards of the rights of minorities in Ceylon. It will be noticed that the restrictions are exclusively directed towards that purpose. It is not a statement of fundamental rights but is purely an attempt to prevent a majority belonging to a particular racial or religious group from depriving any other racial or religious group from enjoying certain fundamental rights such as freedom of worship etc. Projects for a new constitution have been mooted in which there would be a more comprehensive statement of fundamental rights.

There is no procedure laid down in the Constitution to challenge the validity of any laws which are in contravention of or inconsistent with the provisions of Sections 29. But if any such law operates to the hardship of any particular individual, then he can challenge such law by defying it and thereby inviting the matter to be canvassed in a court of law or by questioning the right of any public officer seeking to enforce such a law by the use of the prerogative writ before the Supreme Court. There have been instances in the past where the Supreme Court and the Privy Council have adjudicated on the legality of certain items of legislation which were in apparent conflict with the restrictions of Section 29.

The limitations laid down in Section 29 can be amended or repealed by a  $\frac{2}{3}$  majority of the whole number of members of the House (including those not present). Section 29 (4) reads thus –

"In the exercise of the powers under this section, Parliament may amend or repeal any of the provisions of this order or of any other order of His Majesty in Council in its application to the Island. Provided that no Bill for the amendment or repeal of any other provision of this order shall be presented for the Royal Assent unless he has endorsed on it a certificate under the hand of the Speaker and the number of votes cast in favour thereof in the House of Representatives amounting to not less than  $\frac{2}{3}$  of the whole number of members of the House (including those not present). Every certificate of the Speaker under this Sub-Section shall be conclusive for all purposes and shall not be questioned in any Court of Law."

Parliament therefore can amend or repeal even a restrictive part of parts of Section 29. The size of the legislature is laid down in Section 11 and cannot be increased except by a  $\frac{2}{3}$  majority because that would amount to an amendment of the Order in Council. The only device by which the procedure can be circumvented is by so delimiting constituencies from time to time as to ensure the  $\frac{2}{3}$  majority of persons of a similar view in regard to matters pertaining to the restrictions imposed by Section 29.

Finally it should be mentioned that it is possible to have a constitution as in the *USSR* which sets out a list of fundamental "rights of the citizen" but makes them contingent upon the interests of a society in which the Constitution specifically attributes the leading role to a single Party (see Chapter X of the Soviet Constitution, 1936, particularly Arts. 125 and 126). Moreover there is no express limitation of the power of the Legislative in regard to such fundamental rights and no power of judicial review.

Furthermore the constitution itself is subject to amendment (by a two-thirds vote of both houses) and has been amended by what is in form a Select Committee of the Praesidium in its legislative capacity, the amendment only later being notified to the Supreme Soviet.

It would serve no useful purpose to attempt further elaboration of the forms of limitations on legislative power, following or departing in different ways from the pattern set in the national legal systems considered briefly above. For the purposes of an *international* discussion, seeking to reach agreement on fundamental principles, it may be useful to ask a number of questions, even if the answers must in some cases be inconclusive. To the first question, which is whether the Rule of Law presupposes certain limitations on legislative power we have, arguing from general principles, made an affirmative answer. From a more practical point of view it may here be added that it is scarcely possible even for lawyers to argue that the limitations on legislative power implied in the Rule of Law are, if they exist, a political matter entirely outside the legal sphere. It is necessary to bear in mind that a number of international conventions, which have binding force under international law, do in fact impose on national legislatures limitations

on their power. Of such conventions the European Convention on Human Rights is an outstanding example. If, therefore, it is sought to create a climate of opinion in which by degrees the conception of the Rule of Law as understood in this paper will become universal law, clearly the lawyer will not be able to disinterest himself in the basic limitations on legislative power implied in such a conception of the Rule of Law.

The second question is: assuming that such limitations on legislative power are a necessary part of the Rule of Law, must they be embodied in a Constitution? This question seems formal rather than real. On the one hand countries which have no formal written constitution generally have a number of Statutes as well as a large body of customary law from which the accepted limits on legislation can be implied. On the other hand no Constitution of itself can provide complete guidance to the legislature as to the limits of its competence. It is true, for example, that the more general phrases of the United States Constitution – the conception of “due process” is the outstanding instance – may be given in a Constitution, such as that of India, more specific meaning, but a third question is required to give reality to the problem of whether to have a written Constitution or not. This third question is whether the limitations on legislative power are to be finally interpreted and so decided by an independent judicial tribunal. Is, in other words, judicial review of legislation an essential part of the Rule of Law as understood in this paper? There are clearly a diversity of views as to the correct answer to this question. What is clear is that differing historical reasons have lead different countries to accept or reject the theory of judicial review of legislation. It has been suggested, for example, by Professor Hamson in his Report on the Chicago Colloquium on the Rule of Law, referred to above, that the emphasis found in the present German legal system on judicial review is a natural reaction to a period in which the authority of the Courts was undermined. Again, Mr. Brohi in his treatise on “The Fundamental Law of Pakistan” (1958) puts the emphasis largely on the distrust felt by the framers of written Constitutions of legislative supremacy, particularly where the rights of individuals and of minority groups are concerned.

It does seem not possible to lay down a categorical and universal rule that limitations on legislative power which it is assumed are necessary to the Rule of Law must be interpreted by independent courts of law. Such an approach would be an illustration of the danger referred to in the Introduction to this paper, namely, of the tendency of lawyers to conceive of the essential characteristics of the Rule of Law in terms of purely legal institutions and practices. Nevertheless there is a contrary danger to which lawyers rooted in the traditions of countries without judicial review are prone; that is, to assume that the limitations on legislative power which are made effective in their countries through political channels can be



similarly enforced in other countries with very differing political conditions.

The fourth question has particular relevance to those countries, and it is an increasing number, which have by their Constitution imposed limits on legislative power and at the same time entrusted a judicial body with the final decision as to the scope of those limits. Are there any general principles, based on the experience of different countries, which can be elaborated concerning the way in which Constitutions can be amended and/or judicial review evaded? It is suggested that it is impossible to lay down, to take a crude example, that amendment of a Constitution should require a particular size of majority. What can be said is that all devices, whether by the rearrangement of the electorate or the packing of the reviewing judicial body must be judged by a common criterion: how far do they create an immediate and inevitable danger of invasion of those areas from which legislature must abstain if the Rule of Law is to be upheld?

### **The Content of Limitations on the Law-Making Functions of the Legislature**

It is desirable in the first place to clarify some questions of terminology. When we speak of the content of limitations on legislative power we are here referring principally to the fundamental rights of the individual which he has assumed to enjoy in a free society as distinguished from the instrumental rights which a legal system provides in order to give particular effect to these fundamental rights. However, the phrase fundamental rights is frequently used by Constitutional writers to cover both the basic rights of the individual and what we have called instrumental rights. Thus it will be seen in the extract cited above from the American Report on the Rule of Law that the Bill of Rights and the later amendments of the Constitution are in fact a mixture of individual basic rights in our sense and instrumental rights. It is clear that these instrumental rights are among the most important to be protected in a society under the Rule of Law by limitations on the power of the legislature. But for reasons which have been explained above they are not considered in detail here but deferred for consideration in the sections of the working paper concerned with the Executive, the Administration of Criminal Justice and the Judiciary and the Legal Profession. It may, however, be here stated that it is conceived to be an essential part of the necessary limitations on legislative power that the legislature will not interfere with the citizen's rights to "due process" in the sense of "legislative, executive and judicial fair-play".

#### **(a) Retroactive Legislation**

It has already been stated that underlying the Constitution of the Rule of Law are two elements; in the first place the formal

legality of all action taken in the name of organized society and in the second the recognition of certain basic human rights. Retroactive legislation undermines the reasonable certainty of men in their daily activities which it is the object of a formal legal system to ensure. Where retroactive legislation is prohibited it is, however, usually confined to retroactive penal legislation which makes punishable an activity which was not an offence at the time it was committed; alternatively, retroactive penal legislation may be objectionable because it increases the penalty for an offence which was more lightly punished at the time when it was committed. Condemnation of retroactive legislation outside the strictly penal sphere is more uncommon; taxation, for example, may be retroactively imposed. Moreover it is not unusual, even within the sphere of penal legislation, to pass Acts of Indemnity.

**(b) Equality Before the Law**

This conception which has been expressed in various ways (for example "equal protection of the laws" in the 14th amendment to the Constitution of the United States) is clearly fundamental to the conception of the Rule of Law put forward in this paper. It is not, however, a self-explanatory term. The difficulty arises partly from the inequality of men in terms of their natural endowment, still more from their factual inequality as far as social standing and economic status are concerned. It has been well said by Mr. Justice Bose of India in *State of West Bengal v. Anwar Ali*, All India Reports (1952) S.C. 75, that "it is impossible to apply rules of abstract equality to conditions which predicate inequality from the start". And Mr. Brohi in his work on "The Fundamental Law of Pakistan", referred to above, in dealing with Article 5 of the *Pakistan Constitution* (corresponding with Article 14 of the Indian Constitution) has said: "The principles on which the Courts in our country would apply the provisions of Article 5 ('all citizens are equal before the law and are entitled to equal protection in law') have yet to be fully worked out, and even when they are worked out they are bound to be so vague and nebulous that they are least likely to furnish any practical guidance either to the legislature or to the lawyer in the matter of finding out whether or not an impugned law offends against the right of equality guaranteed by our Constitution." This does not at all mean that an "equal protection clause" may not be of tremendous importance in the Constitution of a particular country (as it has clearly been in the United States, as well as in India and Pakistan), but it is very difficult to give concrete meaning in a Constitution to equality before the law without reference to the particular society to which it is to apply. This has been very clearly stated by Mr. Justice Bose in the above cited case, where he says in relation to India, "what I am concerned to see is not whether there is absolute equality in any academical

sense of the term but whether the collective conscience of a sovereign democratic republic can regard the impugned law contrasted with the ordinary law of the land as the sort of substantially equal treatment which men of resolute minds and unbiased views can regard as right and proper in a democracy of the kind we have proclaimed ourselves to be."

It is thus clear that the concept of "Equality before the law" is susceptible of two interpretations. It could firstly be a purely formal principle. In this manner it implies only that those persons shall be treated as equal whom the law regards as equal. Secondly – and it is with this meaning that we are here concerned – it may imply that the law should treat human beings as equals in respect of those qualities with regard to which it is right so to regard them. This is in essence a moral judgment which cannot be exhaustively defined within the confines of any Constitution and still less in any document applicable to many national societies. It is possible, as in Section 40(6) of the Constitution of *Eire* 1937, to lay down the general principle that "all citizens shall, as human persons, be held equal before the law", and then to limit the generality of the principle by saying that "this shall not be held to mean that the State shall not in its enactment have due regard to difference of capacity, physical and moral, and of social function." Alternatively, as in the *Pakistan* Constitution, there may be a general statement [Article 5(1)] that "all citizens are equal before law and are entitled to equal protection of law" and in other articles (13 and 14) examples may be given of particular applications of equality; thus Article 13(3) provides that "no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste or place of birth; and Article 14(1) provides that "in respect of access to places of entertainment or resort, not intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex or place of birth". Neither of these two techniques, however, can avoid vagueness or incompleteness. As a general principle limiting the competence of the legislature "Equality before the law" means simply this: the law passed by the legislature must not discriminate between human beings except in so far as such discrimination can be justified on a rational classification consistent with the progressive enhancement of human dignity within a particular society. It is easy to think of extreme examples of discrimination in legislation which would offend against the principle of equality before the law as here defined; legislation against the Jewish people under the National Socialist regime is a case in point. The essential value, however, of insisting on equality before the law lies in the necessity which it places on the legislature to justify its discriminatory measures by reference to a general scale of moral values. Equality before the law is thus the opposite to arbitrariness,

and in spite of the difficulty of its interpretation, lies at the root of the Rule of Law put forward in this paper.

**(c) Individual Liberties**

The traditional individual liberties may be divided into two categories. In the first place there is a comparatively limited group of fundamental rights which are the most direct expression of the dignity owed to the human person. Among these may be numbered freedom of religious belief and the right of the members of each society to choose the Government under which they live. In the second place come freedom of speech, freedom of assembly and freedom of association, whereby the first group of fundamental rights are given practical expression. Freedom of speech, assembly and association are not absolute. Their exceptions are justified by the necessity of reconciling the claims of different individuals to these rights and the criterion whereby this reconciliation can be effected is the concern of the law to ensure that as a whole the individual's status and dignity are observed. It is not here intended to examine in detail the way in which different countries interpret the common restriction on legislative power whereby Parliament is prohibited from interfering with such matters as freedom of speech or assembly. Here again, however, it is worth emphasising that the real significance of the restriction lies in the necessity of justifying the law restricting the particular freedom which is in question. It should also be mentioned that the qualified nature of such rights as freedom of speech and assembly gives additional importance to a question already discussed above, namely, the relevance of judicial review to the Rule of Law. In countries such as *England* where the right of freedom of speech rests not so much on any particular enactment as on the residual free activity of every citizen, except as restricted by law (as, for example, with freedom of speech by the laws of libel and sedition) the bias is heavily in favour of freedom of speech. In countries with a written constitution much must depend on the relative weight given to the constitution itself and by interpretation of the judges of the Articles permitting freedom of speech and providing the instances when it may be curtailed.

It will be clearly possible greatly to extend the list of individual liberties and it may be a question, for example, whether the right to individual freedom of movement within the territories of the particular society in question does not imply a basic restriction on the law-making power of the legislature which is essential to the Rule of Law. A similar doubt may exist as to the right freely to choose a profession. We are not, however, considering the entire foundations of an ideal society but rather those minimum rights and the corresponding limitations on legislative power which must be admitted in any society which claims to exist under the Rule of Law. It should also be borne in mind that the necessary flexibility

to extend the traditional rights such as freedom of speech to economic and social rights, is in practice provided by the principle of equality before the law in the way we have interpreted it above. Thus, a right to freedom of movement, which in any event could never be absolute, may be achieved by insistence that the law should not arbitrarily discriminate between the freedom of movement it allows to its different citizens. Of course there will be the question to decide what is meant by arbitrary, but this is only another way of asking when the exceptions to a general right apply.

It is perhaps desirable to give a somewhat more extended treatment to two of the individual liberties which have been discussed above. The right of the members of each society to choose the government under which they live is clearly a right which it is very difficult to apply in practice. We are not, however, here concerned with the delineation of the different units which may be held to constitute a separate society. We are asserting only that given a society the Rule of Law within that society will be an empty concept if it does not make provision for government responsible to the members of that society. Thus in his well known work "*The Law and the Constitution*" (Fourth edition, p. 60), Sir Ivor Jennings has said:

"A people that is free to change the direction of public policy by turning out a Government that does not accord with popular ideas will usually (though not always in respect of each) insist that among citizens engaged in the same kind of activity the laws should apply equally, irrespective of race, religion, colour, social importance, or wealth, and should be administered impartially among all citizens. A democracy necessarily implies equality in this sense, since each is free to choose. Finally the existence of a free system of government creates an atmosphere of freedom which is more easily felt than analysed, but which excludes, for instance, the use of unconscionable means of obtaining evidence, spying, unnecessary restrictions upon freedom of movement and of speech, and, above all, any attempt to restrict freedom of thought. These are intangibles which nevertheless produce an impression on the mind of any observant person who crosses the boundary from a dictatorial State into a free country. They cannot easily be forced into a formal concept dignified by such a name as the rule of law, and in any case they depend essentially upon the existence of a democratic system. The test of a free country is to examine the status of the body that corresponds to His Majesty's Opposition."

Put in terms of a limitation on the power of the legislature, the individual liberty which we are considering implies that Parliament will, at reasonable intervals (the qualifying adjective allowing for exceptional times, such as war) submit itself to the free election of the people and that, therefore, Parliament is incompetent to extend its own life beyond reasonable limits.

It is necessary to emphasise what to many lawyers will seem an unwelcome intrusion of political concepts into a discussion of the Rule of Law because, as has been made clear above, the full

functioning of the Rule of Law, as it is understood in this paper, does not merely depend on the working of legal machinery but also involves (no doubt to a different degree and in various ways in different countries) the ultimate sanction of the ballot box.

Of freedom of speech Mr. Justice Cardozo has said that it "is the matrix, the indispensable condition, of nearly every other form of freedom" [*Palko v. Connecticut* 302 U.S. 319, 327 (1937)]. Not only is freedom of speech an obvious prerequisite of the right to responsible Government discussed above, but it is an essential element for the satisfactory working of those procedural safeguards of basic liberties to which we have briefly referred above under the convenient American term of "procedural due process", but the functioning of which remains to be considered in more detail in this working paper. A limitation on the freedom of the legislature to interfere with freedom of speech has as one of its most important fields of application the publicity allowable in administrative and judicial processes and the right of citizens to comment on such processes. Freedom of speech being of its nature not an absolute but qualified right, there will necessarily be many different opinions as to what are the permissible restrictions on the publicity of judicial administrative proceedings and on the right to comment on them; thus, while it would probably be agreed that as a general rule criminal trials should be held in public, there is a wide divergence of opinion as to the extent of which proceedings before administrative tribunals should be so held. Not many countries would be prepared to go as far as *Sweden* in recognizing a *prima facie* right on the part of every citizen to have access to official documents<sup>1</sup> and there is the well known difference of attitude between American and English Courts, the former out of respect for freedom of speech being much more reluctant to restrain comments on the judicial process than are their English counterparts. What we are, however, here anxious to emphasise is that in spite of difference of emphasis in different countries, freedom of speech is not only a philosophic basis of a free society but also essential to the working of the machinery, whether legal or political, whereby its principles may be put into effect.

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<sup>1</sup> See the Press Act (F.P.A.) April 5, 1949. "to further free interchange of opinion and general enlightenment every Swedish citizen shall have free access to official documents in the manner specified below. This right shall be subject only to such restrictions as are required out of consideration for the security of the realm in its relation with foreign powers, or in connection with official activities for inspection, control or other supervision, or for the prevention and prosecution of crime, or to protect the legitimate economic interest of the State, communities and individuals, or out of consideration for the maintenance of privacy, security of the person, decency and morality," cited in Nils Herlitz, "Publicity of Official Documents in Sweden," *Public Law*, 1958, p. 51.

## Summary and Conclusions

(1) In a society under the Rule of Law both majority and minority alike, accept minimum standards or principles regulating the position of the individual within society.

(2) The necessary existence of such minimum standards or principles implies certain limitations on legislative power. Whether such limitations are embodied in a written Constitution or whether they are only the accepted conventions of legislative behaviour will depend on the political and legal conditions of different countries; but a lawyer who is concerned with the Rule of Law cannot disclaim interest in such limitations merely because within his particular society their ultimate sanction may be of a political nature.

(3) It cannot be said categorically that, even where limitations on legislative competence are included in a written Constitution, the concept of the Rule of Law automatically and inevitably involves the power of the courts to review legislation in the light of the Constitution; where such power, however, is successfully asserted, it is of the greatest importance that the authority of the Court should not be indirectly undermined by devices which leave only the semblance of judicial control without the acceptance by the legislature of responsibility for changing the Constitution in an open way by the prescribed methods.

(4) The legislature in a free society under the Rule of Law must:

- (a) abstain from retroactive penal legislation;
- (b) not discriminate in its laws as between one citizen and another, except in so far as the distinctions made can be justified in the particular circumstances of each society as necessary to, or as a necessary step in the establishment of, an ultimate regime of equal opportunity to all citizens;
- (c) not interfere with freedom of religious belief;
- (d) not deny to the members of society the right to responsible Government;
- (e) not place restrictions on freedom of speech, freedom of assembly or freedom of association, except in so far as such restrictions are necessary, to ensure as a whole the status and dignity of the individual within society;
- (f) not interfere with the procedural machinery ("procedural due process") whereby the above mentioned freedoms are given effect.

## SECOND COMMITTEE

### The Executive and the Rule of Law

#### Introduction

It is the assumption of a free society that the power to make its laws finds its ultimate authority in the people. In all but the smallest communities this authority must find expression in freely elected representatives. Such representatives do not require, and cannot expect to receive, a specific mandate for every exercise of their legislative authority, but they remain answerable to the people which at fixed intervals of time must have the opportunity to confirm, vary or change its choice of representatives.

The power to govern, i.e., to execute the laws which have been duly passed by the representatives of the people, cannot in a free society be exercised arbitrarily. Those who exercise such powers must act within the law and be responsible for their actions to the people through the control exercised by the representatives of the people in the law-making assembly (Legislature) and by the free choice by the people of the effective head or heads of the Executive; such choice may be directly expressed by election – e.g., of a President in the U.S.A. – or indirectly exercised through the power of a majority group in Parliament to determine the Government.

The power to make laws and the power to govern are not in the actual practice of many States entrusted to two sharply differentiated groups of individuals. Members of the Executive frequently have a second capacity as representatives of the people in the Legislature and the Executive generally enjoys special privileges in law or in practice in the introduction of the legislation. Without commitment to any dogmatic theory of the separation of powers it would appear from the experience of free societies that the *functions* of law-making and governing (as distinguished from the individual agents who perform such functions) together constitute in the absence of the appropriate safeguards a potentially dangerous combination of power. It is therefore a common practice in States which possess a written constitution to attribute to the legislative assembly the exclusive power of law-making.

On the other hand it is not uncommon to find in the constitution or in the common law of a country an exceptional power of law-making vested in the Executive to deal with special areas within the jurisdiction of the State, with periods when the legislature is not sitting or with conditions of emergency. And, while total delegation of the law-making power is as a general rule prohibited



expressly or by implication, it is the universal and, in modern conditions necessary and, indeed, inevitable practice for the legislative to delegate power to the Executive to make rules within defined limits. Such rules may be variously described but have the common characteristic that they owe their authority to the power delegated for this purpose to the Executive within the framework of, and subject to the conditions imposed by, the Constitution or by a particular law passed by Legislature. It is of the essence of the Rule of Law in a free society that the law-making power of the Executive, however extensive it may in fact be, should have a defined extent, purpose and method of exercise.

In all modern societies the Executive is necessarily entrusted with wide powers, not only, as has been seen above, in formulating the details of laws laid down in broad principle by the Legislative but also in the application of the laws. The application of the laws involves in the first place the extent of and ways by which the Executive can be compelled to carry out duties which the law imposes. This raises difficult questions as to the distinction between a duty and a mere power and also requires consideration of the kinds of persons or organs against which compulsive remedies are available.

Where the Executive has a power as distinguished from a duty under the law the exercise of the power must be within whatever limits the law prescribes. The real difficulty arises with regard to these limits. Are the limits to be construed solely by reference to the strict wording of the laws themselves? Alternatively, is the authority responsible for the fixing of such limits entitled to look beyond the law to principles, which, until the contrary can be proved, are assumed to be implied in the power giving laws? For example (to take a simple case in the French Report submitted to the International Commission of Jurists) the question might be raised whether a legal authority which has power to regulate the ringing of church bells might use this power as an indirect method of giving expression to anti-clerical prejudices.

If, as is assumed, the subordination of the Executive to the law is ultimately to serve the individual member of society, individuals who have suffered damage as the result of the illegal acts of the Executive must be given a remedy in damages or, in certain cases, by way of criminal prosecution. In the availability of such a remedy against the wrong-doing individual agent of the Executive or against the latter in its corporate capacity, or both, there is considerable variety in different countries. This raises extremely important questions. The feeling of the individual member of society that the Executive is composed of ordinary citizens who owe a personal duty to one another within the framework of the law lies at the heart of the conception of the Rule of Law in a free society, discussed in this paper.

There is also some difference between countries as to the kind

of illegal acts in respect of which the individual may have a personal remedy. Many countries admit that the individual agent of the Executive may be liable criminally and civilly for acts or omissions which would involve such liability if committed by an ordinary citizen. In some countries, however, there is the possibility of illegal acts on the part of the Executive which would not, if they had been committed by an ordinary citizen, have involved civil or criminal liability; if, in such an event, an individual has suffered loss as a result of these illegal acts, there may be no effective remedy in respect of loss already suffered. It remains to be considered how far, in pursuing such remedies as may be available to the individual in respect of illegal acts by the Executive, his position differs from that of a private citizen bringing legal proceedings against another private citizen.

A further critical issue is: what organs are to have the authority to decide whether the Executive has properly used its powers? In some countries this function is as a general rule entrusted to a special arm of the Executive itself acting on the complaint of the citizen; at the other extreme in many countries it is carried out by what is in effect a specialized branch of an independent judiciary – i.e. through administrative courts; in a third group of countries a mixed procedure is in operation. With regard to this third category control is partly exercised by the ordinary courts and partly by “administrative tribunals” and “agencies” which themselves may be to a varying extent subject to the ultimate supervision of the ordinary courts. In countries of this group – mainly, but not exclusively, those of the Common Law world – the attention of lawyers concerned with administrative law has been particularly directed (i) to the composition of such tribunals and agencies; (ii) to the extent to which, either as enjoined by statute or in accordance with principles formulated by the courts, they follow a “judicial” procedure; (iii) to the possibility of appeal to or supervision by the ordinary courts.

### **The Distinction between Total and Limited Delegation of Law-Making Powers**

In some Common Law as well as in Civil Law countries there is a fundamental distinction between the *total* delegation of the law-making power to the Executive and a *limited* delegation within a strictly defined area. Thus in the *United States* the position is summarised in the Statement of the Committee to Cooperate with the International Commission of Jurists as follows:

“The fundamental structural principle of the separation of powers between the three branches of government and the constitutional vesting of all legislative powers in the legislature are the basis for the doctrine that the law-making power shall not be delegated by the legislative to either of the other branches or any subordinate body thereof. This,

however, does not bar 'delegation' of rule-making power where reasonably specific standards are provided by the legislature. There is a distinction of substance, more than merely verbal, between 'legislation' and 'rule-making'."

In *India*, although the doctrine of the separation of powers has not been adopted in the full American sense, a distinction is recognised between the usurpation of the "essential legislative function" consisting "in the determination or choice of the legislative policy and of formally enacting that policy in a binding rule of conduct" on the one hand and conditional legislation on the other. The former cannot be entrusted to the Executive, but power to make the latter may be given. The precise limits of conditional legislation are not free from doubt but Basu (*Commentary on the Constitution of India*, Vol. II, 3rd ed., p. 248) says that the following functions cannot be delegated:

- (i) declaration of the laws in relation to any particular territory or locality;
- (ii) extension of the duration or operation of an Act beyond the period mentioned in the Act itself;
- (iii) repeal or amendment of a law.

It should be emphasised that these general principles require considerable modification in the light of recent decisions and that their precise scope has not yet been fully determined by the Indian Courts.

In *France* it is laid down in the first sentence of Article 13 of the Constitution of 1946 that "the National Assembly alone shall vote the laws" and it was expressly added at that date that the Legislature cannot delegate this right. It should be explained that a practice had developed between the wars of conferring on the Executive the power to issue *Décrets-Lois* – somewhat misleadingly called *pleins pouvoirs*. In fact the power was limited in the following ways:

- (i) the specified purpose of the enabling legislation had to be observed;
- (ii) the power was limited as to time;
- (iii) the *décrets-lois* had to be made in accordance with a specified procedure and subsequently it became customary for the law to be debated by the entire Council of Ministers, imposing upon them collective responsibility therefore;
- (iv) the *décrets-lois* although operative on publication could be nullified by a negative vote in Parliament.

The added phrase in Article 13 of the Constitution of 1946 has been described by one authority as a "prohibition" (Waline, *Droit Administratif*, 5th ed., p. 34) and by another as an "express condemnation" (Laferrière, *Manuel de Droit Constitutionnel*, 2nd ed., p. 1000) of *Décrets-Lois*.

At the time of writing it is not possible to assess the full legal significance of the legislative powers directly assigned under the new Constitution to the Executive.<sup>1</sup>

Particularly noteworthy is the clear distinction made in the Italian Constitution between a total delegation of the law-making power and a limited delegation:

"The exercise of the legislative function cannot be delegated to the government unless directive principles and standards have been specified and only for a limited time and for definite objectives."

On the other hand in some Common Law countries there is no *inherent* limitation as a matter of constitutional doctrine on the power of the Legislature to delegate its law-making powers, in as far as it possesses such power in the first place. And even in countries which recognise in theory the distinction between total and limited delegation there may be under the Constitution or under the ordinary law a certain legislative authority directly assigned to the Executive. For example in *India* when both houses of Parliament are not in session and the President is satisfied that exceptional circumstances justify it, he may legislate by an Ordinance. Any such ordinance, however, must be laid before Parliament and shall cease to operate if before the expiration of the period of six weeks from the reassembly of Parliament a resolution disapproving it is passed by both houses; the ordinance may be withdrawn at any time by the President (Constitution, Section 123; the Governor of a State has similar power in respect of his State: Section 213).

Further, there are certain territories in India, called "scheduled territories" for which special provision has been made on the ground that "they are culturally backward, and that their social and other customs are different from the rest of India" (Basu, *Commentary on the Constitution of India*, Vol. 2, 3rd ed., p. 651). In such territories the Governor of the appropriate State has plenary power

<sup>1</sup> The most significant change in that Constitution is the power given to the Government under Article 37 to regulate matters not governed by law. Such *règlements* are to be distinguished from "delegated legislation", which although very extensively used in the past in France, has been subject to the control of the *Conseil d'Etat*. It is true that by Article 34 Parliament alone can legislate for "the civil rights and fundamental guarantees given to citizens for the exercise of public liberties"; but the important function of determining whether the government's *règlements* impinge on the legislative sphere reserved to Parliament has been entrusted not to the *Conseil d'Etat* but to a Constitutional Council of nine members, of whom three are each appointed by the President of the Republic, the National Assembly and the President of the Senate, that is to say to a body primarily political rather than judicial in character. Moreover, the control of the Constitutional Council over *règlements* is not a remedy directly available to the subject whereby he can challenge the legality of Government action in an individual case, but merely imposes on the government an obligation to satisfy the Constitutional Council that the proposed text of the *règlement* does not *in abstracto* trespass on the field reserved to Parliament.

of legislation subject to consultation with a Tribes Advisory Council where such exists and to the submission to and approval of the legislation by the President.

In the *United States* the Constitution provides that "the privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it" (Section 9, para. 2). The President as Commander-in-Chief may decide when such an emergency exists and may suspend the writ, power to do so being early given to him by Congress. It is not entirely clear whether this important power in the Executive should be regarded as an inherent and original power vested in the Executive under the Constitution or whether it is merely an illustration of a particularly wide and exceptional delegation of power by the Legislative.

In *Italy* there is a somewhat wider power of legislation in the Government in that, in spite of Article 70 ("The legislative function is exercised collectively by the two chambers") and the opening paragraph of Article 77 ("The government cannot issue decrees having the force of ordinary laws without the authorization of the chambers") it is provided in the same Article that "in extraordinary cases of necessity and urgency" the government may adopt provisional measures having the force of law, called *Decreti-Legge*, which must however be ratified by the Legislature within 60 days, failing which the measures become retrospectively inoperative from the date of their issue. It is doubtful whether since the Constitution the power of the Commander-in-Chief to issue *military proclamations*, following the declaration of a state of war by the legislature (Article 78 of the Constitution) and a proclamation of martial law by the President, goes beyond the Commander-in-Chief's power (Sections 17 and 18 of the Penal Code of Martial Law) to issue proclamations "on matters pertaining to the law and to military penal procedure": i.e., such power could not be used to deviate from the law in force in respect of the rights of civilians.

An emergency power of law-making is given in *Austria* to the President under Article 18 (3)-(5) B of the Constitution but is limited as to:

- (i) time - i.e., when the Legislature is not in session or when it is prevented from meeting by *force majeure* which may include such circumstances as a breakdown of the railway system, natural catastrophe and exceptional public disturbance;
- (ii) content of the laws so made - i.e., certain matters are excluded;
- (iii) purposes of the laws so made, which must be justified by reference to (i) and (ii) above;
- (iv) procedure - i.e., the laws must be made on the suggestion of the Government in agreement with the Standing Committee of the Legislature;

(v) control, in so far as the laws so made are subject to the supervision of the Constitutional Court.

In *Sweden* there appears to be an inherent power in the government to legislate to some extent in a way which does not entirely conform with the usual legal pattern of most West European countries, although doubtless through the operation of a free press and political controls the actual result may be similar. The following statement is taken *verbatim* from the answer to the Rule of Law questionnaire given by the Swedish Section of the International Commission of Jurists:

"By virtue of its constitutional powers the Government is entitled to govern the country and in some measure on its own to make laws chiefly on matters concerning the general well-being of the country. This is spoken of as the King's power of making economic legislation. This power is in reality fairly extensive and goes as far, for example, as enabling the Government to enforce the administrative orders relative to these laws by incorporating penalties on condition that no sterner penalty than prison is provided for. The limits of the Government's administrative legislative power are in principle obscure. A certain procedure has, however, now been established which today causes no appreciable cleavage of opinion in practice. In principle it may be said that the Government is entitled to issue such orders as may be required to ensure proper social progress and the maintenance of order, provided that as a result there is no serious interference with civil liberties (personal freedom, right of ownership, etc.)."

It may be interesting to note that the original legislative power of the Executive in the *USSR*, and in the countries that have followed its legal pattern, is much wider than in any of the countries which have been reviewed above. For example, in the *USSR* the Praesidium of the Supreme Soviet, which has many purely executive functions, can "issue decrees", a power not further defined or limited in the Constitution [Article 49 (b)].

#### **Subordinate Legislation in Execution of a Particular Law or of the Law in General**

In countries such as *Ceylon*, *Australia* or the *United Kingdom* delegation of the law-making power depends on the terms of the particular Statute authorising such delegation. Delegation in particular Statutes is often very far-reaching. Sir Carleton Allen in *Law in the Making* (6th ed., p. 527) gives the following example from the United Kingdom of what he describes as "very far-reaching and vague powers" to make Defence Regulations under the Supplies and Services (Transitional Powers) Act, 1945 and the Supplies and Services (Extended Powers) Act, 1947:

"(1) to secure a sufficiency of those (supplies and services) essential to the well-being of the community, or their equitable distribution, or their availability at fair prices;

- (2) to facilitate the demobilization and re-settlement of persons and to secure the orderly disposal of surplus material;
- (3) to facilitate the readjustment of industry and commerce to the requirements of the community in time of peace;
- (4) to assist the relief of suffering and the restoration and distribution of essential supplies and services in any part of His Majesty's dominions or in foreign countries that are in grave distress as the result of war;
- (5) for promoting the productivity of industry, commerce and agriculture;
- (6) for fostering and directing exports and reducing imports, or imports of any classes, from all or any countries and for redressing the balance of trade;
- (7) generally for ensuring that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community."

It is however to be emphasised that in the British practice it is usual (although not obligatory) for Statutes to require delegated legislation to be laid before Parliament with or without the possibility of its being affirmed or negated by resolution.

In Civil Law countries a power to execute the law through subsidiary legislation is frequently given in respect of the law generally by the constitution itself, apart from any specific authority in particular laws. Thus in *France* by Article 47 of the Constitution of 1946, the President of the Council of Ministers had the duty of ensuring "the execution of the laws". This duty of execution authorized the Executive to issue *décrets* and *arrêtés* which may be distinguished from laws directly passed by the Assembly in that:

- (1) They had to state:
  - (i) the legal basis of the *décret* or *arrêté*,
  - (ii) the reasons (if so required by the relevant law),
  - (iii) the contents,
  - (iv) the method of publication and the authorities charged with execution;
- (2) They had not only to avoid conflicts in the jurisdiction of the relevant authorities, e.g., between an *arrêté* of a mayor, a *préfet* or a minister or between a ministerial *arrêté* and a *décret* of the President of the Council – but also in no way to curtail fundamental rights established by law except when such was necessary in the interest of public order;
- (3) *décrets* and *arrêtés*, unlike ordinary laws, could be challenged in the courts.<sup>2</sup>

In *Belgium* there is in Article 67 of the Constitution a specific authority given to the King to issue regulations and decrees in execution of the law but this authority is specifically stated to be

<sup>2</sup> The changes effected under the new constitution are discussed in the footnote on page 221.

"without power to suspend the laws themselves or to dispense with their execution".

A similar legislative power to that of the King in Belgium is vested in *Japan* in the Cabinet, but subject to the important qualification that penal provisions in such orders of the Cabinet are not allowed unless specifically authorized by the law in execution of which the orders have been issued.

The power of the Sovereign under the *Netherlands* Constitution (Art. 57) to issue "general administrative measures" also excludes since 1887 any power to impose penalties otherwise than as authorized by law and it appears to be the better opinion since a decision of the Supreme Court in 1879 that the power given by Article 57 is not general and independent in character but solely limited to the "administration of the Constitution and the Law".

A somewhat similar original power to execute the law by Ordinance is given to the President by Article 28 of the *Finnish* Constitution which reads as follows:

"... the President shall have the right to issue ordinances upon matters which have heretofore been regulated by administrative provisions, as well as ordinances containing detailed provisions for bringing laws into force, the administration of state property, and the organization and operation of administrative services and public institutions. Ordinances shall not contain any provision implying a modification of a law."

### **The Control over Subordinate Legislation**

In Common Law countries the legality of subordinate legislation is sometimes, as has been seen above, subject to the approval or abrogation by Parliament. Effective judicial control depends at all events in the *United Kingdom* on whether (a) the parent statute does not specifically or by implication exclude such control; (b) the enabling clauses in the parent statute are sufficiently precisely drawn to give a significant meaning to the doctrine of *ultra vires*, which is the main ground on which the subordinate legislation may be challenged apart from the subordinate legislation of local authorities, which may be challenged on wider grounds (e.g., reasonableness). For example, a statute authorizing a Minister to make *such regulations as appear to him to be necessary or expedient* may apply a subjective test to the validity of the laws, which is incapable in practice of being questioned in the Courts. An example of very wide drafting of enabling clauses authorizing the making of regulations is given above from the Supplies and Services (Extended) Powers Act, 1947. In Common Law countries with a written constitution it would appear that exclusion of control by the courts will only be possible, in as far as the constitution itself is not violated and in particular provisions as to fundamental rights. For example Section 13 (2) of the Constitution of *India* expressly provides: "The State shall not make any law which takes away or abridges the



rights conferred by this Part (Fundamental Rights) and any law made in contravention of this clause shall, to the extent of the contravention be void . . . Law includes any ordinance, order, by-law, rule, regulation, notification, custom or usage having in the territory of India the force of law."

If in a Common Law country there is judicial control by the ordinary courts over the validity of subordinate legislation, this control can, generally speaking, be exercised in the following ways:

- (1) by allowing the defence of *ultra vires* to civil or criminal action under the questioned subordinate legislation;
- (2) by an application to the ordinary courts for a declaration as to the invalidity of the subordinate legislation;
- (3) by an application for an injunction to restrain action under the invalid subordinate legislation;
- (4) in certain circumstances indirectly by the prerogative orders, *prohibition*, *certiorari* and *mandamus* or even by the writ of *Habeas Corpus*;
- (5) on appeal to the ordinary courts from a special tribunal, as determined by law.

It is worthy of mention that according to the Constitution of India the Supreme Court by Article 32 (1) and the High Courts by Article 226 have a particularly wide power to rectify breaches of fundamental rights (which might be involved in certain subordinate legislation) and to adapt existing remedies for this purpose.

In *France* it appears that there is a more generally applied and detailed control of the validity of subordinate legislation than is often the case in common law countries. The *Conseil d'Etat*, as the supreme administrative court, is ultimately competent to decide on the validity of subordinate legislation – *décrets* of the Council of Ministers or of Ministers, *arrêtés* of other administrative authorities. The subordinate legislation can be challenged on the ground that it (i) is made by an authority not competent so to do; (ii) is incorrect in form, if this defect modifies the actual effect of the legislation; (iii) violates the law or other subordinate legislation issued at a higher level in the administrative hierarchy; (iv) is an abuse of power, in that the subordinate legislation is being used for a purpose not included in the parent legislation. It would seem that these powers of supervision by the courts are somewhat wider than those which may be given to the courts of common law countries under the doctrine of *ultra vires*. Furthermore, as in common law countries, the illegality of subordinate legislation may afford a defence in proceedings before ordinary courts brought on the basis of the questioned legislation.

The dual control of legislation made by the Executive – i.e., by administrative courts, and, by a way of defence, in the ordinary courts – is broadly speaking a characteristic of Civil Law countries. In *Belgium* the *Conseil d'Etat* has unlimited power to annul *arrêtés*

and *règlements* (Section 9 of the Law of 23 December, 1946). The power of the courts to refuse to apply illegal administrative legislation is laid down in Article 107 of the Constitution: "The courts and tribunals shall enforce executive decrees and ordinances, whether general, provincial or local, only so far as they shall conform to the law." The position is similar in *Italy*, with the additional possibility that administrative legislation which violates express provisions of the Constitution may be challenged before the Constitutional Court. In *Austria* any court may refer the legality of subordinate legislation to the Constitutional Court, which may also take up the matter on its own initiative.

The position in *Finland* may in the result be the same although the procedure is rather different. According to Article 92 of the Form of Government, 'if a provision in an ordinance is contrary to a fundamental or other law, it shall not be applied by a judge or other official'. It is not possible to invalidate by declaratory judgment *in abstracto* subordinate legislation, but it is possible to appeal, eventually to the Supreme Administrative Court (unless, it would appear, exceptionally, forbidden by a law or by the subordinate legislation) against an administrative decision taken on the basis of the questioned legislation. In such event as a preliminary point the Court considers the validity of the decree but only in so far it affects the issue before the Court. Further by Article 93 damages can be claimed in respect of an administrative act taken on the basis of the illegal legislation; this provision is far reaching as may be seen from its wording:

"Every official is responsible for the measures that he takes or to which he contributes in his capacity as a member of a collegiate public office. A reporter is likewise responsible for a decision taken on this report, unless he has recorded his dissenting opinion on the minister. Whoever suffers a violation of his right, or injury, as a result of an illegal measure, or of the negligence of an official, has the right to demand that this official shall be punished and pay damages, or lay an information against his demanding his arraignment in accordance with the formalities prescribed by law."

As in *Finland*, so in *Sweden* the illegality of subordinate legislation may afford a defence to legal proceedings, although it appears that in practice the courts rarely examine the legality of a rule. Further, not only the legality but also the suitability of rules made by lower administrative authorities may be challenged before higher administrative authorities with the possibility of appeal either to the Government or since 1909, in a number of cases, to the Supreme Administrative Court.

In *Soviet Russia* there is no right of judicial review of the legality of subordinate legislation. The Procurator-General (who has many other functions) may lodge a "protest" against subordinate legislation of a particular authority with the next higher administrative authority, including the Council of Ministers, but there is no

remedy against a decree of the Praesidium of the Supreme Soviet, except by way of rejection of the decree by the Supreme Soviet itself, which does not appear ever to have happened.

The central importance of subordinate legislation to the conception of the Rule of Law cannot be doubted. It would, however, be wrong to regard all delegation of legislative power as *prima facie* inconsistent with the Rule of Law; the essential question is the degree of control exercised over subordinate legislation. Under modern conditions, and especially in large countries with central governments having jurisdiction over widely differing areas, delegation by the legislature of some part of its powers is essential if the flexibility and adaptability of legislation to particular circumstances is to be preserved. The lawyer however cannot treat the problem of delegated legislation as if it were solely a question of legal controls. The practice of affirming or disallowing subordinate legislation by a subsequent resolution of the legislature can provide a useful safeguard, especially if it is accompanied by a detailed examination of the subordinate legislation in question by a "Committee of Scrutiny" of the Legislature. It is also a valuable practice (as required by section 4 of the Administrative Procedure Act, 1946 in the *United States*) to impose on the rule-making authority an obligation before the rule is made to give notice of the intention to make rules and to provide an opportunity for interested parties to make representations or objections.

Attention may also be drawn to the valuable institution in *Denmark* of the Parliamentary Commissioner for Civil and Military Government Administration (with comparable institutions in *Finland* and *Sweden*). The functions of this officer (which are relevant not only to control of delegated legislation but also to the general activities of the Executive) have been described by the present holder of that office in the *Journal* of the International Commission of Jurists, Vol. I, No. 2, (Spring-Summer, 1958) pp. 224 ff., and need not be elaborated here. It is sufficient to emphasise that the Parliamentary Commissioner, who is appointed by and reports to Parliament, has without prejudice to the normal remedies through the Courts, wide power on complaint by any citizen to investigate the activities of the State administration, including such powers of delegated legislation as may have been entrusted to the latter. It may further be mentioned that, even in countries which do not prescribe as a legal doctrine implicit in their Constitution that the powers of the Legislature cannot be totally delegated, effective control over delegated legislation can be greatly strengthened by inclusion of directive principles and standards in the parent legislation. Thus, what for example is laid down as a principle of law in the Italian Constitution may equally be an objective ("political" in one sense but not meaning thereby of no concern to lawyers) in countries which recognize in theory the complete supremacy of Parliament.

Although much can be done to improve the drafting of the parent legislation giving powers of subordinate law-making to the Executive, and although some measure of supervision can be carried out by Parliament itself, and possibly by some other authority, it is clear that in the experience of many countries the ultimate answerability of the Executive to the Courts for subordinate legislation is an essential safeguard. This was the clear conclusion of the mixed body of Common Law and Civil Law lawyers who met in Oxford in September 1958 at the Seminar preparatory to the New Delhi Congress.

### **The Enforcement of Duties Resting with the Executive**

In Common Law countries there is a limited remedy available to compel an administrative authority to perform a duty owed to the public. It is called *mandamus* and together with other prerogative orders, such as *prohibition* and *certiorari* is an example of a piece of legal machinery which was historically designed to assert the royal power but which has now become available to the subject through the Courts.

It will not lie where there is any discretion in the exercise of the duty. In *India* it is particularly interesting to note *mandamus* is only one example of a wide power given to the Supreme Court (by Article 32 of the Constitution) and to the High Courts (by Article 226) to issue orders in connection with fundamental rights guaranteed by the Constitution, in furtherance of which the Courts may issue any direction or order in the nature thereof unfettered by the technicalities of the prerogative orders as they apply in England.

Broadly speaking in countries which resemble the European Civil Law tradition administrative authorities cannot be directly compelled by the courts to carry out their duties. Thus in *Italy* the position is described in the report submitted to the Commission as follows:

"Failure by an Administrative Authority to fulfil an obligation arising from the law, constitutes unlawful behaviour on the part of such administrative body. The aggrieved party, after having established by a warning summons the unwillingness of the administrative body to fulfil its obligation (silence after a suitable period dating from the warning summons), may apply to the ordinary courts or to the administrative jurisdiction according to which an injury has been done to subjective rights or to lawful interests.

"The Administrative Authority is obliged to conform to the decision of the Judicial Authority. If, however, it does not carry out such decisions it cannot be forced to do so unless the obligation relates to a payment in money. The Administrative Authority can be ordered to make good the damage."

The position in *Belgium* is described in the report submitted to the International Commission of Jurists by reference to an

authority originally writing on France, but which it is said is appropriate to Belgian conditions:

"With the administration the judge is without real power . . . The administration only obeys him because it wishes so to do and to the extent that it so wishes . . .

"The Executive having the monopoly of constraint there is no constraint against it."<sup>3</sup>

The Belgian report adds however that in fact the administration do obey the courts, and that if they do not, there is also the possibility of political pressure on the Government through Parliament.

In the *Netherlands* the administration is subject in varying degree to hierarchical control within the administration, to special tribunals and to the ordinary courts. In regard to the second or third of those bodies the payment of a sum required to be paid by law may be ordered and a court may more widely hold that an act required by law should be carried out, but such holding is not enforceable.

The position in *Sweden* is rather unusual and the answer given in the report submitted to the Commission covers a wider ground than the enforcement of duties on the administration, which is here being specifically considered, but it may be conveniently cited at this point and referred to again below:

"In Sweden, unlike for example in the Anglo-Saxon countries, the administrative authorities cannot be ordered by the courts to fulfil a certain duty or to refrain from carrying out a measure planned by an authority. An authority can only be directly persuaded to carry out or refrain from a duty through the intervention in one way or another of a higher administrative authority. If it is a case of some measure by the supreme administrative authority, i.e. the Government (in relation to which there is no higher instance) there is therefore no possibility of direct action. The ability of a superior authority to intervene in a case which is the province of a lower authority to decide is, however, restricted in Swedish law. As regards spontaneous intervention, it is worth mentioning that under Swedish procedure it is unusual in practice for a superior authority by direct instructions or other means to make known its opinion on how a certain case, the province of a lower authority, should be dealt with. Such intervention is often enough regarded as not being permitted, as under Swedish procedure the various administrative authorities enjoy amongst themselves a high degree of independence. Each of them makes decisions on its own responsibility. On the other hand a higher authority has both the right and the duty to intervene if a dissatisfied person appeals to the higher authority against the lower authority. In this way the higher authority takes over the powers of the lower authority and can replace the lower authority's decision by its own. The higher authority may on such occasion rescind the decision of the lower authority but at the same time refer the matter back to the latter for a fresh decision. It is assumed in that case that the lower authority

<sup>3</sup> Rivero, "L'Etat moderne peut-il être encore un état de droit", *Annales de la Faculté de Droit de Liège*, 1957, p. 96.

follows the directive issued by the higher authority when deciding to refer back the case. The higher authority cannot, however, exercise any absolute compulsion over the lower authority.

"The references made above to the formal legal position do not, however, mean that in reality there are no other factors that cause an Authority to fulfil its commitments and to refrain from measures, other than those just mentioned, that it is not entitled to undertake. In Swedish practice public servants have heavy responsibilities in respect of both criminal jurisdiction and the law of damages. They can, however, be made to answer for offences committed in the course of their duties only by the public prosecutors and not by private individuals. The task of ensuring that public servants fulfil their duties has instead been entrusted to selected senior officials. The Attorney-General as representative of the Government sees that both government and local authority employees legally carry out their duties.

"Similarly two officials, the Solicitor-General (*Justitieombudsman*) and the Judge Advocate General of the Forces (*Militieombudsman*), both of equal standing with the Attorney-General but elected by the *Riksdag*, have the task of seeing that in the civil and military fields, employees carry out their duties in a proper manner. Each of these three officials is empowered to prosecute and to investigate every complaint received from the public against the action of a public servant. Admittedly they cannot alter the decisions of other authorities but intimations from them that a wrong has been committed and that a case should have been handled differently may, where possible, cause the Authority itself to alter its earlier decision.

"To sum up, it may be said that in the case of decisions by lower authorities under the Government persons that consider themselves wronged may either appeal against the decision to the higher administrative authority (in the last resort the Government or the Supreme Administrative Court) or in the case of more serious wrongs report the matter to one of the 'over-seers' referred to above. Neither of these remedies, however, is possible in the case of decisions made by the Government itself."

Finally, it is of interest to mention the position as given by the Chief Justice of *Japan*:

"Though the courts are given general jurisdiction to determine the legality of the administrative action or non-action, the prevailing opinion holds that such jurisdiction does not include the power of the courts to enjoin an administrative authority to carry out an administrative duty imposed on them by law or to refrain from illegal administrative actions. But there are a few cases in which it is held that the court can confirm or declare that the administrative authority is bound or prohibited to act in a certain way. Such a declaratory judgment, if possible, will be binding upon the administrative authority."

Probably the basic problem which is raised in this section is between systems which allow direct and in the last resort *personal* constraint on the individual members of the Executive to comply with the law and systems which confine the power of the courts in a broad sense to issue judgments declaratory of the law, and sometimes (as it would appear in the *German Federal Republic* for example) to order execution in respect of money specifically owed under the law, apart from the possibility of awarding damages for illegal acts and omissions referred to hereunder. *Sweden* appears

to be in a rather special position in having a specific procedure for the prosecution of officials and outside all these systems of law must be mentioned the *Soviet Union* and countries, which have adopted its legal pattern, where the remedy of the citizen rests in principle only in the possibility of "complaint" to the Procuracy, which may or may not initiate action in the courts.

### The Control of Powers Resting with the Executive

In *France* unlawful acts of an administrative authority may be restrained by proceedings before the *Conseil d'Etat* or before lower Administrative Tribunals. The jurisdiction of these administrative courts to which the system prevailing in many other civil law countries bears a close resemblance may arise in the following circumstances.

The right of action arises whenever the person bringing it has a personal interest, which is, however, interpreted by the courts to include a moral as well as a potential future interest.

Any administrative act, administrative regulation (dealt with above) as well as a decision of an administrative authority may be questioned by *recours en annulation*. The grounds on which these acts, regulations or decisions can be quashed are twofold: — *recours pour excès de pouvoir* which corresponds more or less to the doctrine of *ultra vires* in the common law countries, and *détournement de pouvoir*, i.e., misapplication of power for a purpose other than that which the law intended; this means in effect that the administrative courts can investigate motives underlying administrative activities even where a discretion is involved.

In the *German Federal Republic* Art. 19 (A) of the Constitution provides: "Should any person's rights be infringed by public authority, he may appeal to the courts. In so far as another authority is not competent, the appeal shall go to the ordinary courts." Administrative wrongs are usually reviewed by special administrative courts, but as provided for by the Constitution there is a residuary jurisdiction vested in ordinary courts.

In *Japan* whenever an administrative authority acts against the law, any person affected in his legal interests by such an act can bring an action before the appropriate court for a judgment to set aside or nullify that act. He can also file a petition for an injunction *pendente lite* but is not entitled to ask for a final judgment restraining the administrative authority from acting against the law.

In the *Netherlands* there are three types of control of administrative actions: within the machinery of administration, through special administrative agencies outside the machinery of administration (independent tribunals) and through the jurisdiction of the ordinary courts. The ordinary courts have the special power of prohibiting administrative actions before they are put into effect but it does not appear that tribunals generally possess this power.

The remedies available in Common Law countries generally follow the *English* pattern. They are as follows:

(1) The commission or continuance of an act executive in nature may be restrained by an injunction. This may only issue at the suit of a private individual if he can show that he will suffer some special material damage as the result of the act, otherwise it issues only at the suit of the Attorney General.

(2) A person having an interest immediately affected by an act executive in nature may apply for a declaration that the act is unlawful; a declaration is not directly enforceable, but it is unlikely that an act declared to be unlawful would be continued.

(3) By an order of prohibition to prevent an administrative authority usurping judicial power. Statute often requires an administrative authority to conduct an enquiry involving the exercise of quasi-judicial power before authority may be given to an executive act. In such case the enquiry may be challenged at any time before its determination by application for an order of prohibition which will issue if it is shown that the authority had no power in the circumstances to conduct the enquiry.

(4) By an order of *certiorari* to quash a quasi-judicial decision of an administrative authority obtained by fraud or in defiance of the rules of natural justice, i.e., where an interested party was not given an opportunity to put his case or a member of the tribunal had an interest in the matter, or which it had no power to make. Where the tribunal gives the reasons for its decision, the decision may be challenged on proceedings for *certiorari* on the ground that on the face of it the decision was unreasonable, for in such a case the tribunal would have no power to reach that decision.

Under the Common Law system the remedy most often relied upon by an individual against unlawful acts of administrative authorities (in their non-judicial functions) is an action for a declaration and an injunction on the ground that the authority acted *ultra vires*. This remedy is perhaps not as wide as the French conception of *détournement de pouvoir*. Under English Law, to succeed in such a claim, the plaintiff must prove either that the authority exercised the power conferred upon it beyond the proper limits or that it exercised it for improper purposes; where the motives are mixed – some within the scope of the power and others arising out of hope of incidental advantage – the court will not intervene.

In *India* Sections 52–57 of the Specific Relief Act 1877 provide for the issue of prohibitory and mandatory injunctions, and set out the conditions governing their issue, but Section 56 (d) prohibits the grant of an injunction to interfere with the public duties of the Central or a State Government. In some cases it has been held that an injunction against government is not to be issued, as it will always respect the judgment of the court. On the other hand it has been held that, in trespassing on private property,



government is not performing a public duty, and can be restrained by injunction.

Section 42 of the same statute provides for declaratory decrees in favour of a person claiming a legal status, or a right to property against any party denying that status or right.

Under Section 80 of the Code of Civil Procedure, two months' notice to the government or administrative authority concerned must be given before a suit for a declaratory order or injunction can be filed.

As is implied above the problem of restraining administrative actions equally with compelling their performance is dealt with in a rather special way in *Sweden*.

In the *Soviet Union* the restraint as well as the positive order to carry out administrative acts are equally matters which can only be dealt with by the Procuracy which is itself an arm of the administrative apparatus ultimately responsible to the political power controlling the Supreme Soviet.

### **The Personal Remedy of the Individual in Respect of Illegal Acts of Omissions of the Executive**

In *France* the *Conseil d'Etat* as the supreme administrative court permits what is known as *recours en pleine juridiction*, whereby any illegal act or omission of the Executive may give rise to a claim for damages on the part of the individual who has suffered thereby. This claim will lie against the State but there is a possibility of a claim before the ordinary courts for personal fault, although this tends in practice to be limited.

In the *German Federal Republic* the citizen has a claim for property wrongfully taken by the Executive authorities and for pecuniary damage caused through breach of a quasi-contractual obligation arising owing to the relationship between the citizen and the Executive. In respect of negligent or intentional injury of a pecuniary nature there is a duty of the Executive to pay damages, provided the duty is to the individual concerned, but this is very widely interpreted.

Further any illegal act of the Executive, not necessarily negligent, may give rise to a claim for money spent in putting right the consequences of the illegality, e.g., restoration of personal freedom or health. These remedies are in principle against the State and not against the individual official.

In *Italy* a claim for damages may be made against the public authority concerned in respect of illegal acts or against the wrongdoing individual, or both (although not to the extent of recovering double damages). However, by the Law of January 19, 1957, No. 13, Art. 23, the official concerned is solely liable if he had acted with malice or gross negligence. In *Denmark* the official concerned

is only liable in exceptional cases, but the State or appropriate municipality may be sued.

In *Sweden* it appears that the practical remedies by way of suit for damages either against the State or against the wrong-doing official are very limited. A suit against the State is limited to a restricted number of cases such as an action for illegal arrest or detention and even there it is uncertain whether damages can in practice be recovered. An action against the offending official can only be taken if there has been public prosecution or the prosecutor gives his consent.

It will seem there is a good deal of variation in the extent of the liability of the State and even in respect of acts of commission there is not universal acceptance in countries outside the common law of the principle that the State and, to an even lesser extent its individual servant, is liable.

The position in Common Law countries is becoming similar to that of *England* in that, unless the authority concerned is specially protected by law from the consequences which, if committed by a private person would, constitute a cause of action, such authority is liable in all respects as a private person. Two special points should be noted:

- (1) the liability falling on the Executive may in fact be narrower than that obtaining in some countries outside the Common Law, because the liability of the individual, if he were being sued as such, is narrower according to the general principles of English law than in some other systems. For example, the tort of negligence is in some respects less comprehensively developed than in French law;
- (2) there is in general always personal liability of the wrong-doing individual.

In general, in cases of breach of contract the authority concerned is liable as principal; in cases of tort, both the wrong-doing agent and the responsible authority will be jointly and severally liable; in either case, proceedings may be taken against the authority, and, in a case of tort, the agent may be joined as co-defendant.

In particular:

- (1) public authorities, e.g., nationalised industries and local authorities: the action is brought against the authority concerned as stated above;
- (2) the Crown, i.e., central government departments: before 1948 the Crown could not be sued in tort and could only be sued in contract with the consent of the Crown, given on the advice of the Home Secretary; this protection, for all general purposes, was removed by the Crown Proceedings Act, 1947, and actions are now brought against the department concerned if it appears on a list issued by the Treasury, otherwise against the Attorney-General as representing the Crown; in no case is the action against the Crown directly.

(3) Police: The Police authority is not considered responsible in law for the acts of an individual policeman; in this case, therefore, proceedings may be taken only against the individual wrong-doer.

In *India* the liability of the Executive is not in some respects as comprehensive as that of England. An action for damages or other relief lies against a government at the suit of a private person in the same circumstances as an action would have been maintainable against the East India Co. before 1858. As the East India Co. exercised both private and sovereign functions, in so far as it engaged in transactions which, without delegation of sovereign power, could be carried out by private individuals, the government is liable in the same way as a private individual. It is liable for detention of land, chattels, and money, and for breach of contract, but not for the torts of its servants unless it ordered or ratified the act complained of.

In some Commonwealth countries such as *Ceylon* the old maxim that the "King can do no wrong" still limits the liability of the Executive in respect of torts.

In the *United States* the scope of remedies against the Executive is a subject of some debate. The matter is dealt with in the American report submitted to the International Commission of Jurists as follows:

"Judicial remedies against agency action depend upon the nature of the agency act of omission or commission, and upon the scope of the agency powers.

"If privately owned property has been taken for public use without payment of just compensation, the owner has the right to sue the government unit and obtain judgment for the fair value of that property, as determined in that suit. Although the claimant cannot then sequester public funds or otherwise enforce the judgment by compulsory process, the government, federal or state, will honour the judgement by payment of the amount found due. However, there may be delay in payment until the required funds have been made available by legislative appropriation or by executive allocation of funds. This right of action – to obtain compensation for private property taken by the government – enjoys constitutional sanction in the direct guarantees of the Fifth and Fourteenth Amendments to the federal Constitution; yet there is substantial doubt whether in the federal courts there is a constitutionally created cause of action for money value, that is, in the (hypothetical) absence of a statute waiving immunity of the government from suit. The concept of sovereign immunity, that the government cannot be sued by private parties without its consent, is a long-standing Anglo-American legal principle deriving from the old idea that 'the King can do no wrong'. "For other wrongs by an administrative agency – such as torts and breach of contract – the individual may sue for damages wherever the original governmental immunity from suit without its consent has been waived by statute. In general, both the federal and state governments have, by appropriate legislation, submitted themselves to certain limited categories of claims based upon acts which, if done by a private party, would constitute a legal wrong. While the scope of the waiver varies from state to state, in the main the defence of sovereign immunity is still the predominant rule. Judgments in such suits are usually honoured by the government.

"In some instances this immunity from suit is limited by judicial decision to acts in a 'governmental' capacity, and does not exist with respect to acts in a 'proprietary' capacity. Police and fire protection, public education, imposition and collection of taxes, etc., are 'governmental'; while operation of a government-owned industry is 'proprietary'. The line of distinction is difficult to draw and attempts to do so have resulted in considerable judicial confusion. However, the generality of the statutory waiver has minimized any judicial urge to circumvent the reserved immunity.

"One area of sovereign immunity which has not been waived or abolished by legislative action is that of acts or omissions or administrative agencies and their officers in the good faith performance of discretionary functions within their jurisdiction. However, this immunity does not extend to an act beyond the scope of authority.

"Remedial action, where permitted, is often brought jointly against the responsible organ and the wrong-doing agent. Waiver-of-immunity statutes generally provide for assumption of liability and payment of damages by the government, thus in effect absolving the individual wrong-doing agent from payment out of his own pocket, at least to the extent that his acts were performed within the general scope of his official powers."

The contrasting position in the *Soviet Union* is conveniently set out in an article by Dr. Loeber recently published in the *Journal of the Commission* (Vol. I, No. 1) which is cited below. Dr. Loeber is dealing with remedies available to the individual through the Courts, in contrast to the supervisory powers of the Procuracy and the possible intervention of the Communist Party:

"The civil procedure is open to a citizen who seeks redress from the State for violations of his rights committed by State officials in performing official duties. This possibility, however, does not extend to all such violations but only those expressly enumerated in the law, e.g., for embezzlement of deposited moneys. The number of these cases is relatively small. There is moreover a procedural pre-requisite for bringing a lawsuit against the State before the Court. The fact that a violation of official duties has occurred must be established beforehand by a Court or an administrative organ, e.g., in a sentence or disciplinary decision. In practice it is not easy for an individual to establish such a breach of law since he has no legal means to initiate proceedings and no right to participate in them once they have begun. If, for instance, an investigator has violated the rights of an arrested person criminal proceedings against the investigator may be initiated only with the consent of the Procurator-General of the USSR or of the Procurator of the competent Union Republic, i.e., one of the two highest officials in the hierarchy of the Procuracy. Protection by the Courts against violation of laws committed in execution of executive power is, it may be concluded, of doubtful practical value."

In general, however, the Soviet State is immune from lawsuits by individuals.

In *Poland* it is interesting to note that from 1945 to 1956 there was no redress available to a private individual against the State, but by a Law of November 15, 1956 "the State is liable for damages caused by a government employee in execution of his official functions". Government employees include judicial personnel and prosecutors.

## Procedural Limitations in Actions of the Individual Against the Executive

Although in many countries there are some procedural differences-e.g., with regard to the time limit within which action can be brought - between litigation in which two private parties are involved and litigation against the State or against a State servant, it is conceived that these are usually of comparatively minor importance. Attention is here therefore directed to the grave disadvantage at which a private person may sometimes find himself in an action against the State owing to his inability to obtain the fullest information concerning the facts of his particular case.

In *England* the position of the individual in actions against the State mainly gives rise to difficulty in relation to the availability to the individual litigant of State documents. The Crown may require that a document shall not be produced, or that a witness shall not be produced, or that a witness shall not answer a question on the ground that disclosure would be against the public interest. This right is usually exercised in connection with the production of documents and the court must accept as conclusive a statement from the political or permanent head of the department concerned that the disclosure would be against the public interest, without first examining the document. With regard to oral evidence the Crown cannot prevent a witness from being called: it can only object to the questions actually asked.

Even if the Crown does not exercise this right, the Court should of its own volition, or upon objection taken by a party, prevent the disclosure of evidence if that would be against the public interest. In this respect, however, it should be observed that the public interest is not necessarily the departmental interest, and, "one facet of the public interest is that justice should always be done and should seem to be done." [*Ellis v. Home Office* (1958) 2 Q.B. at p. 147 per Lord Justice Morris.]

In a few cases information is barred from disclosure by statute, e.g., atomic secrets.

The above right is a right of the Crown, i.e., central government departments; thus, it cannot be exercised extra-judicially by such bodies as nationalised industries or local authorities.

The Bar Council of England has taken up the matter and made certain recommendations. They envisage different treatment of

- (1) national security documents, and
- (2) documents not dealing with national security.

The Bar Council suggests that with regard to the latter a Minister, if he refused to produce a document, would have to satisfy the Court

- (1) that the production would be against public interest and

(2) that the detriment to the litigant by non-production does not outweigh the prejudice to public interest.

The Government through an announcement of the Lord Chancellor on June 6, 1956 has made more important concessions. Crown privilege will be waived in a number of cases – such as in accidents involving Government servants or premises – but will still be asserted where disclosure of the relevant documents would endanger State security or diplomatic relations or the proper functioning of the public service. The legal critics remain dissatisfied however as long as the Government itself is the final judge of whether the public interest in a fair court process is outweighed by the Government's concern to ensure the proper functioning of the administration.<sup>4</sup>

There appears in *Australia* to be uncertainty at present as to whether the ultimate arbiter in deciding if a particular disclosure of State matters should be made is the Executive (i.e., the responsible Minister) or the Court.

In *India* there is a difference of opinion between the High Courts as to whether a Court can determine if records refer to "affairs of State", evidence of which cannot, according to Section 123 of the Evidence Act be given in Court without the permission of the head of the department concerned. But Section 124 of the same Act provides that a public officer cannot be compelled to disclose communications made to him in official confidence, if he thinks the public interest would suffer.

In *France* the position of the individual would appear to be more favourable in that the Court concerned may draw inferences against the State if they fail to produce the documents.

In *Denmark* the position would be similar as regards civil cases against administrative organs. The position in the *Netherlands* is particularly interesting:

"In contrast to civil lawsuits, which are characterised by passivity of the judge, a judge charged with administrative jurisdiction may demand the production of documentary evidence. Against this, the organ of authority which is a party to the case has power to refuse production of documentary evidence on the ground of the public interests. Sometimes the administrative authority has power to submit documents on condition that they are kept secret. In that case they must not be brought to the knowledge of the opposing party. In one or two cases the judge is not allowed to base his judgement on these documents in spite of the fact that they are known to him, whilst in other cases he may only do so if plaintiff states that he has no objection to this."

In *Sweden* the availability of all official documents is a general principle of constitutional practice and is stated as follows in the report from that country:

<sup>4</sup> See *Auten v. Rayner* [1958] 1. W.L.R. 1300 and the Leader critical of the present position in *The Times* (London), November 5, 1958.

"All documents in the possession of a state authority are available to anyone. This rule is, of course, subject to certain exceptions, e.g., military and political documents. Apparently it very rarely or never happens that a document which a court considers it needs for deciding a case is withheld from it, even if the document is not normally available to private persons. It may, however, in special cases be difficult for a private person to gain access to secret documents."

### **Organs before which Control and Remedies against the Executive are Established: the Problem of "Administrative Tribunals"**

It is not necessary to go into detail at this point as to the way in which in a number of countries (for example, *France, Italy, Germany*) the controls and remedies discussed above are distributed before the ordinary courts and administrative courts of which the French *Conseil d'Etat* is an outstanding example. Such administrative courts have now broadly speaking the same status of independence as ordinary courts. There are, however, even outside the common law world, intermediate authorities which may be important in the establishment of control of and remedies against the Executive.

There are in the Netherlands three main methods of protection against administrative acts. We are not here concerned with administrative appeals within the machinery of government or with the jurisdiction of the ordinary courts (which latter, it may be added, has however been greatly extended in the last twenty or thirty years by judicial interpretation). The third method of exercising control is by special administrative boards or tribunals set up by various statutes.

Of this third method the Netherlands report, after explaining that the criteria adopted by such boards or tribunals are the legality of the questioned administrative decision and *détournement de pouvoir* (and occasionally, where the law so requires, some principle of reasonableness or sound government) proceeds as follows:

"A detailed regulation of the course of procedure is certainly not provided for in every case. This is only the case where the organs of jurisdiction are administrative courts possessing general competence in a particular field. Such are the boards of appeal (second instance the Central Board of Appeal), administering justice in disputes regarding the application of laws relating to social security, the civil servants' courts (second instance also the Central Board of Appeal), administering justice in all disputes between civil servants and the administrative authority regarding the official regulations as to legal status, and furthermore the Court of Appeal for Industry, administering justice in disputes between interested parties and the bodies concerned in the Industrial Organisation existing under public law in regard to decisions or actions taken by these bodies. In addition there are, however, many cases where special boards have been designated as organs of jurisdiction for disputes regarding specific decisions. In these cases there is either no regulation or, at most, only a very summary regulation of the course of procedure."

However, it is preeminently in the Common Law countries that the problems raised by administrative tribunals in relation to the

concept of the "Rule of Law" have been most canvassed. Thus the *United States* report submitted to the Commission says:

"Congress has created directly or indirectly through delegation of power to the President over one hundred administrative and executive agencies to regulate increasingly broad areas of business, commerce, industry and relations in general between citizens of different states or directly with the federal government. The Interstate Commerce Commission regulates railroad, steamship, telephone and telegraph rates across state boundaries. The Federal Trade Commission regulates several important aspects of business activities, such as 'unfair competition'. The National Labor Relations Board has wide powers over employer-employee relations; the Securities and Exchange Commission over the stock exchanges, brokers and dealers in securities, the public sale of securities, etc.

"Each of the many agencies originally made its own procedural rules, without much or any uniformity. Finally, Congress put an end to the major variations by adopting the Administrative Procedure Act which, in the absence of special Congressional exception, is applicable to all these agencies. The Act provides for publication by each agency of its proposed rules before and after final adoption, notice and hearing upon claims by or against the government, determination of claims by an agency officer who has had no connection with the presentation of the government case, etc.

"What kind of agency decisions shall be left to review by the courts? The Veterans Administration handles each year thousands of claims by present and former members of the armed forces, their widows and dependents for pensions, allowances, compensation for injury, illness and death. If the government or the claimant may take every adverse decision to full review by a court of law, the machinery would break down. Administrative determination of claims is quasi-judicial. Denial or refusal of judicial review over agency determination of a choice of standards would work a transfer of traditional power from one branch of government to another.

"No wholly satisfactory conclusion has been found and the courts themselves are not in full agreement on the scope of their review power. Congress has made the decision of some agencies subject to court review or by silence has left the courts to work out practical rules for the limits of review upon sufficiency of evidence or only on points of law. The tendency has been to limit judicial review, even to the extent of a few statutes making the decisions of certain boards 'final, conclusive and not subject to review by any court.' The interests of prompt and final determination, in short of practical expediency, are thus served, but at the expense of optimum uniformity of decision and full protection of rights by traditional procedures. These extreme limitations upon judicial review, where they exist, are a partial blurring of the original 'separation of powers' principle, that is, a projection of the legislative or executive power into an area of previously accepted judicial determination. Yet the narrow construction of such statutory limitations by the courts, legislative control over budgetary resources of the agencies and executive control over appointments together provide continuing protection to basic rights by indirect restraint upon possible excesses and abuses."

It may be added, by way of explanation of the above citation, that even before the Administrative Procedure Act of 1946, therein referred to, the American courts were reluctant to construe a provision in a law which appeared to preclude any judicial review as in



fact having that effect. The Administrative Procedure Act set out to make judicial review normal for agency action, and, although it recognizes preclusion of judicial review by specific statute, the general policy underlying the Act has strengthened the courts in refusing to treat a reference to a particular agency being "final" as necessarily precluding judicial review (e.g., in regard to the legality of a deportation order.)

We may also add here, although the problem is by no means peculiar to the United States (or indeed to Common Law countries), that judicial review may, however, be excluded by the force of distinctions made by the courts themselves. If the administrative act which is questioned involves gratuitous benefits or privileges, the statutory provision for administrative conclusiveness is given effect by the American courts so as to exclude judicial review. It is argued that where the State bestows a benefit to which the applicant has no right, the State may decide whether or not to provide a remedy, and if it does so, may limit the type of remedy. This attitude is increasingly criticized on the ground that to say that the State is granting a privilege does not mean that the administration can arbitrarily deny it to particular individuals. In the period of the "Welfare State" and planned economies where government contracts and licences to trade are of great importance this criticism is becoming increasingly persuasive.<sup>5</sup>

Turning to *England*, we find that the problem of administrative tribunals and ministers examining quasi-judicial powers has been the subject of discussion and concern as in the United States. There are a large number of such tribunals variously constituted and following differing procedures, dealing with such matters as the acquisition of land, national insurance, family allowances, rents, etc., and for such tribunals there have been varying possibilities of appeal, sometimes to a higher tribunal of similar type, sometimes to a Minister, sometimes to the courts and in a few cases not at all. There is also a system whereby the minister makes the first and usually final decision after following a certain procedure of enquiry laid down by the relevant statute; to the question of the *preliminary* procedure we will return under a separate heading below. We are here primarily concerned with the degree of independence shown by the tribunal or ministers where there is a danger at the least of their being judges in their own cause, and the extent to which there is a possibility of appeal or review by an ordinary court. With this latter question is closely associated the obligation, which existed

<sup>5</sup> It is similar to criticisms made in Great Britain of the well-known case of *Nakkuda Ali v. Jayaratne* [1951] A.C. 66, an Appeal to the Privy Council from Ceylon, in which the cancellation of the license of a textile dealer was upheld even on the assumption the principle of *audi alteram partem* had not been observed by the licensing authority; such an omission might have been thought to be a typical case for judicial review on the grounds of a failure to observe the principles of natural justice.

in very varying degree, to give reasons for decisions, for against an unmotivated decision it is difficult to make complaint, except precisely on the grounds that it is unmotivated. These matters were investigated at length by the "Franks Committee" (*Report of the Committee on Administrative Tribunals and Enquiries*, H.M. Stationery Office, 1957, Command Paper 218) and many of their recommendations have been followed in the important Tribunals and Enquiries Act, 1958, concerning which we may draw particular attention to: – (i) measures designed to improve the quality of the members of administrative tribunals, in particular by setting up a consultative and supervisory Council on Tribunals; (ii) the provision for appeal on a point of law to the ordinary courts from a number of tribunals; (iii) the obligation imposed on tribunals and Ministers giving decisions to state reasons therefor.

Much of the American and English experience is relevant to *India*. It should however be emphasised that by Article 136 of the Constitution "the Supreme Court may, in its discretion, grant special leave to appeal from any judgement, decree, determination, sentence or order in any cause or matter passed by any Court or tribunal in the territory of India." But Mr. Justice Bose in his report to the Commission recognizes that there are difficulties and tensions created by administrative tribunals. Thus, he writes of the dangers facing the Rule of Law:

"First, there is the tendency to set up administrative tribunals and take certain matters out of the hands of the courts. In itself this is not a bad thing for law has become so complicated that experts (provided they have a judicial training and temperament) are better fitted to handle complicated technical matters than the average judge. Also there is justice in the impatience of the executive against the law's delays. In most matters of this nature a fair and quick decision is of far more importance than a technically perfect and brilliantly written judgment written after months and years of judicial deliberation and wrangling. I say wrangling, because judges differ on so many questions, not only from court to court but in any given court itself, even in the highest court of the land. To start with the outcome is anyone's guess and in the end the decision might just as well have been one way as the other. The main thing, in my opinion, is not that these tribunals should be done away with but that the appointment of their personnel should be hedged around with the same safeguards and guarantees as in the case of judges and that they should build up the same traditions of independence, fairness, impartiality and the like, and to ensure that their procedure is so framed that the subject is given a full and fair hearing before them. "So far as the present tribunals are concerned the public at large most definitely have not got the same faith and confidence in them as in the courts. Incidentally, their decisions and procedure are subject to review by the Supreme Court because of Art. 136(1), and the Supreme Court has interfered fairly freely. That is another source of irritation and annoyance to the executive, not (to be fair to the executive) because the tribunals are more likely to take the 'official' view, but because this defeats the very purpose of these tribunals, namely, a speedy decision. Also, again to be fair, there is no doubt that Art. 136 is abused by those who are out to delay and prolong a dispute. An application to the Supreme Court often means a stay of proceedings or a stay of the

tribunal's decision, because it is impossible for the court to reach a decision until it has been through the whole of a complicated issue and heard the other side. Owing to congestion of work this takes time. The matter has to wait its turn among a host of other equally important and pressing concerns. I am told that our Supreme Court disposes of these matters much more speedily than most other Supreme Courts."

### **The Contrast between Antecedent and Subsequent Control of Administrative Acts**

In an interesting discussion forming part of the 1st International Congress of Comparative Law organized by the International Association of Legal Science at Barcelona in 1956 (See *Revista del Instituto de Derecho Comparado*, No. 8-9, 1957) a distinction became clear between what is on the whole a Common Law standpoint and that favoured by most countries of Civil Law tradition. The Common Law view has generally been that it is desirable that *before* an administrative decision is made interested parties should be able to some extent to make representations; whereas Civil Law countries have tended to be satisfied with the possibility of a *subsequent* review of the administrative act by judicial means, the latter of course involving the opportunity for aggrieved parties to present their case. The main practical application of this issue arises in connection with the maxim *audi alteram partem*. It should immediately be said however that the practice of Civil Law countries is not uniform in this matter, and in *Austria* for example (see, e.g., Professor Spanner, *Revista de Instituto de Derecho Comparado*, No. 8-9, p. 449) "every individual administrative act or decision of an administrative authority must as a rule - apart from a few exceptions - be preceded by a preliminary procedure which is designed to provide the basis for the decision or order."

In the *United States*, it is common to separate decisions of administrative agencies from preliminary hearings before designated officers, variously known as "trial examiners", "referees", "presiding officers", etc. "The position of the hearing officer is at the core most of the problems of formal adjudication" (Schwarz, *American Administrative Law*, 1958, p. 128). The tendency in the United States, emphasised expressly by the Federal Administrative Procedure Act of 1946, has been to strengthen the independence of the examiner from the agency in respect of which his jurisdiction lies and to insist at the hearing before him on (i) the right to be heard orally, (ii) the right to present evidence and argument and to rebut adverse evidence, (iii) the right to appear by counsel, (iv) the right to know the decision and reasons of the hearing officer (whose position under the Administrative Procedure Act of 1946 has been assimilated to a large extent to that of a first instance judge in the matter in dispute).

There has been a rather similar tendency of late in *England*, although not so far reaching. The "Franks Committee", above

referred to, recommended the control of "inspectors" ("hearing officers" in the American terminology) by the Lord Chancellor, rather than by the interested government department;; it also wanted the publication of inspectors' reports to the deciding Minister. The latter has, it is understood, been largely put into effect without actual legislation, but in many respects the minimum standards of enquiry by inspectors and decisions by a Minister in England would fail to satisfy the stricter tests of American law.

In summing up the discussion at Barcelona on this topic the rapporteur Professor Lawson said that "on the whole an affirmative answer (to the question whether an antecedent procedure should be required by law) seemed to be favoured, not only on the ground that such hearings, if honestly conducted, protect the individual, but also as ensuring an economy of procedure by reducing the necessity for subsequent judicial proceedings, as providing a means of good administrative action and also as tending towards what an American participant called 'creative administration'."

### **Summary and Conclusions**

(1) In modern conditions, and in particular in large societies which have undertaken the positive task of providing for the welfare of the community, it is a necessary and, indeed, inevitable practice for the Legislative to delegate power to the Executive to make rules having the character of legislation. But such subordinate legislation, however extensive it may in fact be, should have a defined extent, purpose and procedure by which it is brought into effect. A total delegation of legislative power is therefore inadmissible.

(2) To ensure that the extent, purposes and procedure appropriate to subordinate legislation are observed, it is essential that it should be ultimately controlled by a judicial tribunal independent of the executive authority responsible for the making of the subordinate legislation.

(3) Judicial control of subordinate legislation may be greatly facilitated by the clear and precise statement in the parent legislation of the purposes which such subordinate legislation is intended to serve. It may also be usefully supplemented by supervisory committees of the legislatures before and/or after such subordinate legislation comes into effect. The possibilities of additional supervision over subordinate legislation by an independent authority, such as the Parliamentary Commissioner for Civil and Military Administration in Denmark, are worthy of study by other countries.

(4) In the ultimate analysis the enforcement of duties whether of action or restraint owed by the Executive must depend on the good faith of the latter, which has the monopoly of armed force within the State; this is even true of countries which possess the advantageous traditional power of the Courts to commit to prison for contempt of its orders.

(5) But in any event the omissions and acts of the Executive should be subject to review by the Courts. A "Court" is here taken to mean a body independent of the Executive, before which the party aggrieved by the omission or act on the part of the Executive has the same opportunity as the Executive to present his case and to know the case of his opponents.

(6) It is not sufficient that the Executive should be compelled by the courts to carry out its duties and to refrain from illegal acts. The citizen who suffers loss as a result of such omissions or illegalities should have remedy both against the wrong-doing individual agent of the State (if the wrong would ground civil or criminal liability if committed by a private person) and in any event in damages against the State. Such remedies should be ultimately under the review of courts, as defined in the fifth paragraph above.

(7) The ultimate control of the courts over the Executive is not inconsistent with a system of administrative tribunals as is found in many (especially Common Law) countries. But it is essential that such tribunals should be subject to ultimate supervision by the courts and (in as far as this supervision cannot generally amount to a full appeal on the facts) it is also important that the procedure of such tribunals should be assimilated, as far as the nature of the jurisdiction allows, to the procedure of the regular courts in regard to the right to be heard, to know the opposing case and to receive a motivated judgment.

(8) The prevention of illegality on the part of the Executive is as important as the provision of machinery to correct it when committed. Hence it is desirable to specify a *procedure of enquiry* to be followed by the Executive before taking a decision. Such procedure may prevent action being taken which (being within an admitted sphere of discretion allowed by the courts) if taken without such a procedure might result in grave injustice. The courts may usefully supplement the work of legislatures in insisting on a fair procedure antecedent to an executive decision in all cases where the complainant has a substantial and legitimate interest.

### THIRD COMMITTEE

#### **The Criminal Process and the Rule of Law: Special Problems of the Relationship between the Executive and the Criminal Administration**

##### **Introduction**

In the questionnaire on the Rule of Law which was originally circulated by the International Commission of Jurists attention was mainly directed, as far as the Criminal Law is concerned, to the institutional characteristics of Public Prosecutor's Departments (or the persons carrying out prosecuting functions in countries where there are strictly speaking no such departments with an exclusive responsibility for prosecutions) as well as of the Police. The same approach was followed in the first draft of this working paper which was discussed by the preliminary Seminar held under the auspices of the International Commission at Oxford in September 1958. From the discussions at that Seminar it became clear that a rather wider approach to Criminal Procedure was required and it is therefore the purpose of this introduction to sketch in broad terms the main safeguards which legal experience in many countries suggests are necessary to protect accused persons in criminal trials, while at the same time allowing a proper regard for the interests of the State in preserving law and order.

It may be emphasised, however, that the rights of the accused in criminal trials, however carefully elaborated, will be ineffective in practice unless they are supported by institutions, the spirit and tradition of which restrain and guide the exercise of the necessary discretions, whether in law or in practice, which belong in particular to prosecuting authorities and to the police. For this reason much of the information relating to the prosecuting function and to the police which was supplied to the Commission has been set out in this *Working Paper* as it serves to illustrate the practical difficulties of applying many of the general principles (which will probably receive a wide measure of acceptance) concerning the rights of the accused in criminal cases. In the final summary and conclusions an attempt is made to knit together the broader consideration of general principles and their particular application in relation to prosecutions and the police.

In drawing up a list of general principles applicable to criminal cases much assistance may be obtained from the resolutions of the Committee on Criminal Law of the Congress held by the Com-

mission in Athens in June 1955. This Committee had as its Chairman, Professor Jean Graven of the University of Geneva, Vice President of the International Association of Penal Law, and as Vice Chairmen, The Hon. Mr. Justice Muhammad Munir, Chief Justice of Pakistan and the late Sir John Morris, Chief Justice of the Supreme Court of Tasmania. From an examination of the resolutions of the Committee and in the light of the discussions of the preliminary Seminar at Oxford the following principles emerge.

**(1) Consequences of the Acceptance of the Principle of Legality**

The Criminal Law must be certain. This is sometimes expressed (as it was in the resolutions at Athens) by saying that "it is not admissible to create accusations and sanctions on the simple basis of analogy with other penal provisions". In fact the attitude of different countries, including many which would be usually regarded as sensitive in their appreciation of the rights of accused persons, differs considerably with regard to the use of analogy. It is perhaps not so much the use of analogy in itself which is felt to be objectionable as the uncertainty to which it may give rise regarding the scope of certain crimes. It is perhaps therefore preferable to say that all law should aim at creating the maximum certainty regarding the rights and duties of citizens but that where, as in the criminal law, their life or liberty is at stake this requirement of certainty becomes imperative. One particular type of offence, more familiar in some countries – e.g., England – than in others, which may on occasions raise misgivings on the grounds of "uncertainty" is "contempt of court" or "contempt of Parliament". However, the main danger of such offences lies in the possibility of their violating some of the procedural safeguards of the accused mentioned below – e.g., that the aggrieved tribunal or legislative body may be a judge in its own cause and that the right to appear by counsel before the legislative body may be restricted or non-existent.

It is a further implication of the principle of legality that (to quote the Resolution of the Athens Committee) "no person shall be liable to prosecution for an act or omission which at the time it took place was not punishable in either national or international law". It will be remembered that in dealing with implied limitations on the power of the legislature in an earlier section of this working paper a reference was already made to the inadmissibility, at all events in Criminal Law, of retroactive legislation.

**(2) The Presumption of Innocence**

It would seem to follow from the recognition of legality that an accused person has a right to be considered innocent until his guilt has been proved. A State in which a contrary principle consistently and universally prevailed – namely, that everyone was

guilty until proved innocent – would put everyone in the arbitrary power of the arresting authorities; it would indeed be a negation of the element of certainty in human relations which we have suggested is at least one element in the Rule of Law. In fact the so-called presumption of innocence, if it simply implied disapproval of such arbitrary power, would verge on platitude. The presumption of innocence is better understood as an assertion of faith in the individual, which finds expression in rules requiring throughout a criminal trial an individual assessment of guilt *ad hominem* rather than a generalized assumption of guilt – or a shifting of the burden of proof – if certain facts are proved. Nevertheless most systems do in some instances allow at least the shifting of the burden of proof if certain facts, not in themselves amounting to commission of the crime, are proved in relation to the accused; a typical example is a reversal of the burden of proof where a man is found in possession of stolen goods and accused of receiving them knowing them to be stolen.

The real importance of the presumption of innocence lies not in the abstract principle, which is generally readily admitted, but in the extent to which in actual practice an accused person – and particularly one in custody – is in a position to assert the principle against an over-eager prosecutor or police official who may find it easier to build up a case by intimidation of the accused, based on an assumption of guilt, than by the laborious collection of independent evidence.

### (3) Arrest and Accusation

A person once arrested is under a serious practical disability in the conduct of his defence. The power of arrest, therefore, should be strictly regulated by law which should provide that arrest is justified only on the grounds that there is reasonable suspicion that the person in question has committed the offence with which he is charged. Furthermore there should be a means within a short period of time (which should not normally exceed 24 hours) by which an accused person can challenge the legality of the arrest before an independent court. By an independent court we here mean a tribunal which is detached from the authority having the responsibility for conducting the prosecution.

The legality of the arrest and the right to challenge it before a court will be insufficient safeguards unless they are given practical reality by insistence on two further principles. In the first place the accused person must be entitled to know as soon as he is arrested the precise nature of the charge which faces him. Secondly, if he is to appreciate the significance of this charge he must have the immediate right to consult a legal adviser of his own choice. He should be informed of this right immediately on arrest in a way appropriate to his education and understanding.



#### **(4) Detention Pending Trial**

Detention pending trial should only be authorised by an independent court in the sense indicated above. Bail should be allowed except where the exceptionally serious nature of the charge, the reasonable expectation that the prisoner will not appear at the trial if released, or that he will interfere with the course of justice (e.g., by intimidating witnesses) justifies a contrary decision.

Prolonged detention before trial even when justified on the grounds of "police enquiries" or "preparation of the prosecution's case" may constitute a serious denial of justice. This is even more true if the alleged reason for the delay is the pressure of criminal business in the courts.

#### **(5) Minimum Rights of Accused Persons Necessary for the Preparation of their Defence**

It has been mentioned above that an accused person must from the moment of his arrest and/or charging have free access to a legal adviser of his own choice. This right must continue, even if he is in detention, up to and during trial and during the period when an appeal may be pending.

An accused person must have the power to produce witnesses for the defence in court both at any preliminary proceedings and at the trial. He must have the right to be present when these witnesses are examined.

In order to prepare his own defence the accused person must know not only the charge against him but also the evidence by which the charge will be supported. He must have this information sufficiently early to enable him to decide what defence, if any, he may offer to the case which may be made against him. This applies both in respect of any preliminary proceedings and to the trial itself.

The accused must have the right to be present (with his legal adviser) when witnesses for the prosecution are examined and to cross-examine such witnesses.

#### **(6) The Minimum Duties of the Prosecution in Presentation of a Case**

The prosecution must not only, as outlined above, disclose to the accused in due time the evidence on which the charge is based. Its function is not at all costs to secure a conviction but to lay all the evidence bearing on the case, whether favourable or unfavourable to the accused, before the court. It must therefore in particular inform the accused, in time for him to take advantage of it, of any evidence, not being used by the prosecution, which might benefit the accused.

It may be added that the duties of a "fair" prosecutor cannot all be reduced to dogmatic formulation, nor can unfairness be entirely checked by the supervision exercised by a judge – important as this may be – in the course of a trial. This emphasises

what has already been argued above, namely the relevance to the Rule of Law of the institutional framework in which the standards of behaviour of the prosecution are formed.

Reference may also here be conveniently made to a problem specifically raised by the *American Report* committed to the Commission, although the dangers to which the report refers have relevance to a number of the principles of fair criminal procedure here being considered. Briefly, some of the effects of an unfair prosecution may be achieved by an examination of a witness by a legislative committee – in the American case, a Committee of Congress – a procedure which is not technically a criminal trial and does not directly bring into question the procedural safeguards of “due process”. Thus, in the words of the American report “witnesses before a committee have no right to a hearing other than that which the committee chooses to accord, no right to participation by counsel as distinguished from advice, no right to any review of public castigation by the committee or to injunctive relief.” Furthermore, refusal to answer questions unless the courts are able to find that the question asked exceeded the scope of the Committee’s powers, may lead to punishment in the courts for criminal contempt of Congress. It is of course true that the privilege of non self-incrimination, upheld by the Fifth Amendment to the Constitution, is available in legislative as well as judicial and administrative hearings, but as the American report to the International Commission emphasizes, the legal principle that no imputation of guilt may be inferred from reliance on the protection afforded by pleading the Fifth Amendment is to be distinguished from the possible public reaction. The latter may lead to a demand for the dismissal of the person relying on the Fifth Amendment from employment, public or private, although in most cases the courts may be able to rule on the lawfulness of the discharge.

**(7) The Examination of the Accused before and during the Preliminary Proceedings and at the Trial**

No one should be compelled to incriminate himself. No person should be subjected to threats, violence, or psychological pressure, or induced by promises, to make confessions or statements. Anyone charged should be warned by the examining authority of his right not to make any statement. A statement improperly obtained should not be used in evidence against the accused.

**(8) The Necessity for an Independent Tribunal of Trial and (where such Exists) for an Unbiased Jury**

No elaboration is required here of this principle in view of the detailed consideration given to the Judiciary by the Fourth Committee. Mention may be made however of the dangers arising from the appointment of special tribunals to deal with par-

ticular cases or series of cases. Theoretically it is possible for an *ad hoc* tribunal to be both independent and to satisfy the other requirements, here listed, of a fair criminal procedure and it is probably not possible completely to rule out recourse to a special tribunal in some circumstances of emergency. There may indeed be cases when recourse to the ordinary tribunal or trial would in fact endanger fair trial. But special courts in criminal cases at least raise a suspicion that they are being used to further ends other than those of justice; this is particularly true of the appointment of an *ad hoc* tribunal other than by the Judiciary – i.e., by the Executive or Legislative; an obvious example is provided by the Special Courts set up in *Hungary* after the Revolution in 1956.

**(9) The Conduct of the Trial in Public**

In proceedings preliminary to trial the measure of publicity allowed varies greatly not only as between the Common Law and Civil Law worlds (being on the whole wider in the former) but also within the common law world itself. As to the trial itself there is probably a wide measure of agreement that exceptional circumstances (to be interpreted however by the court and not demanded as of right by either the accused or the prosecution) may justify a denial of a public hearing in whole or in part. Cases involving military secrets, and juvenile offenders (in their own interests) are often so treated. The burden of proof however should be on the prosecution to justify the exclusion of the public from a trial.

There is another aspect of public trial which can be expressed by saying that the accused has the right to be tried *in public* but should not be tried *by the public*. Freedom of speech to report objectively proceedings in court is not to be confused with liberty to endanger a fair trial by public discussion of the issues before they are decided in court.

**(10) Prohibition of Cruel, Inhuman and Excessive Punishments**

The recognition of the dignity of man which, we have argued in the general introduction to this whole Working Paper, underlies the conception of the Rule of Law requires that punishment should not be cruel, inhuman or excessive. We cannot argue that the Rule of Law implies a particular theory of penal reform and we must recognize that the judgment of different societies (which would all claim to observe the Rule of Law) will vary greatly as to what is the appropriate length of sentence for particular offences, or indeed as to whether capital punishment is permissible. On the other hand it is possible to be more specific in condemning all sorts of punishment which involve physical maltreatment of the prisoner. The Criminal Law Committee of the Athens Congress added the useful supplementary right of a prisoner not to be penalized for making a complaint to the competent authority about his treatment.

#### (11) The Right of Appeal

The central importance of the individual in the conception of the Rule of Law here presented requires recognition not only of his minimum rights but also of his human fallibility, from which the legal system is not exempt. Hence it is conceived that in every case involving imprisonment or a substantial fine there should be right of at least one appeal to a higher court against conviction and against sentence.

#### (12) Remedies for Abuse of "Fair-Trial" Procedure

An accused person should have a criminal and (where he has suffered damage) civil remedy against anyone who is personally responsible for his illegal arrest or improper treatment by omission or commission during detention. The State (or appropriate public authority) should further accept liability for wrongful arrest or improper treatment by individuals who act with its authority.

### Preliminary Observations Concerning Prosecutors and the Police

One of the cardinal ideas lying at the centre of the conception of the Rule of Law, which is investigated in this paper, is the proper distribution of power between the individual on the one hand and different organs of the State on the other to which the collective power of the people is entrusted. An important practical aspect of this problem arises in the sphere of crime. It has been well said in a recent study (Lord Macdermott, Lord Chief Justice of Northern Ireland, *Protection from Power under English Law*, London, 1957, p. 13):

"The discovery and punishment of crime are functions which produce a dramatic preponderance of power on the part of the State. Against the wealth and resources of the prosecution the accused stands relatively poor and alone and, far more often than not, his case and its personal problems arouse little general interest or concern. In such circumstances the urge to get at the truth and to convict the guilty which excites most prosecutors may be armed with a great variety of weapons. The choice of these is important for it cannot but throw light on the nature of the system to which it belongs, on the extent to which that system recognizes the dignity and worth of man, and on the place which it accords to the Rule of Law."

It is the assumption of this paper that the responsibility for law-making, as opposed to the execution of the laws, rests ultimately with the Legislative, subject to a limited possibility of the delegation of such responsibility. This applies to the Criminal Law, where however the power of the Legislative to delegate authority to impose penal measures is frequently altogether prohibited. The execution of the Criminal Law might in theory be carried out by a variety of State organs. For example, impeachment by the Legislature was not infrequent in the past and is not completely unknown in modern systems; a law recently introduced in some Soviet Re-

publics, subjecting "anti-social parasitic elements" to exile by decision of a meeting of their neighbours, may perhaps fall within this category. But as a general rule the carrying out of the criminal law involves the co-operation of the Judiciary and the Executive. This paper presupposes general agreement on the exclusive power of the Judiciary (in a broad sense which includes juries or similar bodies) to try issues of guilt or innocence and for this reason devotes special attention in Section IV to the factors which influence the exercise of the judicial function. In practice, however, the stages by which an accused person is brought to trial raise problems concerning the observance of the law, and its fundamental assumptions, which are as acute as those relating to the purely trial function of the Judiciary. This pre-trial procedure is as a general rule in the hands of the Executive, subject in varying degree to control by the Judiciary. The answerability of the Executive to the law, and to its fundamental assumptions, have in general been considered in the first section of this paper; but the organs of the Executive which have special responsibility for pre-trial procedure – namely, the prosecuting authorities and the police – have a particular importance, which requires separate consideration. Briefly this importance may be found in the discretionary powers which in practice they exercise in issues which directly affect the liberty of the individual. It is therefore essential to consider not only the formal legal framework within which such organs carry out their functions but also the way in which these functions are in fact performed and the spirit and traditions of the institutions which exercise them. Although, as has been pointed out in the general introduction to this whole Working Paper, no dogmatic assertion of a theory of separation of powers is made, or is indeed possible, it is none the less true that the character of a legal system is profoundly influenced by the corporate spirit of the institutions amongst which power is distributed.

#### **The Distinction between "Accusatorial" and "Inquisitorial" Systems**

It will be useful at the outset to discuss a distinction which is said to exist between legal systems in the Common Law tradition and those which follow the Civil Law. This distinction is sometimes characterized as between an "accusatorial" and an "inquisitorial" approach to criminal procedure, but it has been pointed out in a recent comparative study (Glanville Williams, *The Proof of Guilt*, 2nd ed., London 1957, p. 28) that these terms are somewhat misleading, in so far as no modern system is in a pure form wholly "accusatorial" or "inquisitorial". It is nevertheless important to bear this distinction in mind, because the dangers of abuse of power are found in different forms and in differing places depending on whether a legal system is on balance accusatorial or inquisitorial.

What is generally understood to be involved in the accusatorial system is the conception of trial as a proceeding before an inde-

pendent and passive arbiter in which the accused and the prosecution play more or less the same role as the parties in a civil law suit. The Judiciary is not concerned with the preliminary investigation of facts which results in bringing the accused before the court. But in all modern Common Law systems, even where the possibility of private prosecution remains, the investigation and the prosecution of crime is in practice in all serious cases the responsibility of a public authority, the position of which is different from that of a litigant in a civil case; furthermore the Judiciary has assumed a measure of control over the pre-trial stage of a criminal case. However, it is true that the accusatorial conception of trial, described above, has greatly influenced the character of the investigating and prosecuting authorities and the methods whereby the Judiciary has exercised control over them. This influence is clearly seen in England (and less clearly in some other Common Law jurisdictions) in the somewhat haphazard structure of the investigating and prosecuting authorities among which perhaps more by accident than design responsibility is widely distributed. It is also seen in Common Law jurisdictions in the comparative passivity of the Judiciary during the period before the accused is brought to Court. Further, the accusatorial tradition is responsible for the indirect methods whereby in the Common Law system the Judiciary controls the investigation and the prosecution. These methods are twofold. Firstly, the prosecution has to make out before a judicial tribunal a *prima facie* case. The function of the tribunal is not to investigate the facts as a whole but merely to decide on the facts as presented by the prosecution (in the light of the case put forward by the accused, if he chooses so to do) whether there is sufficient evidence to justify committal for trial. Secondly, the Judiciary have developed strict rules of evidence (in some cases now embodied in statute) binding both on the judicial tribunal, which decides whether or not there is a *prima facie* case, and on the trial court; the purpose of these rules is to exclude evidence offered by the prosecution which has been obtained in circumstances likely to have involved an abuse of its powers by the prosecuting authorities.

The historical essence of the inquisitorial system lies in the idea that it is the responsibility of the State through the Judiciary to investigate and punish crime. The Judiciary cannot therefore be passive but has a positive duty to discover the truth. In its developed form, however, the initiation of criminal proceedings has been entrusted to a separate body of prosecutors, which, while retaining a strong connection with the Judiciary, constitutes a special hierarchy ultimately answerable to a Minister of Justice. On the other hand, the Judiciary has maintained its control over the investigation of crime once it has been brought to its notice, through an examining judge, who with the assistance of the prosecuting authorities actively participates in investigation of the facts and collection of evidence for

the trial. Indeed, it has been said, perhaps with oversimplification (Glanville Williams, *op. cit.*, p. 27) that "if the terms 'accusatorial' and 'inquisitorial' must be used, it seems clearest to say that they refer only to the mode in which evidence is elicited, and that the single characteristic of an inquisitorial system is the activity of the judge in questioning the defendant and witnesses".

Lawyers who have been trained in an accusatorial system tend to think that the impartiality of the Judiciary in the inquisitorial system is jeopardized by the part they play in the pre-trial procedure. On the other hand, lawyers accustomed to the inquisitorial system emphasise the value of control by the Judiciary over abuse of power by the prosecution.

### A Survey of the Organization and Practice of Prosecutions

In England the right to prosecute is in principle the right of every citizen. In practice the great majority of prosecutions are instituted by and carried on by the police, and such are in common parlance spoken of as "police prosecutions", although, strictly speaking, the police act in their capacity not as officials but as individual citizens. The Attorney-General is generally responsible for the enforcement of the criminal law but the control which he exercises over prosecutions is indirect and rare in so far as he is entitled to take-over or to stop (by entering a *nolle prosequi*) any prosecution. It should however be added that strictly the right to enter a *nolle prosequi* only applies to the more serious offences triable on indictment; in summary cases he must obtain the leave of the Court which in practice would normally be given.

The Attorney-General is a member of the Government and the House of Commons, appointed from among leading barristers who are supporters of the party in power. It should be explained that as the chief law officer and legal adviser to the Crown and departments of State his functions are not confined to criminal prosecutions. In regard to the latter however the discretion which he exercises is his own and not that of the Government of which he is a member. The position has been explained by Lord Macdermott (*op. cit.*, p. 33). After citing a former Attorney-General (Sir Hartley, now Lord, Shawcross) "who speaks of a clear rule that in the discharge of his legal and discretionary duties the Attorney-General is completely divorced from party political considerations and from any kind of political control." Lord MacDermott makes the following comment:

"The considerations which weigh with the Attorney-General in deciding whether or not to prosecute go beyond the existence of evidence proving the commission of the offence in question. He must also regard wider issues, such as the effect of a prosecution on the public interest and any special circumstances which may have a bearing on the justice or rightness of a decision one way or the other. In all this he must exercise

his own judgment and his own discretion, but he is entitled to inform himself of the relevant facts and probable consequences and, in doing so, to seek from his ministerial colleagues such help as they can give him. This sort of consultation may sound a delicate business, but once the underlying rule is accepted the line separating the functions of consulting ministers can easily be drawn and maintained in the right place."

The Director of Public Prosecutions, who holds an office first set up in 1879, although subordinate to the Attorney-General is assigned by Statute the responsibility for prosecuting certain serious crimes such as murder, to the exclusion of private prosecutors and he may prosecute or take over the prosecution in all cases where the public interest so requires.

It is a feature of the English legal system (which contrasts rather sharply with the practice even in some other Common Law jurisdictions such as the United States) that where the prosecution is initiated or taken over by the Director of Public Prosecutions or where the police bring proceedings the actual conduct of the prosecution in court is entrusted to members of the Bar in those courts where they have exclusive right of audience and normally by solicitors or barristers before other courts. Thus it may frequently happen that a member of the Bar appears for the prosecution in one case and for the defence in a succeeding case. The absence of any systematic hierarchy of professional prosecutors and the answerability of prosecuting counsel to the traditions and discipline of the Bar (which is concerned as much with the rights of the defence as of the prosecution) is widely felt to provide an important safeguard against the arbitrary or over-zealous exercise of the prosecutor's position.

In English law (and generally speaking in all countries following the Common Law tradition) in serious cases triable on indictment the evidence collected by the prosecution is submitted to a judicial tribunal (the examining magistrates) which, before committing the accused person for trial, has to be satisfied that there is a *prima facie* case against him. This requirement is an important limitation on the power exercised by the prosecution. The function of the examining magistrates as has been explained in the Introduction above differs however from that of the investigating judge (*juge d'instruction* in France) in that their duty is to consider only the evidence put forward by the prosecution, in the light of any evidence offered by the accused, if he does not exercise his right to reserve his defence.

In the trial itself the prosecutor has in general the same rights as the accused. This needs qualification to the following extent:

- (1) the onus of proof is on the prosecution (presumption of innocence) although in certain cases proof of certain facts may shift this burden;



- (2) it is the duty of counsel for the prosecution to bring to the Court's attention any evidence favourable to the accused of which he has knowledge;
- (3) the prosecutor cannot give evidence of the bad character of the accused unless the accused has given evidence of his own good character;
- (4) from the verdict of "not guilty" by a jury at an Assize Court, there is no right of appeal by the prosecution on fact or law to the Court of Criminal Appeal, although the accused may have a right of appeal.

The particular importance of (2) above is that it places primarily on the Bar at the trial a duty which in inquisitorial systems is assumed at the bringing of criminal proceedings by the examining judge and the prosecutor.

Much of the foregoing applies to the *United States* but there are important differences. In Federal law the Attorney General of the United States is ultimately responsible for prosecutions. In State law, it is not usually the State Attorney General but the local prosecutor, the "District Attorney".

Although the terminology may differ, the essential elements in the initiation of criminal proceedings are the same under Federal and State law. In general, prosecution for the more common types of crimes – homicide, robbery and theft, misappropriation of money, etc. – are matters of State law. Federal crimes are offences against the functions, rights and property of the Federal Government and are subject to Federal statutes.

Prosecution of major crimes is initiated by the Department of Justice through its local United States Attorneys who, like the Attorney General, are appointees of the President.

In the States the prosecution is usually initiated by the local "District Attorney" of the county or other judicial district, who is generally elected by the voters for a specified term of years. The procedural method varies somewhat from one state to another depending on the provisions of the state constitution or the statutes.

There is considerable latitude for discretion of the prosecutor at all stages. The prosecutor may decide not to act for lack of sufficient evidence, or for a number of other reasons. After indictment or presentment the prosecutor may move for a dismissal, though usually this can be done only with the consent of the court. In some jurisdictions the consent of the accused is also needed: he may insist on standing trial, the better to clear his name. Prosecution for minor offences may generally be discontinued without court approval.

The prosecution is conducted in court by the appropriate Attorneys or their assistants and there is thus some difference from the English system with its prosecutions in serious cases mainly in

the hands of normal practising members of the Bar, briefed *ad hoc* for each case.

As in England so in Federal Courts and in most of the states prosecution for serious crime involves satisfying a judicial tribunal (preliminary examination by the magistrate) that there is a *prima facie* case to answer. But whereas in England the grand jury has been abolished, in the United States the Federal Constitution, Fifth Amendment, provides that no person shall be held to answer for a capital or otherwise infamous crime except upon a presentment or indictment of a grand jury. A Federal grand jury consists of 16 to 23 members drawn by lot from a much larger list of individuals, men and women, residing in the judicial district for which the United States Attorney and the particular grand jury function. The concurrence of 12 or more of the grand jury members is required for an indictment. The grand jury generally receives the complaint and evidence of probable crime from the United States Attorney, but in many states the local grand jury may return a presentment on its own initiative.

The person accused by a Federal grand jury may waive formal indictment, except in a "capital" case, and the United States Attorney may thereupon proceed by "information" alone, i.e., a formal detailed charge prepared and filed by him in lieu of an indictment. Minor Federal offences, for which the penalty is only a fine or imprisonment for less than one year, or without hard labour, may be prosecuted on an information.

In the United States a more serious offence generally requires indictment by the local State-created grand jury, although the due process clause of the Fourteenth Amendment has been held not to require consideration of the alleged offence and indictment by a state grand jury in those states whose constitutions do not themselves contain such a requirement. If, however, the grand jury is used, its members must be selected by a fair and impartial method without discrimination as to race, colour or religion – in the states as well as in Federal prosecutions.

The respective rights of the prosecution and the defence are similar, but a prosecutor may appeal from a dismissal of a charge ordered by the trial Court upon a question of law but never from acquittal upon the weight of the evidence. The Report of the American Committee to co-operate with the International Commission of Jurists draws attention to the fact that in the Federal Courts the accused may, under certain circumstances, obtain an order authorizing him to inspect documents but the prosecutor enjoys no such rights. Regarding the prosecutor's duty to disclose evidence favourable to the accused, the rule is stated in the Canons of Professional Ethics of the American Bar Association thus: "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of

the accused is highly reprehensible." There is no corresponding burden upon the defendant to produce evidence favourable to the prosecution for that would violate the fundamental constitutional protection against forcible self-incrimination. Moreover, the accused cannot be required to testify at his trial.

Realistically viewed, the American report adds, the position and prestige of the prosecutor enables him – as he sometimes does – to make inflammatory statements against the accused in argument to the jury. The trial court may caution the jury to disregard this but nevertheless an ineradicable impression may have been so made upon the minds of the jurors. If the statements by the prosecutor are viewed by the trial Court, or the appeal Court on review after conviction, as materially prejudicial to the accused, his conviction may be set aside by the trial Court or reversed by the appellate Court.

In other jurisdictions which have been influenced by the Common Law, the principles which have been set out in regard to England have in the main been followed. Two features must, however, be mentioned: (1) the police normally initiate prosecutions, and as the police, whether State or national, are generally more centrally organized than in England the ultimate responsibility of the Government is emphasized; (2) it is common to find the actual conduct of the prosecutions in the hands of a full time professional prosecutor. In *Ceylon* it may be mentioned that the Attorney-General can indict a person discharged by a magistrate without giving reasons and the Attorney-General in *Australia*, at all events in the example as given in the Australian report regarding New South Wales, also has a special power in that he must in a sense fulfil the function of a Grand Jury (which does not exist in that State) in finding a "true bill", and he has the power himself to indict, where the magistrate has refused to commit.

Among countries where, at all events in criminal law, there is some Common Law influence, although their general character might be more regarded as eclectic, such as the *Philippines* or *Thailand*, it may be mentioned that the necessity for the prosecution to make out a *prima facie* case may be discharged before the trial court rather than, as in England, before a separate tribunal; and in this connection it is interesting to note that in Thailand, under a law of 1956, examining justices of Districts Courts are now entrusted with the duty of deciding whether there is a *prima facie* case to go for trial.

Turning to systems which are more characteristic of the "inquisitorial" system, it will be useful to begin with *France* which has set the pattern for many other systems. It is first important that the Judiciary (*magistrature*) includes both the judges or magistrates in the English sense (*magistrature assise*) and the prosecutors (*magistrature debout*); secondly, that the prosecutors are organized in a hierarchy (*Ministère Public*) answerable to the Minister of Justice, who is a member of the Government; thirdly, that although pro-

ceedings are initiated by the prosecuting body (and not by the police), at an early stage control in serious cases passes to a *juge d'instruction* (investigating judge) who is a member of the *magistrature assise* of the Court having trial jurisdiction in the case, (although he does not sit at the trial) and from whose decisions appeal lies to a special bench of judges (*Chambre d'accusations*) of the appropriate appeal court. (This *Chambre d'accusations* in any event reviews committal by the *juge d'instruction*, in serious cases to be tried by a *Cour d'Assise*). Fourthly, not only in the trial itself but in preliminary investigation, it is the function of the judge to consider all the evidence both for the prosecution and for the accused, in contrast to the position of the examining magistrates in England, who, unless the accused chooses to give evidence, are concerned only with the question whether the prosecution can make out a *prima facie* case against the accused.

This general picture must be qualified in the case of France and some other systems to the extent that criminal proceedings may be initiated indirectly by the injured party who in effect brings civil proceedings before the criminal court.

The prosecution has a discretion in the initiation or discontinuance of proceedings, and the Minister of Justice is ultimately responsible for its exercise. He will therefore issue general instructions by means of circulars to the *Procureurs Généraux* attached to the different Appeal Courts, who in turn are responsible for the *Procureurs de la République* attached to lower courts. In individual cases the theory is that an order not to prosecute does not relieve the particular prosecutor concerned from his legal duty to prosecute if the public interest and the facts warrant it, although the theory is modified by the internal disciplinary control of the prosecuting body. It is clear that the prosecutor can be ordered to prosecute by his superiors. However, the prosecutor, whatever his written instructions, is always entitled orally to express his own convictions. This is sometimes expressed in the maximum "*la plume est servie, mais la parole est libre*." When, however the trial court becomes seized of the case, the discontinuance of proceedings passes under its jurisdiction.

Regarding the respective conditions of prosecution and defence there has been a distinction between the right of the prosecution to interrogate witnesses directly and that of the defence only to put questions through the Court. The French report submitted to the International Commission of Jurists considers that this is not a matter of any practical importance and adds that for this reason the new Code of Criminal Procedure allows both prosecution and defence directly to interrogate witnesses.

The relationship between the *juge d'instruction* and the *Ministère Public* has been clarified and the position of the former strengthened by the new Code of Criminal Procedure, the *Titre préliminaire* and *Livre I* of which were approved by Parliament

on December 31, 1957. The significance of the changes made is particularly important in regard to the position of the *police judiciaire*, in respect of which the *juge d'instruction* had a somewhat equivocal position vis-à-vis the *Ministère Public*. The matter is referred to below under the heading covering the police.

It would serve no useful purpose to review in detail the many systems which in the main follow the pattern of the French system. Thus in the *German Federal Republic* the Federal Minister of Justice in Federal cases and the Ministers of Justice of the States in other cases are ultimately responsible. The initiation of proceedings is in the hands of the Federal and State Prosecuting Authorities. Head of the Federal Prosecuting Authorities is the Federal Director of Prosecutions (*Oberbundesanwalt*). He is assisted by Public Prosecutors (*Bundesanwälte*). In the States the function is exercised, at the Supreme State Courts and State Courts, by one or more State Prosecutors and their deputies, at the Regional Courts (*Amtsgerichte*) by State or Regional Prosecutors (*Amtsanwälte*). It should however be emphasised that there is in principle no discretion in the bringing or discontinuance of prosecutions ("legality principle" – see Section 152 of the Code of Criminal Procedure) and it may be added that this principle is followed in a number of other countries such as *Austria* and *Italy*. It may also be mentioned that the obligation on the prosecutor to present all the evidence favourable or unfavourable to the accused is specifically recognized, as is the equality of the parties in the presentation of the case and the production of evidence.

The position in *Sweden* shows features of both the accusatorial and inquisitorial systems, with special characteristics of its own. While on the one hand there is a hierarchical system of prosecutors and a preliminary investigation not unlike the French system, on the other the Common Law practice is since 1948 followed in that the examination of the accused and witnesses at the trial is conducted by the parties under the supervision of the judge. Private prosecution plays a somewhat more important part than in most other European systems, and there is a special procedure (as in *Finland* also) for the prosecution of officials by a "Parliamentary Attorney".

In the *Soviet Union* and with some variations in the countries which follow its legal pattern, the role of the prosecution cannot be described as characteristic of either the accusatorial or inquisitorial system as described above. In different ways systems which are in a broad sense either accusatorial or inquisitorial seek to control the abuse of power by the prosecution by the supervision at some stage by an independent Judiciary. In the Soviet Union on the other hand all stages of criminal proceedings until trial are in the hands of the prosecuting authorities, who constitute an elaborate hierarchy under the Procurator-General of the USSR, in turn answerable to the Supreme Soviet (Legislature) or in practice to the

Praesidium, which assumes the functions of the Supreme Soviet when, as is normally the case, the latter is not in session. Evidence obtained in the preliminary investigation is admissible in the trial, and it rests with the Procuracy rather than with the courts to ensure that the police or (since 1955) state security agencies observe the law in the collection of evidence. Furthermore, the Procuracy has the power to apply for the setting aside by "protest" of the final decision of any court, even with the highest jurisdiction, a right which is not given to the accused (A full study of "The Soviet Procuracy and the Rights of the Individual against the State" has been published in the *Journal of the International Commission of Jurists*, Vol. I, No. 1, p. 59.)

The position of the prosecution in *Yugoslavia* departs from the pattern of the USSR to the extent that a judicial preliminary investigation, as distinguished from an investigation by the police is mandatory for major crimes punishable by death or imprisonment for not less than 20 years; in other cases an enquiry may be instigated either before an investigating judge or by the police; evidence produced by the police during the preliminary enquiry may be used by the trial court if proof of such evidence cannot be repeated at the trial.

### **The Organization and Control of the Police**

The main problem arising in respect of the role played by the police in the machinery of criminal justice is perhaps not so much what legal limitations of admittedly necessary discretionary powers must be imposed to reduce to some extent the "dramatic preponderance of power on the part of the State" to acceptable proportions, as the actual exercise of its powers and observance of the limits by the police. However extensive the Judicial control – e.g. by means of *Habeas Corpus* or similar remedies, and however effective the ultimate political responsibility of the head of the police, neither of these can in themselves provide complete safeguards against the *de facto* powers arising from physical custody of persons in the hands of the police. Indeed it may be said that the integrity, restraint and discipline of the police force are a significant measure of the respect accorded to the Rule of Law in a country.

On the other hand, legal restrictions and judicial control may and do influence the attitude of the police. In most legal systems their powers to arrest without a warrant are wider than those of private citizens. Broadly speaking those powers exist under the following circumstances: if the offender is caught in the act (*in flagrante delicto*) or immediately afterwards; if there is reasonable suspicion of a serious offence having been committed; in cases of disturbance of the peace; and finally where the person arrested is a member of a suspect class, e.g. vagrants, or persons who cannot give a good account of themselves. In most jurisdictions the power

of arrest of a private person is limited to cases of the first category and then only for serious offences. England and the USA provide notable exceptions in that arrest on the ground of reasonable suspicion is also permitted.

Once an arrest without a warrant has been made, it must be confirmed by a court within a short period, usually 24 or 48 hours. This period is the only time during which the police are certain of having control over their suspect.

The limits imposed on their powers of arrest outlined above may lead to unlawful or arbitrary arrests and detention by the police. Where no reasonable suspicion in the objective sense exists, there is sometimes a danger that a person believed to "know something about the case" may be arrested for vagrancy or breach of the peace or even detained without a formal arrest having been made at all, with the result that the need for the prompt production of the person arrested before a magistrate is evaded. The risk of this form of detention is more likely to occur in systems where the public are insufficiently protected by actions for wrongful arrest. It may perhaps be added that the likelihood of its occurrence is less obvious in legal systems subjecting the police to immediate supervision by the separate prosecuting authorities one of whose members is the responsible head of the Judicial police in his area of jurisdiction, while on the other hand the writ of *Habeas Corpus* provides a strong deterrent and remedy in common law jurisdictions.

The object of arrest and the detention preceding production before a magistrate is in most cases to obtain information regarding a criminal offence. In view of the shortness of the period of lawful detention the possibility exists that the police may exercise undue pressure on the person detained, the "third-degree" method providing a notorious example. To minimise the risk of such or similar methods being employed many systems exclude the evidence so obtained at the subsequent trial, though another incentive to use third-degree methods may lie in the possibility of obtaining from the person in custody – whom the police or prosecutor may not consider a suspect at all – information which may enable them to obtain independent evidence in itself sufficient to effect a conviction.

Of the remedies available, *Habeas Corpus* is perhaps the most efficacious as, with the exception of the rather theoretical right of reasonable self-defence against illegal arrest, all other remedies open to him are *post-facto*. From this it would appear that especially in those legal systems that do not know *Habeas Corpus* or a similar remedy, the administrative safeguards provided by adequate training, discipline and regard for the law on the part of the police are of the greatest practical importance. This would seem to be all the more true as a police force acting in accordance with the concepts of the Rule of Law is more likely to get the essential co-operation of law-abiding citizens.

Although the interrogation of suspects and witnesses by the

police is perhaps the most frequent source of illegality, problems are also raised by use of other means of gathering evidence. Most jurisdictions empower the police to conduct searches and impound physical evidence, subject to certain constitutional or statutory guarantees, e.g. the requirement of a search warrant or the presence of a judicial officer during searches, if the evidence thus acquired is to be admissible. Although the police has no general right of access to premises, such access may often be obtained with the consent of an occupant acting either under the impression that he may not lawfully refuse or in fear of antagonising the police. Methods of extracting information of more recent origin are wire-tapping, the use of drugs, blood tests and lie-detectors. On the balance these methods are regarded as unlawful either because they amount to an inadmissible invasion of the privacy of the individual or because, though not on principle immoral, they are unreliable. The use of the blood test in cases of suspected drunken driving has however been widely accepted if submitted to voluntarily. A number of jurisdictions allow wire-tapping if under the control of a high administrative official or the judiciary, thus placing wire-tapping in the same category as the interception of telegraphic messages, letters, etc.

In *England* the responsibility for the police rests to a large extent with the local police authorities. There is a certain amount of supervision by the Home Office in respect of the appointment and removal of Chief Constables. But control is indirectly exercised by the Home Office by advising Parliament to withhold grants-in-aid to the local police authorities; and it should also be borne in mind that the Metropolitan Police District of 747 square miles with 8,300,000 inhabitants is centrally administered by a Commissioner responsible to the Home Secretary. The considerable measure of independence of the police from governmental control is reflected also in the fact that the police consider themselves not as servants of the Executive but as officers of the law whose personal responsibility derives directly from the law. The English organization of the police stands in marked contrast to that in Continental systems and indeed to that in a large number of Common Law jurisdictions, where a far more centralized form of organization responsible to the Executive prevails.

The powers of the police have a broad similarity in all Common Law countries. Arrests without a warrant issued by the court may be made by the police and by private citizens. It lays the arresting private person open to an action for wrongful arrest unless arrest was reasonable and a felony has in fact been committed, whereas the police constable is protected if he can only show that his suspicion was reasonable. In addition, the police have certain statutory powers of arrest, e.g., for vagrancy. Unlawful arrest either by a private citizen or a policeman may be lawfully resisted. There is also *post-facto* redress in the form of prosecution for assault or



civil actions for damages against the person effecting the arrest, but the policeman is not a servant either of the local authority who employs him or of the State, neither of which is therefore liable.

Special mention should be made of the remedy of *Habeas Corpus*, which is widely characteristic of the Common Law. Its essential features are that it (1) provides a speedy method of access to the Courts which (2) may be invoked by anyone on behalf of a person detained, (3) places the burden of proof on the authorities to justify the detention, and (4) effects a final order of discharge against which the detaining authority cannot itself appeal.

A further important limitation on custody is provided by the institution of *bail*. Bail (which according to the Bill of Rights must not be "excessive" and is subject to higher judicial review) may or in certain circumstances must be granted as follows: -

- (1) if a person is arrested without a warrant the police are authorised and required if, the prisoner cannot be brought before a court within 24 hours, to release him on bail, conditional on his appearance in court;
- (2) on arrest under warrant, the warrant directs that the person arrested be either brought before a magistrate or released on bail conditional on his appearance before a magistrate;
- (3) on appearance before a magistrate, the prisoner may, before or during the hearing of the charge or on committal for trial, be released on bail.

Regarding the power of the police over persons in custody, restraint is effected by legal prohibition and by exclusion of certain evidence obtained in custody by improper means. The matter is dealt with in the following way in the Report of the British Section of the Commission:

#### **"Legal Prohibition**

The police are subject to the ordinary law as it applies to private citizens. Thus a police officer may be prosecuted for an assault or larceny - although if the property has been returned it would be difficult to show the necessary intention - and it would be no defence for him to say simply that he was acting to obtain a confession or information, nor would this justify a civil trespass.

#### **"Exclusion of Evidence**

1. Evidence is subject to the tests of relevance and firsthand knowledge. Provided that it satisfied these tests information offered by the police obtained by a criminal act is admissible; so similarly, evidence obtained by a civil wrong or deception.
2. In practice a judge may comment adversely upon, or direct the jury to disregard, evidence obtained by objectionable methods.
3. A confession will be excluded unless shown by the prosecution to be voluntary, and a confession will not be admitted if made in consequence of some temporal inducement related to the outcome of proceedings by or with the acquiescence of a person in authority.
4. In practice confessions will be excluded if obtained contrary to the "Judges' Rules"; these rules are rules of practice and of no binding

authority, but the judge has a discretion to exclude any confession obtained contrary to their spirit.

5. The rules are to the following effect:

- (i) a police officer may question a suspect;
- (ii) once he has decided to charge a person he should caution him;
- (iii) persons in custody should not be cross-examined but be questioned, after caution, if that is proper and necessary in the circumstances; for instance, a person arrested for burglary may say he has thrown the property away, and then he may be asked where he has thrown it, or a person arrested as an habitual criminal may be asked to give an account of himself;
- (iv) persons in custody should not be confronted with each other or informed by the police of each other's statements, but copies of their statements should be given to them, without comment.

6. Evidence (other than the confession itself) obtained in consequence of an inadmissible confession is admissible together with that part of the confession relating to it."

Again, taking England as an example, lawful custody entitles police to search the prisoners, but custody apart the police have special powers in certain specified circumstances to conduct searches provided they are authorized by a magistrate, or, in some cases, an executive official's warrant. There is some dispute as to the validity of a decision in 1934 as to the legal justification allowed for a seizure of property in circumstances *prima facie* unlawful where the evidence so obtained might be material to a later prosecution against any person.<sup>1</sup>

With regard to methods of obtaining information other than by search, the police under authority from a principal Secretary of State (i.e., the Executive) may use information obtained by interception of the mail and, in respect to certain official secrets, concerning telegrams or telephones; in spying cases, a Chief Officer of Police may act in cases of emergency. The position regarding telephone interceptions in general has been recently reported on and may deserve further treatment.

It is said that by analogy with the original and non-statutory power of the Crown to intercept mail, the Crown has power to intercept telephone communications in order to detect major crime or criminals or to prevent injury to national security.

The following is taken from the Report of the Committee of Privy Councillors constituted by the Prime Minister to report on the interception of telephone messages and published on October 30, 1957:

- (a) The invariable practice is that interception is carried out only on a warrant from the Home Secretary (or, in Scotland, from the Secretary of State for Scotland), which sets out the names and addresses or telephone numbers of the persons concerned.

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<sup>1</sup> *Elias v. Passmore* [1934] 2 K.B. 164.

(b) Save in the most exceptional cases it is the practice to use the information obtained only for the purposes of detection and not as evidence.

(c) Warrants to the Metropolitan Police and Board of Customs & Excise are granted on the following principles:

- (i) the offence must be really serious, i.e., one for which a man with no previous convictions could reasonably be expected to be sentenced to 3 years' imprisonment, or lesser offences involving large numbers of people;
- (ii) usual methods of investigation must have been tried and failed, or, in the circumstances, be unlikely to succeed;
- (iii) there must be good reason to think that interception would result in conviction.

(d) Warrants to the Security Service are granted on the following principles:

- (i) there must be major subversive or espionage activity, likely to injure the national interest;
- (ii) the material likely to be obtained must be of direct use in compiling information necessary to the Security Service in performing its duties.<sup>2</sup>

The pattern of the English law is also found in most other systems following the common law tradition. The following important points mainly but not exclusively of difference may be noted.

The police in the *United States* is organised on three levels: Federal, State and municipal. On each level the competent executive is finally responsible: the FBI (Federal Bureau of Investigation) is part of the Department of Justice and headed by the Attorney-General. The Chief of the State Police, whose functions are often limited largely to highway traffic control, is appointed by the State Governor to whom he is directly responsible. The responsibility for the enforcement of the majority of the State laws relating to crime as well as local ordinances lies with the municipal police forces whose chiefs are either appointed by the local governing body, or, more rarely, by the State Governor, or elected by the voters. The degree of effective supervision over the police varies in the different communities. It would appear that concern is sometimes expressed regarding the control exercised on the one hand and the individual sense of responsibility of the police on the other in some parts of the USA. The legal safeguards in respect of arrest, detention and investigation being in principle similar to those in England, it may well be that differences in practice are to some extent due to the

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<sup>2</sup> See on telephone-tapping in general a comparative survey by Dobry, *Journal of the International Commission of Jurists*, Vol. I, No. 2, 319.

variety of attitudes and organisation of the police to be found in a much larger country such as the USA. It is stated in the report of the Committee to co-operate with the ICJ, that

"Regulations controlling police activities often provide a substantial additional measure of effective limitations. In many communities the organised police force are given instruction upon the limits of their permissible exercise of forcible power and in the corresponding rights of citizens to protection from abuse. There is a notable present trend toward education of police officers in these respects and enforcement by administrative action within the police unit."

The rules relating to arrest and conditions of, and safeguards against, illegal custody are in principle similar to those in England. There are however Federal criminal penalties for violations of civil rights. In respect of administrative remedies and civil actions for damages the following citation from the American Report submitted to the Commission should be noted:

"Administrative remedies within the police force such as suspension, down-grading or discharge also serve as deterrents. The failure to use such remedies in some states and localities, however, is a matter of common knowledge. Particularly do they fail to suppress unlawful searches and seizures. Cases of civil action for damages against police officers for such violations are very rare, and successful criminal prosecutions of police officers for this type of violation are rarer still. Only a few states have statutes which make their political subdivisions – counties and municipalities – civilly liable in damages for wrongs committed by their police officers since, in acting illegally, they are usually regarded as having acted beyond the scope of their employment."

The most important legal provisions which affect the power of the police over a person in custody are contained in the Fifth Amendment to the Constitution, requiring "due process" and specifically prohibiting forced self-incrimination, which is applicable to the Federal Government and the requirement of "due process" in the Fourteenth Amendment, which applies to the states. There is no rule forbidding the police to question the accused, either before or after arrest, as to his suspected complicity in an alleged crime, but a confession obtained by police questioning must be genuinely voluntary if it is to be admissible in evidence against the accused at his trial. Any confession obtained through threats or sustained pressure will be excluded under the due process clause of the Fifth and Fourteenth Amendments. These forbidden procedures include detention in isolation for a long period, failure to take the person before a magistrate within a reasonable period of time, questioning by the police in relays, the use of promises and inducements, disregard of the rudimentary needs of life and other kinds of psychological pressure – not standing alone, but in the aggregate as to be regarded as a "combination" violating due process. The courts give full scrutiny to all the circumstances surrounding the extraction of

a confession later challenged by the accused as being involuntary. In the Federal courts even a voluntary confession obtained during a period of illegal detention is inadmissible. Similarly, the Fourth Amendment, applying to the Federal Government, against unlawful searches and seizures and the "due process" clause of the Fourteenth Amendment applying to the States, make illegal, in the words of the American Report submitted to the Commission, "any trespassory search and seizure of the person, premises, property or papers of an accused person unless justified as incidental to a legal arrest or pursuant to a search warrant issued by a judge upon a showing made to him of probable commission of crime."

In the Federal courts evidence obtained by the police beyond the legal limits of search and seizure may not be offered in evidence against the accused. In the State courts, the practice and rules are not uniform with those of the Federal courts. In about two-thirds of the States the courts of last resort have held that their constitutions do not bar the use of evidence obtained by unlawful search, i.e., a search which is neither permitted by the individual subjected to it nor authorised by a court order. The Supreme Court of the United States has held that the provisions of the Federal Constitution do not bar the use by State officials in State court proceedings of evidence illegally obtained. In the remaining States, however, their Courts have decided the rule to be the same as in the Federal Courts. The extreme form of personal body search, such as the use of a stomach pump to reveal and extract narcotics, has been held a violation of the Federal constitutional provision, even in a State court trial.

The Federal constitutional prohibition does not bar use of evidence obtained by illegal "eavesdropping" or the use of electric listening and recording devices. Under a Federal statute (1934), a criminal penalty is prescribed for divulging or using information obtained by an unauthorised interception of a wire message, and the Federal Courts have excluded evidence of all such intercepted communications and also other evidence of secondary nature itself obtained by legal methods through initial use of the intercepted communication to which the accused was a party.

In other common law countries, as *Australia, Canada, Malaya, India*, federal responsibility lies with the Minister of Justice or the Home Minister, and responsibility on the state or provincial level with the Attorney-General (Canada) or state Home Minister. In *Canada*, municipal police forces are subject to the municipal authorities frequently through a Police Commission.

The powers and duties of and remedies against the police in respect of arrest and confinement do not differ greatly in law from those in England.

It should be noted that, in *India*, no confession made to a police officer can be used against an accused person (Section 25 Indian Evidence Act), nor can any confession made while in *custody*

to *anyone* be used, unless made voluntarily before a magistrate (Section 26, Evidence Act and Section 164 of the Criminal Code of Procedure). And no statement made by any person to a police officer in the course of investigation, whether in writing or oral, can be used at the trial except at the request of the accused (Section 162, CCP). The position is similar in this respect in *Ceylon*, where law and practice are given as follows:

"The powers of the Police to obtain information are governed by Chapter 12 of the Criminal Procedure Code. An officer-in-charge of a Police Station can by writing require a person to appear at the Station to testify in any matter under investigation. If he fails to do so, such person may be apprehended on a warrant. No person can be required to make any statement incriminating himself. Except for this restriction, it is an offence for a person to refuse to answer any questions put by the Police Officer to use any force on a suspect in custody.

"A confession to a Police Officer by an accused is inadmissible in evidence. The Police frequently produce accused persons before magistrates to have their confessions recorded by the latter because confessions to Magistrates are receivable in evidence. Magistrates, however, have to be satisfied by thorough examination of the accused person that they have not been induced, intimidated or deceived into making the confession. Rules have been framed for the guidance of Magistrates to be followed in regard to the questioning of suspects prior to the recording of such confessions. The Trial Courts, like the Supreme and District Courts, have been very reluctant to admit such confessions, if there is reasonable suspicion that Magistrates have not been vigilant in the observance of the rules laid down for ensuring the voluntary nature of such confessions."

Before turning to some contrasting European countries, it may be of interest to consider certain aspects of the position of the police in *Japan* where features of the European Continental and of the Common Law systems may be found.

The general administration of the police is in the hands of *The National Public Safety Commission* under jurisdiction of the Prime Minister, and composed of five members appointed for five years by the Prime Minister with the consent of both Houses of the Diet. The Commission is presided over by a State Minister who is not a member and has no vote except in the case of a tie. The general control of the Commission police functions are exercised by the *National Police Agency*, headed by the Director General with further decentralisation into Prefectures and Local Police Stations. Criminal investigation is conducted by specialised units and the prosecuting authorities in co-operation. Powers of arrest of the police are limited by Art. 33 of the Constitution: "No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offence with which the person is charged, unless he is apprehended in *flagrante delicto*." This limitation having been found too severe, the Code of Criminal Procedure permits arrest without a warrant also when there are sufficient grounds to suspect the commission of certain types of serious crimes, and if, in addition,

there is no time to procure a warrant. In this case a warrant must be obtained immediately afterwards. It should be noted that a warrant is not an order to bring the suspect before the court but a permission of the court for a police officer or public prosecutor to arrest. If the police decide to act on the warrant they may detain the person arrested for 48 hours after which he must be brought before a public prosecutor, who may detain him for a further 24 hours after informing him of the charges against him. For longer detention a court warrant is necessary unless a prosecution is instituted immediately.

Japanese law recognises *Habeas Corpus*, though only where no other adequate remedy is available. This is not considered to be the case where a person is unlawfully detained as apparently sufficient safeguards are provided by the requirement laid down in Art. 34 of the Constitution, that the suspect shall be informed of the charges against him and cause must be shown in open court in the presence of the accused and his counsel, and further by the possibility of questioning the validity of the detention order before a District court. There are also the usual criminal sanctions. It should be noted in this context that the prosecutor has discretion as to the initiation of proceedings. If he should decide not to prosecute in a case involving the police, the injured party may request a court to prosecute. Finally, civil actions for damages can be brought against the State.

A suspect as opposed to an accused under detention cannot obtain release on bail. As has been seen above, this may amount to a considerable period (48 plus 24). There are rather wide exceptions to the obligation to grant bail and, in a paper submitted to the United Nations Seminar on Human Rights in Baguio in February 1958, Professor Hirano of the University of Tokyo stated that on the whole there was a general feeling in Japan against the use of bail.

No person is compelled to testify against himself, and confession made under compulsion, torture or threat, or after prolonged arrest or detention is not admitted in evidence, and no person is convicted or punished in cases where the only proof against him is his own confession. (Art. 38 of the Constitution and Art. 319 of Criminal Procedure Law.) It has been suggested (by Professor Hirano, *op. cit.*, *supra.*) that the exemption provided by the Code of Criminal Procedure to the general right to refuse to appear for questioning when a suspect is under arrest or detention may, in practice, be open to abuse.

We may next take *France* as an example of legal systems following what we have described above for want of a better term, as the "inquisitorial system".

The police in France is organised in three separate forces, each charged with the maintenance of order generally (*Police administrative*), as well as criminal investigation (*Police judiciaire*).

The *Gendarmerie Nationale*, which is a Branch of the Army and falls under responsibility of the Minister of National Defence, has the task of policing the rural districts and roads. The Department of the Seine (Paris) and the other municipal regions are in charge of the *Préfecture de Police* and the *Surété National* respectively, under the ultimate control of the Minister of the Interior.

The *Police judiciaire* exercises its functions under the direct control of the *Procureur de la République* (Public Prosecutor) and the general supervision of the *Procureur Général* of the Appeal Court having jurisdiction. The recently introduced First Book of the Code of Criminal Procedure has put an end to the ambiguous position of the *Juge d'instruction* who was – but is no longer – an officer of the *Police judiciaire* under the control of the *Procureur Général* while at the same time being in charge of the preliminary judicial enquiry assisted by the prosecuting authorities. Under the new Code, neither the *juge d'instruction* nor the prosecuting authorities are officers of the Judicial Police, though the *Magistrature Debout* retains its control over the Police, who must obey its orders to investigate, while the *juge d'instruction* may entrust the execution of certain “*actes d'instruction*” to officers of the Judicial Police during the preliminary inquiry. However, the police may also commence investigations on their own initiative but must inform the prosecuting authorities of offences coming to their knowledge. The new Code also provides for disciplinary control over the Police by the *Chambre d'Accusations*.

The only arrest which can be made by the police on their own initiative (and by private citizens) is in cases *in flagrante delicto*, which is however rather widely defined. Otherwise the police arrest on a warrant from the *juge d'instruction*. The suspect may then be kept for 24 hours, after which further detention is only possible on the authority of the prosecuting body or the *juge d'instruction* – and this only in cases of grave suspicion. This second period must not exceed 24 hours. Further detention rests with the *juge d'instruction*.

Damages can be obtained against the police in the ordinary courts for illegal arrest and detention, but the *Police judiciaire* are not subject to the administrative courts.

For our present purposes it is of primary importance to consider the period of police detention prior to *inculpation* (formal charge before the *juge d'instruction*), as from that stage onwards the accused is not bound to give evidence on oath, cannot be interrogated by anyone except by the *juge d'instruction*, has the right to be assisted during each interrogation by counsel of his own choice, and his counsel, who can acquaint himself with the file of the instruction, has always the right of free communication with the accused.

On the other hand, a person who has not yet been accused (*inculpé*) is interviewed by the officer of the *Police judiciaire* or by the *juge d'instruction* as a witness, and therefore has no right to



counsel and has the obligation of giving evidence on oath. In that way, the *inculpation* may be delayed in order to deprive the accused of the guarantee to which he is entitled once the charge is made. But the courts have lessened this danger by providing for *inculpations tardives*: i.e., a suspected person can no longer be treated as a witness and must be treated as an accused when there are sufficient grave indications of his guilt. If such suspicions exist, his hearing as a witness is invalidated. The new Code expressly provides that a person can refuse to be treated as a witness and insist on being charged.

Although in France there are no strict rules of proof or evidence and the probative value is governed by the *intime conviction* of the judge, the proof must be achieved by *lawful means*, and all irregularly obtained evidence must be rejected.

In this connection the rules as to obtaining evidence by officers of the *Police judiciaire* are fairly strict. The most relevant rule, which is well established in France, is that it is not lawful to obtain evidence by surprise or by ruse or tricks. For example, a *juge d'instruction* or *commissaire de police* is not allowed to telephone a suspected person and pretend that he is his accomplice; nor can he require a suspect to telephone his real accomplice and to listen in to the conversation on another line. The French *Cour de Cassation*, by a decision which has been somewhat criticised, has held that recording of telephone conversations with a third party, even with the consent of the subscriber, gives rise to civil liability.

Normally searches are carried out in the presence of, or at all events with the specific authority of, the *juge d'instruction*, except that in the case of *flagrant délit* the officer of the *Police judiciaire* can search and take possession not only in the home of the accused but also in other premises.

Although there is much in common between the French and Italian systems regarding the police, the following special points may be mentioned:

(1) In principle every agent or officer of the police is criminally responsible, but no proceedings may be taken against him without authorisation of the Ministry of Justice when the prosecution is in respect of the use of arms or other means of physical coercion.

(2) The Supreme Court has emphasised the wide power of the judge to admit and evaluate all evidence, however obtained, unless specifically prohibited by law. The police are in fact prohibited from using any means that may weaken the will or consciousness of the accused (e.g. by drugs).

(3) Where the police are civilly liable for illegal acts, there will be liability on the State (Art. 28 of the Constitution).

Although there are many points of interest which might be illustrated from the laws of other countries the main structure of

discussion has probably been sufficiently brought out and we may conclude by a reference to the police in the *Soviet Union*.

The Ministry of the Interior (MVD) and the State Security Committee (KGB) are ultimately responsible for the conduct of the police.

Soviet citizens have no powers of arrest and confinement (in contrast to some other countries influenced by Soviet law, such as Yugoslavia and Czechoslovakia). As regards arrest by the police, a distinction should be made between "arrest", technically so-called, which is subject to the provisions of the Code of Criminal Procedure and the Constitution on the one hand, and "taking into custody", on the other. An arrest "may be made only by order of the court or with the approval of the public prosecutor." (Constitution, Section 127). No such requirement and, in general, no particular requirements are established for "the taking into custody by agencies of the Ministry of the Interior and State Security and other agencies." On the other hand, the Procuracy has power to inspect and to transfer cases into which the State Security organs have initiated an investigation. (An innovation introduced in 1955 - See Loeber, *Journal of the International Commission of Jurists*, Vol. I, No. 1.)

In the case of an arrest, technically so-called, of a person by the agencies of police inquiry, a notification must be sent within 24 hours to the procurator indicating the reasons for the arrest (RSFSR Code, Section 104). Within 48 hours from the receipt of notification the procurator must decide whether to approve or cancel the arrest (*ibid.*) Approval by the court is equal to that of the prosecuting attorney (Constitution, Section 127). If a person is arrested on mere suspicion, in exceptional cases the codes allow him to be kept for 14 more days, during which time it must be decided what charges are to be made against him (RSFSR Code, Section 145).

No statutory provisions have been disclosed which would affect the admission of evidence due to the method by which it was obtained, with the exception of confession. In regard to confession the codes of criminal procedure uniformly state the following:

"The investigator shall have no right to seek to obtain a deposition or confession from the accused by means of violence, threat and other similar measures. (RSFSR Code, Section 136; Ukrainian Code, Section 134; Armenian Code, Section 135; Turcoman Code, Section 53; Uzbek Code, Section 26, para. 2)."

However, in practice, especially under the rule of Stalin, confessions were frequently extorted, as has been admitted by Soviet authorities.

Citizens are not accorded any powers with regard to search and other means of gathering evidence. Investigating agencies, including the police, have powers to undertake a search practically at their own discretion. The statutes do not require a court warrant

or approval by the prosecuting attorney. There are no known provisions regarding wire-tapping.

Finally, in respect of remedies, it should be emphasised that *criminal* sanctions against the police depend on action by the Public Prosecutor. In respect of a *claim for damages*, while there would appear at all events in law to be the possibility of a claim against the wrongdoer himself, action against the State is not possible for the acts or omissions of the police except in relation to money or other property deposited with the police. The main emphasis is laid on the possibility of complaint to the Procuracy.

### Summary and Conclusions

(1) (a) A reasonable certainty of the citizen's rights and duties is an essential element of the Rule of Law. This is particularly important with regard to the definition and interpretation of offences in the criminal law, where the citizen's life or liberty may be at stake.

(b) Such certainty cannot exist where retroactive legislation makes criminally punishable acts or omissions which at the time they took place were not so punishable, or if punishable, involved a less serious penalty.

(2) An accused person is entitled to be presumed innocent until his guilt is proved. The faith of a free society in the individual requires that the guilt of each accused should be proved *ad hominem* in his case. "Guilt by association" and "collective guilt" are inconsistent with the assumptions of a free society. Those who have the custody of arrested persons have a particular responsibility to respect the presumption of innocence.

(3) The circumstances in which an arrest may be made and the persons so entitled to act should be precisely laid down by law. Every arrested person should be brought before an independent court within a very short period, preferably 24 hours, before which the legality of the arrest is determined.

(4) Immediately on arrest an accused person should be informed of the offence with which he is charged and have the right to consult a legal adviser of his own choice. He should be informed of this right in a way appropriate to his education and understanding. This right should continue up to and during trial and during the period when an appeal may be pending.

(5) Detention pending trial is only justified when exceptional circumstances are proved to the satisfaction of an independent court which should otherwise allow bail on reasonable security. Permission to detain beyond the period mentioned in para. 3 above should only be given by an independent court and such permission should be reviewed at reasonably short intervals, when the detaining authority should be required in court to justify the continued detention. Prolonged detention awaiting trial, for whatever reason, is a serious injustice to an accused person.

(6) An accused person must have the right and power in practice to produce witnesses in his defence and the right to be present when they are examined.

(7) An accused person must be informed in due time of the evidence against him, in order that he may adequately prepare his defence. He must have the right to be present (with his legal adviser) when witnesses for the prosecution are examined and the right to question them.

(8) The function of the prosecution at all stages of the criminal process is to investigate and lay before the Court all the evidence bearing on the case whether favourable or unfavourable to the accused. The prosecutor should in particular inform the accused in due time of any evidence not being used by the prosecution which might benefit the accused.

(9) No one should be compelled by the police, by the prosecuting authorities or by the court to incriminate himself. No persons should be subjected to threats, violence or psychological pressure, or induced by promises, to make confessions or statements. It should not be possible to evade the obligations which arise from the foregoing principles by treating a person under suspicion as a witness rather than as an accused person. Information obtained contrary to these principles should not be used as evidence.

(10) The search for evidence in private premises should only take place under authorization from a competent court. It should only be permissible to intercept with private communications such as letter and telephone conversations for the purposes of collecting evidence upon specific authority given in the individual case by a competent court.

(11) The particular responsibilities of the police and prosecuting authorities during that part of the criminal process which precedes a hearing before a Judge require that the rights and duties of the police and prosecution should be clearly and unequivocally laid down by law. Different systems have evolved different ways of supervising and controlling the activities of the police and the prosecuting authority. Similar results may be achieved either mainly by the subordination of the police to the prosecution authorities which are in turn ultimately under the direction of the courts or mainly by the internal discipline and self restraint of the police and the traditions of fairness and quasi judicial detachment on the part of the prosecution; in the latter case the remedy of *Habeas Corpus* has proved an important procedural device for ensuring that detention is legally justified.

(12) Every system of criminal procedure has its characteristic dangers. It is in all cases essential that where an accused person has been illegally treated he should have a personal remedy both against the officials responsible and against the State in the name of which the officials have acted or failed to act. Evidence which

has been illegally obtained should not be admitted at the trial of an accused person.

(13) The prosecuting function necessarily involves the exercise of restraint and a sense of fairness which cannot be comprehensively reduced to precise formulation. Although it is the common practice to vest in the Executive the final responsibility for the conduct of prosecutions it is essential that the supreme prosecuting authority exercises his functions in an independent capacity rather than in pursuance of instructions given by the Executive.

(14) The trial of accused persons must take place before an independent court. Special courts created *ad hoc* for a particular case or series of cases endanger fair trial or at the least create the suspicion that fair trial will be endangered.

(15) The trial of accused persons should take place in public. Exceptions must be justified by law, the burden of proof resting on the prosecution to show that the conditions envisaged by the law are satisfied. Publicity in preliminary proceedings, where allowed, should not endanger fair trial by public discussion of the issues before they are decided in court.

(16) The Rule of Law does not imply a particular theory on penal reform but it must necessarily condemn cruel, inhuman and excessive punishments.

(17) In every case involving imprisonment or a substantial fine there should be a right of at least one appeal to a higher court against conviction and sentence.

(18) The principles outlined above should be applied as far as the nature of the offence allows to charges of "contempt of court" and "contempt of Parliament". Those principles above which relate to fair questioning of accused persons are also applicable to procedures of investigation which do not in themselves form part of a criminal process but which may have for those concerned effects on their reputation and economic security comparable to conviction by a court.

## **FOURTH COMMITTEE**

### **The Judiciary and Legal Profession under the Rule of Law**

#### **Introduction**

##### **(1) The Judiciary**

In a free society, whether it has a written constitution or not and whether or not this constitution is subject to the review of a judicial body, the position of the Judiciary and of the individual judges is of special importance. As has already been implied in the Introduction to Part II (The Executive and the Rule of Law) it is a characteristic of a free society that those to whom the power of governing is entrusted can only act under and within the authority of the law. It has been further stated in the Introduction to Part I (the Legislative and the Law) that the power of the Legislative to make law, whether or not subject to formal constitutional limits, is in a free society exercised on the assumption that the fundamental liberties of the people as a whole will not be violated. The inevitability of human error, especially when self-interest (which includes the exercise of power as an end in itself) comes into conflict with the claims of others, requires that the law, and the assumptions which underlie it, should be interpreted by a Judiciary which is as far as possible independent of the Executive and the Legislative.

The conception of independence as applied to the Judiciary needs however further elaboration. It does not mean that independence should be absolute, entitling a judge to act in an entirely arbitrary manner. The judge's duty is to observe the law and the assumptions which underlie it, in the light of his own conscience, to the best of his abilities.

To assert the independence of the Judiciary, within the restricted conception of independence given above, is even in free societies to state an ideal rather than a fully realized condition of fact. The individual judge, the judicial collegium and the highest court are not exempt from human imperfection or impervious to the influence of sectional interest. It is therefore important to have regard to the independence not only of the judge but also of the Judiciary as an institution; the latter may provide traditions and a sense of corporate responsibility which are a stronger guarantee of independence than the private conscience of the individual judge. The distinction between the independence of the judges and that of the courts has been emphasized by the Chief Justice of Japan in a recent survey of the administration of justice in that country

(Kotaro Tanaka, *The Democratization of the Japanese Administration of Justice*, 1953).

For all grades of the judicial hierarchy the same ideal of independence must be asserted, but the circumstances governing different types of the judicial function necessitate a variety of methods in striving for this ideal. For example, in the *United Kingdom*, an important jurisdiction is exercised by lay justices of the peace, whose position necessitates special rules governing their appointment and dismissal which might not be appropriate to professionally trained judges. In *France* (and in many other countries) the conception of the Judiciary, as it has been discussed in this paper, must be taken to include the personnel of certain administrative courts; indeed a supreme administrative court, such as the *Conseil d'Etat*, may play a central role in the maintenance of the Rule of Law and the independence of its members is therefore of cardinal importance.

The significance of the qualifying phrase "as far as possible" in relation to judicial independence is seen most clearly as far as its independence of the Legislative and Executive is concerned. There must be machinery for the selection, promotion and, in case of extreme necessity, removal of judges. This may involve the participation of the Executive, the Legislative, the Judiciary itself, other institutions (such as the Bar), the people through the electorate or a combination of two or more of these bodies. What is essential to a free society under the Rule of Law is that such machinery and, perhaps more important, the tradition which govern its exercise, should themselves express the spirit of the law and its underlying assumptions.

## (2) The Legal Profession

The function of the Judiciary in a society under the Rule of Law is closely associated with the function of the legal profession. Indeed, it may be doubted whether strictly speaking the legal profession should be described as a "free profession". In the same way as the Judiciary is not independent in the sense that it is able to exercise arbitrary power so the legal profession is not "free", if by freedom is meant liberty to pursue its own ends or those of its clients without regard to the law or to its underlying assumptions. But in the same way as the Judiciary the legal profession must be free from interference from the Executive, from the Legislative and, indeed, from the Judiciary within the proper sphere of discretion (when properly exercised) which the law allows it.

The legal profession can have in society a dual significance. On the one hand it may represent, collectively considered, a more or less powerful body, with special knowledge of the working of the legal systems, which can, and in many countries does, exercise on its own account considerable influence on society as a whole. This influence may be – and not infrequently is in fact – used to

restrain change as such in the interests of the cautious conservatism, which is sometimes associated with legal training; rather less frequently the legal profession may use its collective influence for its direct sectional interest. But the legal profession can also be a restraining force on the arbitrariness of other centres of power within society. And from a more positive aspect, it can exercise an educational influence on the general public. The influence of the legal profession tends to be high in countries where the Judiciary is recruited mainly from the Bar, as in England, but the collective power of practising lawyers, even in countries where the Judiciary constitutes a separate profession (as in France, for example), may be extremely important.

On the other hand it is possible to consider the legal profession in the light of its unique function of mediating between the individual and the law of society as a whole. The lawyer by virtue of his technical knowledge has a special responsibility to translate into effective action the legitimate aspirations of the individuals, who make up society and upon whose fundamental rights and dignity a society under the Rule of Law is here assumed to be based.

In the comment on particular systems which follows attention is primarily directed in the first place to the way in which the legal profession in different countries is organized. Here there are wide variations: a high degree of autonomy of a powerful centrally organized body (as in England); central organization with a considerable measure of control by some other organ (this is in most countries the Judiciary, in the USSR however it is the Executive); local organization centred on a particular court (as in France) with sometimes national organizations on a voluntary basis (as in the USA) enjoying great *de facto* influence; or indeed the absence of any obligatory organization for those pursuing the legal profession (as in Sweden). Secondly, it will be relevant to consider the duties of the lawyer as such to the individual client, to the Court and to the tradition of his profession within the general framework of society. A satisfactory resolution of a possible conflict in such duties makes it easier to admit the principle that the individual should in all circumstances be entitled to legal representation and advice; this idea forms the third topic for examination. From it follows the necessity of considering how far the right to legal representation is affected by the financial status of those who desire it. This is a particularly relevant consideration within the general context of this paper where the situation being envisaged usually opposes to the individual the financial resources of the State.

## **A Survey of Judicial Organisation in Various Countries**

### **(1) The Selection of Judges**

It would serve no useful purpose to attempt a comprehensive survey of the different systems of selection adopted by different



countries, but a fundamental distinction may be made at the outset between systems in which judicial posts are normally filled by members of a distinct profession, who have made it their career from an early age, and those in which the judges are chosen at large, although usually, at least in respect of superior judges, from the Bar, the legal faculty of a University or a legal department of government service and with a minimum qualification of legal training.

There are many variations on these two systems but of the latter that of *England* is perhaps the most characteristic and its main features may therefore be set out at some length.

Judges of Superior Courts, County Court Judges, Recorders (who have an extensive criminal jurisdiction within certain boroughs) and paid magistrates must be barristers of a standing varying with the importance of the office. They are not examined in any way to ascertain their qualifications, and the Prime Minister or Lord Chancellor acts on his own personal knowledge or on the advice of other persons who have personal knowledge of the person appointed.

All justices of the peace are in principle laymen, though in fact many of them have had legal or even judicial experience, and where the chairman of a bench has had such experience in many cases the jurisdiction of the bench is enlarged to enable it to try more serious offences than would otherwise be the case.

The Lord Chancellor, who is a politician nominated by the Prime Minister, is appointed not only as a judge, but also as the spokesman of the Government in the House of Lords. He is also entrusted, so far as they exist, with some of those duties carried out by a Minister of Justice in continental countries, but not those connected with the police.

The other judges of Superior Courts are appointed by the Crown. The appointment is generally upon the advice of the Lord Chancellor, but the Prime Minister in effect chooses the Lord Chancellor himself, the Lords of Appeal in Ordinary (who hear appeals in the House of Lords), the Master of the Rolls, the Lord Justices of Appeal (who sit with the Master of the Rolls in the Court of Appeal), the Lord Chief Justice and the President of the Probate Divorce and Admiralty Division.

County Court Judges are appointed by the Lord Chancellor. Recorders and paid magistrates are appointed by the Crown on the Lord Chancellor's recommendation. Justices of the Peace are appointed by the Lord Chancellor, upon the advice of the Crown's representatives in each country. The latter, in turn, receive recommendations from local committees, but the selection is generally based on names suggested by local political associations.

In no cases are judges, whether superior or inferior, elected by popular vote.

Two general observations suggest themselves in regard to the

English system described above. In the first place, although the responsibility for the selection of judges is distributed among different officers of the Executive (who in so doing act in their individual capacity) it is a system which necessarily creates a potentiality of abuse on the part of the Executive. That it is not in fact abused depends to a large extent on public opinion of the legal profession, as well as, and probably to an even greater extent, on the traditions which govern those who exercise the choice. Secondly, it may here be emphasized, pending more detailed discussion below, that in the English system relatively small importance attaches to the problem of promotion, once a judge has been appointed. There is no question of the promotion of a Justice of the Peace and promotion of a County Court Judge to the High Court is rare. Within the limited circle of the superior Judiciary promotion involves only some increase of prestige and a comparatively modest increase of remuneration.

In order to make clear the distinction between the English and French judicial system, it is necessary to explain that in *France* the *magistrature*, which is the general term for the Judiciary, includes not only judges in the sense of those who decide cases, but also the members of the *Parquet*, which may be roughly (although not entirely accurately) translated in English as the Public Prosecutor's Department, as well as the administrative grades of the Ministry of Justice. As a preliminary to the appointment to the *magistrature*, a University degree in law, a period of legal apprenticeship and the passing of a qualifying examination are required. Under Article 84 of the Constitution of 1946 the President of the Republic appointed the judges (in the restricted sense of the word in English, excluding the *Parquet*) whose names were submitted to him by the Superior Council of the Judiciary. This body, which took over a responsibility previously resting with the Executive since Year VIII (1797) of the Revolutionary Era, during which election of judges by the people had been tried, is an innovation of particular importance. It consisted of the President of the Republic, the Minister of Justice, six persons and six alternates elected for six years by the National Assembly, four judges and four alternates elected for six years from the different categories of the Judiciary, and four members and two alternates belonging to the legal profession not being Members of Parliament or judges, who were appointed by the President. Finally, it should be added that in the Bill passed by the National Assembly on June 3, 1958, authorizing the Government to initiate constitutional changes and to submit them direct to a referendum, among other restricting principles which had to govern any change made, "the independence of the Judiciary" was specifically mentioned.<sup>1</sup>

<sup>1</sup> Under the Constitution of 1958 the Superior Council of the Judiciary is retained, although it now only makes recommendations with regard to higher judges and in respect of lower judges its function is confined to consultation by the Minister of Justice (Articles 64 and 65).

As explained in the Introduction to this section, the *Conseil d'Etat*, the *Section du Contentieux* of which performs judicial functions vital to the maintenance of the Rule of Law in France, is in essence a supreme administrative court, which nevertheless falls outside the general system for the selection of judges described above. Entry to the lowest grade is by competitive examination. Subsequent promotion and, to the limited extent that this is possible (never more than one quarter of the vacancies), appointment from outside the *Conseil d'Etat* is made by the Minister of Justice (or in the case of higher grades by the Council of Ministers on his proposition) out of the list of candidates put forward by the Vice-President of the *Conseil d'Etat*, who is its effective head. An English jurist (Professor C. J. Hamson, *Executive Discretion and Judicial Control*, 1954) in referring to the freedom of the *Section du Contentieux* from political and executive influence, has said that by the test of actual experience its independence is "self-evident".

Among countries which have adopted with modifications the English system of selection of judges, *India* is an excellent example and it will be sufficient to summarize at some length the very full reports submitted by Indian jurists.

It may first be useful to set out briefly the scheme of courts in India. At the apex is the Supreme Court, under which are High Courts in each State. The High Court has under it District Judges, who preside over various districts of the State. The Court of the District Judge in its civil work is known as the District Court and in its criminal work as the Sessions Court. Lower courts on the civil side are known as Subordinate Courts and on the criminal side as Magistrates' Courts.

Judges of the Supreme Court must have been either judges of the High Court for five years or advocates of a High Court for at least ten years, or, in the opinion of the President, distinguished jurists. Judges of the High Court must have held judicial office in India for ten years or for the same period have been advocates of a High Court. A District Judge must have been in the service of the Union or of a State or have been an advocate for at least seven years, and be recommended by the High Court. Qualifications for lower judicial posts vary in each State according to the regulations made by the Public Service Commission.

Judges of the Supreme Court are appointed by the President of India, and, except in the case of the Chief Justice, the *Chief Justice* of India must always be consulted. The convention so far has been to appoint the most senior member of the Supreme Court as Chief Justice, although it is not required by the Constitution. In the High Courts the appointment is also by the *President*, after consulting the Chief Justice of the High Court concerned, the Governor of the State and the Chief Justice of India. But, although the President appoints, he acts on the advice of the ministers: in effect, therefore, the appointment is a ministerial one regarding

which, however, the opinion of the President carries great weight. There is thus the potentiality of "political" appointments, but in fact no case has yet occurred where any appointment has been made without the concurrence of the Chief Justice of India; in practice, his veto on the appointment of what may be called "political nominees" of government has always been accepted. This can now be regarded as a convention of the Constitution, the effectiveness of which must largely depend on the Chief Justice of India.

District Judges are appointed by the Governor of the State after consultation with the Public Services Commission of the State concerned and the High Court.

In commenting on the system described above, Mr. Justice Bose points out that there have been attempts on the part of the Executive to put forward names of what may be termed "political" or "patronage" nominees, but up to the present this has not succeeded except in a very few cases in some of the High Courts. This is due to the fact that the Chief Justice of India cannot, from the very nature of things, know every nominee for a High Court judgeship throughout India, and though he does what he can to make independent enquiries, he has to rely to a very large extent on the Chief Justice in the High Court concerned. If there is a weak Chief Justice in a particular High Court, his acquiescence in the appointment of an executive protégé may mislead the Chief Justice of India. The cited report says, however, that fortunately this has been very rare, but that until the present convention is more firmly established, the matter will require ceaseless vigilance on the part of the Chief Justice of India and on that of lawyers generally. He adds that at the lowest level on the criminal side (Magistrates Court) the separation between the Executive and the Judiciary is not as complete as public opinion desires. But the danger of "political" decisions in these lower courts is minimized by the fact that their decisions are subject to appeal and revision by the District Judge (acting as the Sessions Judge), by the High Court and, in the end, by the Supreme Court.

The *United States* resembles England in that there is no *magistrature* in the French sense, and that Federal Judges are appointed by the Executive, although subject to the confirmation of the Senate. In State Courts, however, there is greater variety in the method of selection.

Personal qualifications prescribed for judicial office are in general very limited. Normally the only statutory requirement is that of admission to the Bar, but in a very few States even this requirement does not exist. Although only lawyers engaged in active practice or judges in other Courts, Federal or State, are usually appointed to the United States Supreme Court, there is no constitutional or legislative requirement to this effect. Some appointees to the Court will have been away from actual practice for some time in an executive, legislative or teaching post, prior to

appointment. It is pointed out in the report submitted by the US Committee to Co-operate with the International Commission of Jurists that such appointees bring with them a wide variety of experience valuable in handling the complex legal-sociological questions which they so often face.

The judges of all the Federal Courts – Supreme Court, Courts of Appeal, District Courts and the Special Courts of limited jurisdiction (Court of Claims, Tax Court, Military Appeals, Customs, etc.) are all appointed by the President and a confirmation by the Senate is required. Only rarely does the Senate fail to confirm a presidential nominee.

In the States the method of selections varies. In all but a few the judges of the principal courts are elected by popular vote for fixed terms of years and here the Governor has the power to fill mid-term vacancies by appointment. The judges of some of the lower courts in incorporated units of local government – cities and towns – are appointed by the mayor or other chief executive.

In the remaining few States the judges are appointed by the Governor, either without restriction of choice or from a list of persons selected by a Bar association. Such appointments are in some states subject to confirmation by the legislature.

Among countries which have, as in France, a hierarchy of trained judges, the *German Federal Republic* affords an interesting example, which is, however, somewhat complicated by its federal nature and by the existence of several Federal Courts, supreme in different fields.

Essential preliminary qualifications as to theoretical and practical training are laid down for the judicial office in the *Bund*, with specialized experience for particular courts (e.g. Labour Courts); comparable qualifications are, generally speaking, required in the Courts of the *Länder*.

The judges of the Supreme Court of the *Bund* (*Bundesgerichtshof*) are nominated jointly by the Federal Minister of Justice and a committee consisting of the *Länder* and an equal number of members elected by the *Bundestag* and formally appointed by the President. Other higher Federal Courts (Administrative, Finance, Labour and Social) are similarly constituted, the appropriate Minister taking the place of the Minister of Justice. Decisions are made by simple majority in secret ballot. The members of the Federal Constitutional Court, however, are elected as to half by the *Bundestag* and half by the *Bundesrat* (representing the governments of the *Länder*). In the *Länder* there is the authority of a provision in the Constitution of the Bund to follow the procedure adopted in the Bund with regard to the judges of the *Bundesgerichtshof* and other higher federal Courts described above, and this authority has been used in several *Länder*.

It will thus be seen that the German solution of the problem of appointment of the Judiciary has some resemblance to that

adopted in France, in that sole appointment by the Executive is, at all events in the *Bund*, avoided, and that as in France and the USA, the participation of the Legislative is involved. In France, however, the appointing body is drawn not only from the Executive and Legislative, but also from the Judiciary and from other members of the legal profession.<sup>2</sup>

In *Italy* the pattern of judicial selection is broadly speaking similar to that of France, but attention may be drawn to changes contemplated by legislation to be placed before Parliament. These changes will effect in Italy much the same result as was achieved in France by the introduction in 1946 of the Superior Council of the Judiciary. The changes in Italy will give effect to Article 104 of the Constitution, which acknowledges that the Judiciary is an autonomous order and entrusts its control to the High Council of the Bench. This body is presided over by the President of the Republic and consists of the senior President and the Advocate General of the *Corte di Cassazione*, as well as other members elected as to two-thirds by the ordinary members of the Judiciary from the different categories of that body, and one-third by the Legislative from University professors and advocates of fifteen years' standing.

Among the countries in Northern Europe it would appear that in *Sweden*, although in theory professional judges are appointed by the Executive, in practice owing to the observance of a strict rule of seniority, the courts themselves exercise the deciding influence, except in the case of the highest judicial appointments, and of certain judges in the towns (where the central government has to make a choice from three candidates chosen by the local government authority). *Finland* is noteworthy in having a system which, apart from the appointment of the President of the Supreme Court by the President of the Republic, and of the judges of the Court of First Instance, whether professional or lay, by the Council of the Commons (local authority) formally entrusts judicial appointments to the Judiciary itself.

Outside Europe we may take as interesting examples of methods of judicial selection the systems in force in Chile and Japan. In *Chile*, although there is formal co-operation of the Executive and the Judiciary in the sense that the judges are appointed by the former on the recommendation of the latter, the real power appears to rest with appointing bodies drawn partly by seniority and partly by election by higher Judiciary, from judges and others (e.g., practising advocates) of certain standing who would be qualified to act as judges in the Supreme Court.

In *Japan*, the most interesting feature of the system is the Judicial Research and Training Institute, under the supervision of

<sup>2</sup> But see the qualifying footnote regarding the new French Constitution on page 283 *supra*.

the Supreme Court, at which all those who wish to be either judges, prosecutors or practising lawyers must pass. For appointment to an ordinary judgeship ten years' experience as an assistant judge, prosecutor or advocate is required. The Chief of the Supreme Court is appointed by the Emperor upon the designation of the Cabinet and fourteen other judges of the Supreme Court are appointed by the Cabinet. Judges of the inferior courts are appointed by the Cabinet from a list of persons nominated by the Supreme Court. Article 79 (para. 2) of the Constitution of 1946 enacts:

"The appointment of the judges of the Supreme Court shall be reviewed by the people at the first general election of members of the House of Representatives following their appointment, and shall be reviewed again at the first general election of members of the House of Representatives after a lapse of ten years, and in the same manner thereafter."

This may be said to correspond to endorsement by the Senate of the USA, and is in substance an institution of recall. It is to be observed, that the Supreme Court is not composed exclusively of career-judges. In fact, about one-third consists of career-judges, the rest being men who have distinguished themselves as practising lawyers, men of practical experience in constitutional or administrative law, professors of law or diplomats.

Before turning to the Soviet Union, it is useful to draw attention to the somewhat unusual position regarding the selection of judges in *Switzerland* who are in principle chosen by the vote of the people, although vacancies occurring between elections are filled when Parliament is sitting by the latter body, and in fact elections are rarely contested and the percentage of voters is extremely low. The inference of the Swiss report is that by general consent an attempt is made to keep appointments out of the field of political controversy.

In the *Soviet Union* and, with some variations in countries which follow its legal pattern, the selection of judges as a general principle is by election of the appropriate soviet (legislative organ). In fact, this system of selection gives a rather misleading impression in that, in the first place, some countries still appoint through the Executive (in Poland, for example, judges are appointed by the Minister of Justice, acting in consultation with the Chairman of the Council of Ministers) and, secondly, where there is election, the right to nominate is reserved to the Government Party or organizations under its control. (See, for example, the specific wording of Para. 24 of the Soviet Judiciary Act, 1938, listing the bodies with power to nominate.)

**(2) The Participation of the Lay Element in the Judiciary and the Special Problem of Administrative Tribunals**

It will be convenient to deal at this point with the participation of the lay element in the judicial process, as at all events in the *Soviet Union* and generally speaking in countries with similar legal

systems there is no clear line of distinction between professionally trained judges and lay judges. The latter may be variously called people's judges or people's assessors, but they sit and have equal rights with full-time judges, who may or may not be themselves legally trained.

In other countries the participation of a lay element in the judicial process may be (i) virtually excluded, at all events as far as the normal judicial procedure (excluding tribunals where specialized technical knowledge is required) is concerned, and (ii) permitted to a limited extent. Broadly speaking, the system prevailing in the *Netherlands* would come in the first category. The second category permits many variations; it may be divided from the point of view of the limits enforced which may relate either to the functions of the lay element and/or the jurisdiction which it enjoys.

In *England* the functions and jurisdiction of the lay element<sup>3</sup> must be considered in relation primarily to the jury and the justices of the peace. Where persons are accused of more serious offences, they are tried by a judge with the co-operation of a jury of laymen. The jury decides questions of fact as well as, in criminal cases, the ultimate question of guilt or innocence of the accused. In civil cases there is now no unqualified right to a jury, except in certain actions involving liberty of the subject or character (e.g., false imprisonment or defamation) in which event the jury also assess the quantum of damages. Juries are always directed on points of law by a professional judge, who also goes through the evidence on points of fact and is at liberty to advise them as to the weight to be attached to each item. Juries reach their decision alone, without the presence of the judge and give no reasons for their decision, which must be unanimous.

Justices of the peace exercise summary jurisdiction over minor offences where there is not a paid magistrate and, with such magistrates, do perhaps nine-tenths of the work of trying criminal cases. Justices of the peace are judges of fact and of law, but are advised on points of law by their clerk, who is always a professional lawyer. He is however excluded from sitting with them when they are considering the question of guilt or innocence in criminal cases. Justices of the peace at county (but not borough) quarter sessions<sup>4</sup> also exercise jurisdiction over all but the most serious crimes triable on indictment, the chairman is now normally a qualified lawyer.

In the *United States* the role of lay judges appears to be less important than in England; on the other hand, jury trials not only in criminal but also in civil cases are regarded as a fundamental feature of the legal system. Art. III of the Constitution requires jury trial for all crimes except impeachment. Broadly speaking, the

<sup>3</sup> See Sir Carleton Allen, "The Layman and the Law", *Journal of the International Commission of Jurists*, Vol. II, No. 1, pp. 55 ff.

<sup>4</sup> In the boroughs quarter sessions are taken by "Recorders", who are professional lawyers.



jurisdiction of laymen as judges in such countries as *Australia*, *Canada* and *India* is very restricted, but juries with functions comparable to that of the English jury are normal in serious criminal cases.

Among countries where the main emphasis, as far as the participation of laymen is concerned, is laid on the function which they perform, may be mentioned in particular the *German Federal Republic*. In the courts of highest instance laymen do not participate as judges except in certain specialized courts (e.g., agricultural, social or labour affairs). In lower courts they function in the full sense as judges under the title of *Schöffen* but sit with and under the chairmanship of a professional judge. For serious crimes there is a jury but the professional judges guide its deliberations, unlike the judge in England whose function is limited to directing them before they retire. The appointment of *Schöffen* and jurymen in criminal cases is made from a list (drawn up by the local authority by a two-thirds majority decision) by a special committee presided over by the local judge. Appointment is for two years and the placing in particular cases is decided by lot. In other cases where lay judges are employed different organizations with special interests frequently have the right to suggest names, nomination being by the judicial administration, the specialized branch of administration concerned, or by the Court. Lay judges are independent, subject only to the law, and can only be removed by a process similar to that of professional judges.

In *Sweden* there is a highly developed system of lay participation in the judicial function of an especial character. Laymen appointed by local authorities participate in the administration of justice in the lower courts with the professional judges, taking part in all cases except the most trivial ones in the provinces but only in the more serious cases in the towns. The lay judges (who form a Board of Lay Justices) are co-judges but have only one vote between them. The Board consists of a minimum of seven and a maximum of nine persons. In the provinces, however, the Board in certain minor cases may judge with only three members. Members of the Board of Lay Justices have no special training. Usually they carry out their duties regularly over a long period in their courts and in doing so acquire a thorough experience of judicial work. They deliberate together with the professional judges in the cases brought before them and decide the cases jointly with the latter. Unanimity is, however, required amongst the Board if they are to out-vote the ordinary judge.

It may also be mentioned that among countries outside Europe, *Japan* is especially interesting in having dropped the jury system (more or less after the Common Law model) and having introduced at the highest level (i.e., the Supreme Court) the possibility of including out of a total 15 members up to five who are not necessarily lawyers but who have wide public experience.

We may conclude with a brief reference to a problem which is not exclusively concerned with the lay element or, in a narrow sense, with the Judiciary. In many countries, as has been mentioned in the section of this working paper dealing with the Executive, a very large number of laymen are however members of administrative tribunals; the latter (to be distinguished from the administrative courts of, for example, Germany or from the *Conseil d'Etat* in France) are to a greater or lesser extent under the supervision of the ordinary courts, but they do in fact exercise a wide jurisdiction in many matters which concern the ordinary citizen, in particular in claims – pensions, insurance and the like – which arise in a Welfare State. The quality of the members of administrative tribunals varies widely. Even if they are not laymen but, for example, retired judges or legal officials, there is a danger that such appointments, which are often for a relatively short period of years and tenure of which is in any event often less well secured than that of the regular judiciary, may be regarded as “spoils” at the disposal of the Executive. Some attempt to deal with certain aspects of those problems has been made in England in the Tribunals and Enquiries Act, 1958, which requires the Lord Chancellor (the highest judicial authority, who is however also a member of the Executive) to set up a Statutory Council to make recommendations to the Ministries concerned on appointments to tribunals. A cross reference may here be made of the remarks of Mr. Justice Bose cited in the section of the Working Paper dealing with the Executive and the Rule of Law, under the heading, “Organs before which Control and Remedies against the Executive are established: the Problem of ‘Administrative Tribunals’.”

### **(3) Promotion of Judges**

This matter, although in practice important in its impact on the independence of the judges, can be briefly dealt with in this commentary for the following reasons: (i) in *England* the limited number of the higher judiciary gives comparatively little scope for promotion and in other countries of the Common Law tradition, promotion, where the possibility has to be considered, gives rise to similar factors as those which govern appointment; (ii) in countries which have a trained judicial hierarchy there is an increasing tendency to entrust a special body, not only, as has been seen, with appointments but also with promotion, which is in effect regarded as a new appointment.

### **(4) Dismissal and Compulsory Retirement of Judges**

What has been said above with regard to promotion applies also in *France*, through the authority of the Superior Council of the Judiciary, to the dismissal and retirement of Judges, and will apply in *Italy* when the High Court of the Bench is instituted. We may

distinguish in respect of these and a number of other countries between, on the one hand, the recognition of the *principle of irremovability* (see, e.g., Article 84 (3) of the French Constitution of 1946)<sup>5</sup> and, on the other, the *possibility of removal* for cause stated by a disciplinary body. In many countries, as for example in *Italy* (Section 29 of the Penal Code), the question of removal may not in practice arise because the judge in question has been convicted of an offence before an ordinary court which automatically disqualifies him from holding public office. Otherwise the safeguard of judicial irremovability rests with the body which has disciplinary control in the procedure which it follows and in the publicity given to the reasons for removal.

In the *German Federal Republic* removal on disciplinary grounds is decided by a Disciplinary Court consisting only of judges. A special procedure is however provided for in the Constitution for the transfer, retirement or, in certain circumstances, dismissal of a Federal judge who infringes one of the principles of the Constitution of the Bund or of a *Land*; he may be removed on application of the Legislature by two-thirds majority decision of the Federal Constitutional Court. The German report is especially interesting in providing a statistical analysis of judges dismissed in the last ten years. These are as follows: — Federal judges — none; judges of the *Länder* — eight. The grounds included: previous convictions for homosexual practices coming to light after nomination, financial malpractices, anti-semitic behaviour in 1938, pro-Communist activity in Russian imprisonment.

Broadly speaking, in many other countries the removal of a judge requires a decision of a judicial body. But in the *USSR* and its associated legal systems there is also provision for recall during the term of office by the electing body, with an important power in the Executive to initiate or to approve proceedings for recall. In *Czechoslovakia* the large-scale removal of judges was legalized by *ex post facto* legislation of 1948. In *Hungary*, particularly during and since 1957, a considerable number of judges were stated to have been dismissed although the means of dismissal and the reasons (except in occasional collective statements in general terms regarding certain sections of the Judiciary) were not made public.

To disciplinary removal after court proceedings and recall during office by the electing body (subject to *de facto* control by the Executive) should be added the possibility of impeachment (i.e. trial) by the Legislature (as in the *United States*, *Chile* or the *Philippines*) or by resolution of that body (as, for example, in *England*, *Australia*, *Ceylon*, *Canada* and *India*). In considering this possibility it is important to emphasise the practice as much as the theory. In the questionnaire on this working paper a question was asked as to the actual removal of judges within the last ten years and the answer

<sup>5</sup> See now Article 64 of the Constitution of 1958.

was negative in respect of all the countries mentioned; in fact, in *England* no High Court judge has been removed since 1701 when the Act of Settlement laid down the provisions regarding the terms of higher judicial office. It should however be emphasised that in *England* the lower grades of the legally trained Judiciary enjoy *de facto* rather than *de jure* irremovability, and the lay justices of the peace can be, and very rarely are in fact, removed by the Lord Chancellor. A similar qualification would have to be made with regard to other countries, as for example *India*, where judges can be removed by the body appointing them or some higher authority, with, however, the important safeguard that they must be accorded a fair hearing and that the proceedings concerning removal are subject to review by way of a writ of *certiorari* in a High Court or in the Supreme Court.

#### (5) The Security of the Judicial System

A word must be added concerning the judicial structure as a whole which, if it is subject to arbitrary change, may weaken the independence of the individual judges within it. On the other hand, the judicial structure is part of the machinery of society and must be capable of adjustments to correspond with new requirements of that society. In most countries it is sought to achieve a proper balance between the absolute inviolability of the judicial structure and excessive interference with its basic characteristics by fixing in the Constitution the main courts with a greater or lesser degree of particularization regarding such matters as the number of judges. In the *United States* the judicial power is vested by the Constitution [Art. III (7)] in "one Supreme Court", but the number of the judges can be fixed by ordinary law and has in fact been increased from six to nine; under the same provision Congress has, however, power to create by ordinary law "such inferior courts as (it) may from time to time ordain and establish" and it has taken advantage of this power to introduce lower Federal courts. In *India* the total number of Supreme Court judges (and their salaries) are fixed by the Constitution (Arts. 124, 125 and Second Schedule, Part D), but the number may be increased by ordinary legislation.

It would serve no useful purpose to give further examples of parallels from other countries with written constitutions, but some explanation may be added concerning *England* where the judicial structure is, as is true of any subject-matter, capable of change by Parliament. Since the abolition of the Star Chamber it is clear that, although the King as the Executive was the original fount of justice, the creation of new or reorganization or abolition of existing courts rests with the Legislature, and that any changes in the structure of the courts will in fact be discussed against a background of traditional respect for the Judiciary and subject to the institutional strength of the Judiciary as a whole and the closely associated opinion

of the Bar. A point of some interest is that the salaries of the judges are charged upon the "Consolidated Fund", and are not, therefore, unlike the payments to members of the Armed Forces and Civil Service, subject to annual discussion and authorization by Parliament.

There is a possibility that, quite apart from basic changes in the structure of the Judiciary, there may in practice be some challenge to its independence through the interference of other authorities in its internal administration. The problem can be sufficiently illustrated by some remarks of the Chief Justice of Japan, concerning recent developments in that country. The quotations are taken from Chief Justice Tanaka's *The Democratization of the Japanese Administration of Justice*, pp. 7 et seq.

"With regard to the independence of the courts, the new system is implemented by the provision that the Supreme Court shall carry on the administration of the internal affairs of the courts through its conference of fifteen justices. At present the justices meet once a week and decide upon adoption, amendment or revocation of rules, appointment of judges of inferior courts and other personnel-affairs, the internal budgets of the courts, and other matters. The administration of court-affairs, which under the old system appertained to the jurisdiction of the Minister of Justice, has been separated completely from politics. The Attorney-General, who is a Cabinet member – the original title, *Hōmu Sōsai* in Japanese, was lately changed to *Hōmu Daijin* (Minister of Justice), and the scope of his powers was somewhat modified – is placed in charge of some business which is judicial in a broad sense, the major items being affairs pertaining to the procurators' office and the registration and execution of penalties. In point of his not being a member of the Cabinet, the Chief Justice of the Supreme Court differs from the Lord Chancellor of England; his position is also different from that of the Chief Justice of the United States in that he is the head of the administration of court-affairs. Aside from being the first judge, he presides over the meetings of judges regarding administrative affairs. As a consequence of the Supreme Court's being in charge of administration of the Courts, a Secretariat comparable in size to that of the former Ministry of Justice has been established.

"A most important power vested in the Supreme Court is the rule-making power; by virtue of this power it adopts rules of procedure and rules for the governance of attorneys, the internal discipline of the courts and the administration of judicial affairs (Constitution, Article 77, Paragraph 1). Rules so far promulgated by the Supreme Court since its establishment in the summer of 1947 amount to about 150. These provide for procedure in civil and criminal cases, organization of the courts and details of judicial administration. In respect of the scope of the rule-making power, the judges of the Supreme Court disagree; some of them argue that since law is superior to rules, the latter can be adopted only within the scope of the former, some contend that law can be modified by a rule, while some others insist that law and rules stand on an equal footing, so that in cases where they conflict, the issue is to be settled by consulting the order in time of the adoption of them. For the present, the Supreme Court has been making rules for regulation of details only within the scope of law.

"An issue recently arose between the legislative and judicial branches, in the form of a controversy over whether the provision of Article 62

of the Constitution, conferring on the two houses of the Diet power to conduct investigations 'in relation to government', included a visitational power over the courts. Under that article, each House of the Diet may conduct investigations in relation to government, and may compel the presence and testimony of witnesses and the production of records. Accordingly the Judicial Committee of the House of Councillors, being concerned with matters in an inferior court then under public criticism on the score of the punishment awarded and other points, had started investigation and had made adverse comments on it before the judgment was finally rendered. The conference of judges of the Supreme Court thereupon in the name of the Chief Justice directed an open letter to the president of the House of Councillors, under date of May 20, 1949, protesting against the acts of the Committee on the ground that the power to inquire into the correctness of a judgement or to make investigations concerning the finding of facts and the fixing of penalties belongs exclusively to the courts in whom is vested the judicial power and that the Diet cannot on the strength of Article 62 of the Constitution claim such a power. It has, moreover, not seldom occurred that when dissatisfied with a judgment, a defeated litigant has petitioned the Committee on Prosecution of Judges for action under the Law for Impeachment of Judges; but this is owing to misunderstanding of the spirit of the impeachment-system. Fortunately, there has so far been no case in which the Committee has acted on such a petition and demanded dismissal of a judge thus attacked."

## A Survey of the Legal Profession in Various Countries

### (1) The Organization of the Legal Profession

It may be convenient to refer at the outset to four recent articles on the Bar, which, dealing with rather different types of organized legal profession, give a good general survey of the subject. They are by W. W. Boulton on the Bar in England and Wales (*Journal of the International Commission of Jurists*, Vol. I, No. 1; by Pierre Siré on the Bar in France (*ibid.* Vol. I, No. 2); by Richard Rabinowitz on the Bar of Japan (*Harvard Law Review*, Vol. 70, No. 61); and by Samuel Kucherov on the Bar in the USSR (*American Journal of Comparative Law*, 1956, Vol. 5, No 3).

The legal profession in *England* is divided into two branches: barristers and solicitors.

There are some 17,000 practising solicitors in England and Wales. They deal directly with the lay client and are concerned with legal work of every variety, contentious and non-contentious. They have not, however, the right of audience in the High Court, Court of Appeal and House of Lords, which Courts are reserved to barristers.

The professional organization of solicitors is the Law Society, which acts under statutory powers. Application for admission of a solicitor is made to the Master of the Rolls (a high member of the Judiciary) through the Law Society. The Law Society grants the required practising certificate annually but may refuse it in certain cases, e.g., if the applicant is an undischarged bankrupt. Rules of conduct are made by the Law Society, and its Disciplinary Com-

mittee hears complaints against solicitors and may suspend or expel an offender. A solicitor is an officer of the Supreme Court and in this capacity is subject to control of that Court.

Barristers cannot act for lay clients except upon the instructions of a solicitor. As mentioned above they have the exclusive right of audience in the Higher Courts and share with solicitors the right of audience in other Courts. There are about 2,000 practising barristers. The body directly responsible for barristers is one of the four Inns of Court. All barristers must belong to one of these Inns. The Inn admits him as a student and calls him to the Bar when he is duly qualified. The Inn alone can exercise disciplinary powers in respect of his professional conduct. The government of the Inn is vested in the Benchers, a body of the senior members of the Inn, a number of whom will be Judges. From the decision of an Inn there is a right to appeal to the Judges.

The representative professional body of barristers is the General Council of the Bar, in the election of which all members of the Bar have a right to vote. The General Council of the Bar has no direct disciplinary powers, but the Professional Conduct Committee of the Council receives complaints of professional misconduct, investigates them and, if necessary, refers the matter to the appropriate Inn. The Council also gives rulings on questions of etiquette, which are published each year in its Annual Report. More effective perhaps than disciplinary action is the restraining influence of the corporate spirit engendered in the atmosphere of semi-collegiate life of the Inns of Court in London and in more or less comparable sets of Chambers in some provincial towns; this corporate life, in which barristers normally spend their whole working lives, is an important feature of the English legal profession which is not fully paralleled even in all Common Law countries.

The practice of law in the *United States* is a profession affecting public interest and for that reason it is recognized that the legislature may prescribe minimum requirements for the admission of lawyers to practice and for their discipline. The courts hold that in so doing the legislature acts in aid of the judiciary, not in denial or exclusion of the basic constitutional power of the judiciary. In the absence of a statute specifying causes for disbarment, the courts themselves may exercise over lawyers the disciplinary powers of censure, suspension or disbarment. The legislature does not itself assume to exercise its supplementary power by enactments addressed to any specific individual, nor except rarely does it admit a candidate to practice or prescribe the technical qualifications. Actual admission is generally by order of the highest court of the State.

Bar "associations" (voluntary, private groupings of lawyers, generally by geographical or political area) carry much of the real responsibility under delegation by rules of court, for suspension and discipline of the Bar. Association committees investigate, hear complaints, make recommendations to the courts for discipline

– by censure, suspension or expulsion – and act as prosecutors of offences against the professional standards of conduct.

In *Canada* the position of the legal profession as a whole is rather like that of solicitors in England, except that it is organized on a Provincial basis. The ultimate supervision rests with the Court but in fact it is delegated to the Provincial Law Society, or its equivalent in the Province of Quebec.

In *Australia* the position is fundamentally similar, although somewhat complicated by the existence of barristers and solicitors, who are not however strictly comparable to their namesakes in England. For present purposes certain features of the position in Victoria may be emphasised: admission to practice as a barrister and solicitor is by the Supreme Court of the State, the conditions being prescribed by a body set up under statute and consisting of members of the Judiciary, law officers of the Executive, representatives of legal practitioners and of the Universities; disciplinary control rests with the practitioners themselves through a statutory committee which the Chief Justice appoints, but actual removal from the roll of barristers and solicitors rests with the Court.

In *India* admission to the Bar, in the case of lawyers practising in the High Courts, is by the judges of the High Court after consulting the Bar Council. (The Bar Council is a statutory body created by the Bar Councils Act. There is a separate one for each High Court.) In the case of lawyers practising in the Supreme Court, admission is by the Supreme Court, after consulting the Supreme Court Bar Council and, in the case of lawyers practising *only* in the subordinate courts, by the District Judge.

Disbarment of lawyers practising *only* in the Subordinate Courts is by the High Court after a Judicial enquiry and hearing. The matter is governed by the Legal Practitioners Act. In the case of those practising in the High Courts the matter is first sent by the High Court to a tribunal of the Bar Council concerned for enquiry and report. The enquiry takes the form of a trial. Charges are framed, witnesses are examined and evidence is recorded. The tribunal reports to the High Court and the practitioner is heard by two or more judges of the High Court on the record and report submitted by the Bar Council tribunal. The dismissal, or other modified punishment, if any, is by the High Court. Their decision is open to revision by the Supreme Court. A similar procedure obtains in the Supreme Court, which takes the role of the High Court.

It sometimes happens that the same man is enrolled on the Rolls of the High Court and that of the Supreme Court. In such a case the decision of the High Court does not affect the status of the lawyer of the Supreme Court and vice versa. Up to now the initiative has always been taken by the High Court and after their decision has been given *qua* his status as an advocate of that Court, the matter is reported to the Supreme Court for such action as the Supreme Court may wish to take regarding his status as advocate of



the Supreme Court. The matter is then heard over again by the Supreme Court on the records furnished by the High Court together with such further submission and evidence as the advocate concerned may choose to tender before that body.

So far there has been no clash between the two decisions, probably because action is only taken in really flagrant cases. Normally unofficial warning by judges in or out of court is enough. Mr. Justice Bose, the author of one of the Indian answers to the questionnaire on the Rule of Law, is of the opinion that the practice is unsatisfactory because a difference of opinion may arise with the possibility of a man being debarred from practising in one court and being free to practise in another. The fact that the decision of the High Court is revisable by the Supreme Court is not a foolproof safeguard, because there is no *right* of appeal. Interference is discretionary under the residuary powers of the Supreme Court under Art. 136 of the Constitution and although those powers are unlimited, and although the Supreme Court interferes freely under that section when there is real injustice, the Supreme Court does not usually interfere when the decision is one which reasonable judicial minds could reasonably reach. Mr. Justice Bose considers that the difficulties can only be removed by an All-India Bar, the formation of which is under consideration.

The organization of the Bar in *France* emphasises local autonomy of the different Orders of Advocates of which one is attached to each Court of Appeal. Each order with its *Bâtonnier* exercises administrative and disciplinary powers over the advocates entered on the Roll of the Order, subject to the supervisory control of the appropriate Court of Appeal. There is however a special Bar of fixed number for advocates appearing before the *Cour de Cassation*, the *Conseil d'Etat* and the *Tribunal des Conflits*. They have the right to nominate their successor, whose name is submitted for approval by the President of the Republic. There are national associations of lawyers, on a voluntary basis, which have no legal authority, but which concern themselves with matters of general interest to the profession.

In the article referred to above M. Siré emphasizes the traditional character of the internal organization of the Orders of Advocates:

"Within each Bar the government of the Order is a form of aristocracy. Barristers may be democrats as citizens and political men, but the Venetian style of the constitution of their Order, however paradoxical it may appear nowadays, has never been seriously questioned. In Bars with more than twenty members, the General Assembly of the Order may only debate in Sections, which are called Columns (a reference to the columns of the Rolls), and the Columns may only express opinions, which are submitted to the Council of the Order for its decision. This means that the Council of the Order has absolute power. This Council is elected by the General Assembly, which, in the more important Bars, meets only to vote. In the smaller Bars (with less than six members) the Civil Court acts as Council of the Order.

"All Bars, large and small, have their Bâtonnier, whom they elect in General Assembly. The Bâtonnier convenes the Council of the Order and presides over it. He carries out its decisions. He personifies the Order. He exerts an educational control over young barristers in training (stagiaires) and a discreet but effective domination over all colleagues. In the larger Bars he has great responsibility. His term of office usually lasts two years. A former President of France (Poincaré), after having occupied the highest office in the country, considered it a very great honour to be elected Bâtonnier of the Order of Barristers at the Paris Court of Appeal. Presided over by the Bâtonnier, the Council of the Order discusses all the Order's business. Its powers are at the same time administrative and disciplinary."

In the *German Federal Republic* it is worthy of note that, although as in France there are local Bars, with considerable *de facto* power, the admission to and dismissal from the legal profession is the responsibility of the Ministry of Justice of the appropriate *Land*; the actual supervisory function is exercised by the governing body of the Chamber of the Bar (*Anwaltskammer*) and by Courts of Honour set up by the Bar Chambers. It should also be noted that admission to particular courts, as distinct from membership of the Bar, requires separate application and may be subject to special rules concerning residence, provision of a substitute in case of absence, etc.

*Sweden* deserves special mention because anyone fulfilling certain very general qualifications (age, good conduct, etc.) is entitled to assist a party in a case and to act as an attorney in a Swedish court. The legal profession thus enjoys no monopoly. A special body responsible for carrying out the duties of the legal profession does not exist. Anyone may establish his own law practice and professionally offer his services to the public as an attorney in court cases. The great majority of those who engage in such activity do, however, have legal training. Members of the Lawyers Association (*Advokatsamfundet*) constitute a special group. Only trained lawyers are entitled to join this Association, which is private but with some measure of public control, its statutes, for example, having to be approved by the Government. The Code of Judicial Procedure contains a number of rules relating to lawyers by which is understood any lawyers who are members of the Association. Other jurists, or other people engaged in similar activities, may not use this title. Under the Code of Judicial Procedure membership of the Lawyers Association is restricted to Swedish citizens domiciled in the country who are over 25 years of age and who have received a legal education and in addition such practical training as is laid down in the statutes of the Association. They must also have a reputation for integrity and in other ways be regarded as suitable to engage in legal activities. Applications for membership of the Association are decided by the Governing Board of the Association. The Board is also entitled to exclude a member whose conduct fails to maintain certain specified standards. Supervision is exercised in law by the

Governing Board of the Lawyers Association which must ensure that in pleading in court and in his other activities a lawyer fulfils the duties entrusted to him. The Attorney-General (the Government's senior legal adviser) may request the Board to take action against a lawyer who has failed in his duties. If the Board has rejected an application for membership or has expelled someone from the Association, appeal against this decision may be made to the Supreme Court.

In some countries (it would appear, for example, in *Iran*) the Ministry of Justice exercises some degree of actual control over the organization of the Bar. In *Japan* there has been a sharp change from this kind of control to a system in which authority is exercised by Bar Associations under ultimate supervision by the Supreme Court. Efforts have recently been made to raise the status of lawyers in Japanese society, where they have not up till now played a comparable role to that of lawyers in many other countries.

In the *Soviet Union* legal practice is collectivized and the legal profession is subject to the supervision of the Ministry of Justice and not of the Courts. Lawyers have to be members of the Bar (*kollegium*), though permission to practise law may be granted to anybody, regardless of qualification, by the Ministry of Justice. Individual lawyers within a collective office (*konsultatsiia*) are assigned cases by the manager of the collective. The Bar of *Hungary* has recently been reorganized on similar lines to that of the Soviet Union, but in *Yugoslavia* the lawyers are not compulsorily organized on a collective basis; the Lawyers Chambers are not fully autonomous in that the governing body – i.e., the Council – includes representatives from outside the profession. In *Poland* the Bar has in recent times enjoyed a much wider measure of autonomy through the General Council of the Bar and Provincial Bar Associations.

## **(2) The Role of the Legal Profession**

It will be convenient in the light of the reference to the organization of the legal profession in the USSR in the preceding section to begin with some mention of the role of the legal profession in that country. Legal authorities there emphasize that the function of the lawyer is to be contrasted with that of his namesake in countries outside the USSR and its associated legal systems. Primary emphasis is placed on the duty which the lawyer owes to the political and economic principles on which society is based, rather than to the individual client. The role of the lawyer therefore cannot be discussed without reference to such basic principles and in particular the extent to which society as such recognizes the primacy of the rights of the individual. Nevertheless, there are in Soviet legal literature discussions, which appear at present to be inconclusive of practical problems of behaviour of the lawyer – as, for example, whether a counsel, who in the course of trial becomes convinced

of his client's guilt, is entitled against his client's wishes to cease to press for an acquittal.

The position of the *English* barrister may be contrasted in two respects: (1) that in *principle* he must accept any case which a solicitor (who is himself free to accept or reject a case) asks him to take up – a rule which affords some contrast, as will be seen, with the position in many countries; (2) that having accepted a case his duty is normally to present it to the best of his ability – a principle which is common to many legal systems. The position is admirably set out in the article by Mr. Boulton, referred to above and may in part be cited:

"A barrister is bound to accept any brief in the courts in which he professes to practise at a proper professional fee dependent on the length and difficulty of the case. He cannot pick and choose his cases. Indeed, he has been compared for this reason with a taxidriver on the rank, who is bound to take the first passenger who wishes to hire his cab.

"It is of interest to note in this connection the contrast between the obligation placed upon a member of the English Bar and the principle which governs advocacy in the courts of some other countries, namely, that a lawyer should not act in any case in the righteousness of which he does not honestly believe. Such a thesis is quite incompatible with the contribution which the Bar makes to the English legal system, for two reasons. Firstly, it could (in the eyes of the profession at least) provide a wholly undesirable avenue of escape for a member of the Bar asked to undertake some unpopular cause; and secondly, it would result in counsel departing from his role of advocacy and usurping the functions of the court itself."

After mentioning the well-known defence by Lord Erskine of his conduct in defending the unpopular author of "The Rights of Man", Thomas Paine, Mr. Boulton continues:

"There are more modern examples of this fundamental duty of the English barrister being put to the test. In the 1920's two eminent counsel who were also Members of Parliament accepted instructions to appear on behalf of certain public men to whom they were politically opposed and whose character had been attacked in connection with matters which had aroused the bitterest party feeling. A great controversy arose and received much publicity in 'The Times' as to whether the counsel concerned had acted correctly in accepting the instructions. The suggestion was made that the rule whereby a barrister is under the duty to accept any brief in the Courts where he professes to practise should be discarded where obedience to it would involve dereliction of higher duties to the State. It was contended that by taking up these cases the counsel in question had rendered impossible the performance of their duties as Members of Parliament to their constituencies and to the public. But in the eyes of the profession the two counsel acted entirely in accordance with their duty as members of the Bar.

"The rule that a barrister must accept any brief in the courts in which he professes to practise has its exceptions. The first applies where counsel is faced with a conflict of interests in the shape of special circumstances which would render it difficult for him to maintain his professional independence or would otherwise make the acceptance of instructions incompatible with the highest interests of Justice.

"The second exception to the general rule as to the acceptance of briefs applies where counsel finds that he would be personally embarrassed.

Embarrassment may arise in two different ways. The first is where counsel finds himself in possession of confidential information from a source other than his instructions.

"Secondly, embarrassment may arise out of some personal relationship between counsel and a party to the proceedings. Although no written rule is to be found, it is well established that if because of such relationship counsel would find it difficult or impossible to maintain the independence and objectivity which is expected of him in the performance of his duty to his client, he is justified in declining to act and, indeed, ought not to do so."

The position of a barrister, having once accepted a brief, is dealt with by Mr. Boulton in the following way:

"According to the best traditions of the Bar of England, a barrister should, while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interests of his client without regard to any possible unpleasant consequences either to himself or to any other person. As regards the defence of prisoners, counsel has the same privilege as his client of asserting and defending the client's rights and of protecting his liberty or life by the free and unfettered statement of every fact and the use of every argument and observation that can legitimately, according to the principles and practice of law, conduce to this end, and any attempt to restrict this privilege is jealously watched. Every counsel for an accused man must spare no effort to defend him, no matter how much public opinion is against the man, no matter how distasteful is the task, no matter how inconvenient to himself and no matter how small his fee. He must make the most of every flaw and every gap in the net which seems to be closing round the unhappy man. But he is not entitled to attribute wantonly or recklessly to another person the crime with which his client is charged unless the facts or circumstances given in evidence, or rational inferences drawn from them, raise at the least a not suspicion that the crime have been committed by the person to whom guilt is so imputed.

"Nor may counsel, if he is defending, provide or devise a line of defence for the accused. This raises the question as to what counsel may do if his client makes a confession of guilt. The guidance given by the Bar Council on this point is as follows:

"Different considerations apply to cases in which the confession has been made before counsel has undertaken the defence and to those in which the confession is made subsequently during the course of the proceedings.

"If the confession has been made before the proceedings have commenced, it is most undesirable that a counsel to whom the confession has been made, should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another counsel.

"Other considerations apply in cases in which the confession has been made during the proceedings, or in such circumstances that the counsel retained for the defence cannot retire from the case without seriously compromising the position of the accused.

"In considering the duty of a counsel retained to defend a person charged with an offence who, in the circumstances mentioned in the last preceding paragraph, confesses to counsel himself that he did commit the offence charged, it is essential to bear the following points clearly in mind: (1) that every punishable crime is a breach of the common or statute law committed by a person of sound mind and understanding; (2) that the issue in a criminal trial is always whether

the accused is guilty of the offence charged, never whether he is innocent; (3) that the burden of proof rests on the prosecution. Upon the clear appreciation of these points depends broadly the true conception of the duty of the counsel for the accused. His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged.

"The ways in which this duty can be successfully performed with regard to the facts of a case are (a) by showing that the accused was irresponsible at the time of the commission of the offence charged by reason of insanity or want of criminal capacity, or (b) by satisfying the tribunal that the evidence for the prosecution is unworthy of credence, or, even if believed, is insufficient to justify a conviction for the offence charged, or (c) by setting up in answer an affirmative case.

"If the duty of counsel is correctly stated above, it follows that the mere fact that a person charged with a crime has in the circumstances above mentioned made such a confession to his counsel, is no bar to that counsel appearing or continuing to appear in his defence, nor indeed, does such a confession release the counsel from his imperative duty to do all he honourably can do for his client.

"But such a confession imposes very strict limitations on the conduct of the defence. A counsel 'may not assert that which he knows to be a lie. He may not connive at, much less attempt to substantiate, a fraud.'

"While, therefore, it would be right to take any objection to the competency of the court, to the form of the indictment, to the admissibility of any evidence, or the sufficiency of the evidence admitted, it would be absolutely wrong to suggest that some other person had committed the offence charged, or to call any evidence, which he must know to be false having regard to the confession, such, for instance, as evidence in support of an alibi, which is intended to show that the accused could not have done or in fact had not done the act; that is to say, a counsel must not (whether by calling the accused or otherwise) set up an affirmative case inconsistent with the confession made to him.

"A more difficult question is within what limits, in the case supposed, may a counsel attack the evidence for the prosecution either by cross-examination or in his speech to the tribunal charged with the decision of the facts. No clearer rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged. Further than this he ought not to go."

Mr. Boulton deals with the clash between the barrister's duty to his client and his duty to the Court in the following way:

"Counsel always has to bear in mind that in addition to his duty to his client, he also has a duty to the court and these two obligations sometimes appear to be in conflict. He must on no account deceive or mislead the court, and this rule extends to the point of making it obligatory for counsel to draw the attention of the court to any relevant statutory provision or binding decision which is immediately in point whether it be for or against his contention. But counsel is under no duty to disclose facts known to him regarding his client's character or antecedents, nor to correct information which may be given to the court by the prosecution if the correction would be to the client's detriment. Counsel ought always to treat the court with courtesy and deference; and this applies equally to a bench of magistrates in the country as to the highest court in the land."

Broadly speaking the position of the lawyer in other *Commonwealth* countries with regard to his duties to his client and the Court follow the English pattern.

In the *United States* the position regarding acceptance of a brief is that the lawyer is free to accept or decline professional employment, subject to one important exception. If appointed by the court to represent a party in a matter then pending, the lawyer is, in the absence of overwhelming personal reasons of compelling nature, bound to accept that appointment. Also, if he is requested by the court to represent an indigent person unable to pay the customary fee, the lawyer should accede to that request. There are also cases where a lawyer is disqualified from accepting a brief, which are in spirit broadly similar to the exceptions to the obligations to accept under the English rule.

With regard to the lawyer's duty to advise and plead on behalf of his client the lawyer in the *United States* is according to the American report submitted to the Commission:

"free to give such advise as is necessary to promote the lawful purposes of his client, to protect his rights or to prevent an imposition upon him. The lawyer is under a duty so to do. He is equally free in litigation to take such action as will adequately state, protect and enforce the rights of his client at law. The lawyer has the privilege to decide what rights the client enjoys and may assert, and to determine the course of action. "These freedoms and rights are subject to objective standards, not only of legality of action and advice but also of the ethics of the profession. As it is impossible even to summarize all these ethical standards, known as 'canons', only the more important of these principal rules can here be stated as illustration.

"The lawyer is expected to ignore his own personal opinion of the guilt of his client who is accused of an offence; he is bound by fair and honorable means to present every defence and right allowed by law. As a prosecutor, his primary professional duty is not to obtain conviction of guilt of the accused but to see that justice is done. The lawyer should obtain full knowledge of the client's case before advising upon it; he must give candid opinion upon the merits of the cause and the probable result of pending litigation.

"If fraud or deception has been practised which has unjustly imposed upon the court or an adverse party, the lawyer should first inform his client and if the latter refuses to forego any advantage thereby gained, he should then inform the injured party or the latter's counsel. The lawyer should not communicate directly with a party represented by other counsel. In litigation he should not assert to the Court or jury his own personal belief in the merits of his client's cause. He should not conduct a civil case or make a defence which is intended only to harass or injure an opposing party, to work oppression or a wrong.

"There is the general standard, strictly imposed, of scrupulous honesty in all dealings with the client, including receipt and disbursement of funds provided by the client or received by the attorney for his client. Subornation of perjury, forbidden by statutes and canons of ethics, is a serious offence. Unfortunately it does occur and the occasional instances which come to light lead to disbarment proceedings.

"The lawyer should not permit judicial disfavour or public unpopularity either of the client or of his cause to restrain him from full discharge of his duty within the bounds of the law. Realistically viewed, however, many lawyers do, on occasion, hesitate to accept representation of

causes offered, out of fear that this may result in diminution of the volume of subsequent practice. Most recently, however, there have been notable instances in which recognized leaders of the Bar in a number of cities have undertaken to represent as clients persons brought to trial upon charges of unlawful or other actions in connection with activities of the Communist Party within the United States; such representation has elicited wide-spread approval by the Bar at large.

"Having accepted employment - a 'retainer' - the lawyer should not, without good cause or the consent of his client, withdraw from representation and if the matter is in litigation, without the consent of the Court."

In *France* and *Germany*, as in the United States, a lawyer is free to refuse or accept a brief, except where he is specifically requested to take a case by the Court or, as in France, by the *Bâtonnier* of his Order. Concerning the position of the lawyer in a case once accepted there is, broadly speaking, agreement between the English, American, French, German and many other systems regarding the freedom of the lawyer to urge before the Court every legitimate argument in favour of his client. But there are, as regards the relinquishment of a case, different shades of emphasis. Whereas in the United States, as has been seen, withdrawal is not allowed without good cause, in France and Germany the right of withdrawal, subject to limitations, is emphasized, particularly where the lawyer becomes convinced of the guilt of his client. It may be helpful in explaining an attitude which is rather different from that of legal systems in the English tradition to cite from Articles 6 and 30 of the *Chilean Code of Professional Ethics*:

"The lawyer has the liberty to accept or reject matters where his patronage is sought without having to express the reasons for his resolution, save in the case of official appointment, where his refusal must be justified. In making up his mind he must not be influenced in his personal interest by the pecuniary fee, or the power or fortune of the opposing party. He must not accept a matter whose arguments are contrary to his convictions, and more so in political or religious matters which he has previously defended; and when he is not in agreement with the client as to the way in which to present or develop a case, or where he sees his independence thwarted for motives of friendship, relations or others. In fact he must not undertake a matter unless he has moral liberty to go through with it.

"Once lawyer accepts a case, he cannot renounce it save for a justified cause which affects his honour, his dignity or his conscience."

### (3) The Right to Legal Advice and Representation

This extremely important matter can only be raised in outline here, as there is inevitably a wide discrepancy between the general right which is admitted in all countries and the interpretation of its scope and actual practice on which information cannot be complete. Attention may be directed to three aspects of the matter in criminal cases recently raised at the United Nations Regional Seminar on the Protection of Human Rights in Criminal Law and Procedure at

<sup>6</sup> See also p. 277 *supra* [point (7)].



Baguio, the Philippines, February 1958, – namely: – (1) when does the right arise?; (2) the methods by which the accused can contact counsel; (3) consultation between a lawyer and his client in prison. Outside the criminal law, the question, as will be seen below, has particular importance in some countries in relation to administrative proceedings.

In the *United States*, the American report states:

"In Federal criminal prosecutions the right to assistance of counsel, by appearance and participation, is specifically guaranteed by the Sixth Amendment of the Constitution. This right is as broad as the right of the individual as a party to be heard. Beyond this, the right to appear by counsel is a basic if implied guarantee in all matters subject to judicial trial. Some state constitutions expressly so provide. It is fair to assume that the right would be similarly guaranteed for all administrative proceedings which are subject to the due process guarantee. The question has never been raised because under statutes, regulations and custom the right to appear by an attorney is universally recognized.

"In civil cases personal appearance of the parties is not ordinarily necessary and they may appear by counsel alone. Only in a very few situations which are ordinarily viewed as not amounting to a 'taking' is the right limited, as for example, in preliminary investigatory proceedings before a grand jury, administrative tribunals or legislatures. Here there is no constitutional right to appear by attorney. This is true whether or not the individual appears under subpoena or voluntarily to protect his own interests.

"Statutes and practice modify the situation to some extent. The Administrative Procedure Act entitles an individual who is compelled to appear in person before the agencies to which the Act applies, to be accompanied, represented and advised by counsel. Legislative bodies allow limited representation by lawyers.

"Some administrative agencies have established special requirements for admission of attorneys to practice before them but most of those agencies do admit attorneys with little or no technical experience to practice before them. A few attempts have been made to exclude attorneys from practice before small claim tribunals, in an effort to avoid technicalities and costs which are supposed to appertain to the legal profession. Such provisions are of doubtful constitutionality and of less practical importance."

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.

In *India* the right to consult and to be defended by a legal practitioner is guaranteed by Art. 22 (1) of the Constitution from the time of arrest and Mr. Justice Bose in his report to the Commission points out that this Article was inserted after the right, although defended by the Judiciary, had been curtailed during the War prior to independence.

Similarly the right to counsel "at all time" is assured by Art. 37 of the Japanese Constitution. The reference to the time is important particularly in relation to the legal system usually described as "inquisitorial" where criminal proceedings normally first involve investigation by the police and an enquiry by a special Examining Magistrate before trial. Thus in *France* the right becomes specific at the time of the first hearing before the *juge d'instruction*. In some countries this aspect of the matter is dealt with by a specific legal provision. For example in the *Philippines* it is an offence (Act 857 of June 16, 1953) to prevent counsel from visiting and conferring privately with an arrested person.

#### (4) Provision for Legal Aid <sup>7</sup>

A full examination of the problems of legal aid would upset the balance of this working paper and probably press the claims of the Rule of Law too far. We may begin with some countries such as *India* and *Thailand* where in very serious criminal cases the Court is under an obligation to provide counsel if the accused person is unable to pay for his defence. In other countries, such as *France*, the protection of the indigent litigant or accused is wider. M. Siré in the article referred to above describes the position as follows:

"There is a whole category of clients whose defence will be completely free of charge under the legal-aid system. There are offices for this purpose at every Court, which establish whether or not the litigant is without means: if he is, he is granted the invaluable right of free defence and the barrister may neither claim nor accept any fee. French barristers have for a long time considered as a priceless honour the obligation of playing their part in the administration of justice free of charge. But the burdens that go with this honour are becoming extremely heavy and now give rise to some complaint. In criminal cases legal aid is a right, and is granted on request. Most often the legal-aid cases are conducted by junior barristers, appointed *ex officio* by the *Bâtonnier* as a matter of routine. They can thus undergo or complete their professional training and climb the first rungs towards fame. But in important and particularly difficult cases, it frequently happens that the *Bâtonnier* appoints *ex officio*, subject to the regime of the legal aid system, an experienced barrister who holds a prominent position among his colleagues. In a horrifying and most distressing case – that of Oradour-sur-Glane – heard by the Bordeaux Military Court in 1953, two former *Bâtonniers* of the Bar of Bordeaux were appointed *ex officio* by the *Bâtonnier* to defend the accused. The hearing lasted a whole month, mornings and afternoons."

In the *German Federal Republic* there is a comprehensive system of legal aid which in criminal matters gives the accused a right to counsel under certain conditions without regard to his capacity to pay and the relevant provisions have to be read in the light of the provision of the Constitution [Art. 3 (1)] requiring equality before the law. In *Belgium* a law of June 29, 1929 provides

<sup>7</sup> See for a fuller comparative study: Marsh, *Journal of the International Commission of Jurists*, Vol. II, No. 2, 1960.

for free legal assistance in all types of cases with the possibility of recovering from the assisted person a determined proportion of the expense. In *Finland* a person without sufficient means is assigned by the Court a legal practitioner and the expenses are paid out of public funds. Many systems are substantially similar, but there may be difficulties as regards (i) the quality of counsel available (ii) – a closely connected question – the means to pay them an adequate fee.

Both these difficulties are illustrated in the position in the *United States*. As the American report says:

"In the Federal Courts the impecunious accused who is genuinely without funds with which to compensate his counsel has the right to ask the Court to appoint counsel for him and the Court habitually does this from among the admitted practitioners of the Federal Bar. The same practice prevails generally in the States and is so provided expressly in many of their constitutions. In capital cases this is a requirement of due process and in many States likewise for felony prosecutions where the accused is a youth or an infirm person unable to conduct his own defence.

"The question of payment of compensation is a serious problem. For federal prosecutions there is no provision for payment of counsel by the government. Lawyers who are thus appointed by the court feel it to be a professional obligation to render services to the best of their ability without any compensation. Occasionally, where the trial will be unduly lengthy, funds have been provided from volunteer sources including members of the local Bar at large, or counsel work is divided among several attorneys who thus temper the drain upon their time and efforts.

"Many States have express statutory provision for payment of fees to counsel appointed by the Court to represent impoverished persons prosecuted for crime, the range of fees being of modest order. Absence of any provision for such payment may tend to make such professional work of less than the best grade, especially if counsel be appointed on the very eve of trial.

"In a growing number of cities organized volunteer legal assistance is provided, especially for representation in criminal prosecutions, by legal aid societies. These are private, non-profit organizations supported by charitable contributions from lawyers and laymen. These societies have a staff of regularly paid attorneys whose sole business is the representation of indigent clients. This volunteer service is also extended to such clients in civil cases. It is, however, common to insist upon the payment of some, even minimum, fee unless the client is totally without funds.

"In a few States the office of 'public defender' has been created by statute, he being a full-time public employee with a staff of attorneys who undertake the defence of such accused persons as are unable to pay for counsel. The public defender is the opposite number of the public prosecutor.

"Persons of modest means or none at all who have occasion to institute a civil action for recovery of money damages, habitually enter into arrangements with counsel for representation on a contingent fee basis – a practice which is recognized by Bar associations and the Courts as wholly legitimate, up to a maximum percentage limitation of the fee in relation to the amount actually recovered by the client.

"They who appear before administrative agencies normally have the means to pay their own counsel, but in those agencies which deal with a large volume of matters involving relatively small claims affecting persons in moderate circumstances, the solution sought has usually been

other than that of providing counsel at public expense. Instead, the procedure has usually been simplified and made of an investigatory rather than a adversary nature."

The position in *England* is of some interest as a system has been introduced which has features rather different from the legal aid provisions of other countries. It must however be considered in the light of the factors which are by no means universal, as for example, the relatively high cost of legal representation (as opposed to Court fees, which are relatively low), the system of costs which will normally involve the unsuccessful party in a civil case in paying the costs of both sides and the prohibition of any arrangement between counsel and his client for a fee contingent on his success in the case.

A distinction must first be made between criminal and civil matters. In criminal matters legal aid is granted by the Court and paid out of public funds. In civil matters there are some relatively unusual features of the system: – (i) the scheme is conducted by the legal profession itself, through local committees of solicitors; (ii) the expense is met – to the extent that it is not paid for by the damages recovered (nearly 80 % of the cases brought are successful) and by contributions from the litigants – by the State; (iii) once the litigant is accepted he has a free choice of a lawyer from the great majority of lawyers who are associated with the scheme; (iv) it has recently been extended to legal advice as well as representation in legal proceedings. However the scheme is limited by an outside limit of £ 420 per annum of disposable income, and of £ 500 disposable capital on the part of the assisted person and therefore leaves the person of medium resources without effective help.<sup>8</sup> Furthermore the scheme only applies (apart now from legal advice) to proceedings in the High Court or County Courts and not to proceedings before administrative tribunals.

### Summary and Conclusions

(1) An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Independence here implies freedom from interference by the Executive or Legislative with the exercise of the judicial function. Independence does not mean that the judge is entitled to act in an arbitrary manner; his duty is to interpret the law and the fundamental assumptions which underlie it to the best of his abilities and in accordance with the dictates of his own conscience.

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<sup>8</sup> "Disposable" income is gross income less certain deductions and allowances. A person within the limits is required to contribute to the cost of Legal Aid unless his disposable income does not exceed £ 156 per annum, and his disposable capital £ 75. The Government has announced its intention of raising the financial limits.

(2) There are in different countries varying ways in which the Judiciary are appointed, reappointed (where reappointment arises) and promoted, involving the Legislative, Executive, the Judiciary itself, in some countries the representatives of the practising legal profession, or a combination of two or more of these bodies. In some countries judges are elected by the people but it would appear that this method of appointment, and particularly of reappointment, has special difficulties and is more likely to secure judges of independent character where tradition has circumscribed by prior agreement the list of candidates and limited political controversy. There are also potential dangers in exclusive appointment by the Legislative, Executive or Judiciary, and where there is on the whole general satisfaction with the calibre and independence of judges it will be found that either in law or in practice there is some degree of co-operation (or at least consultation) between the Judiciary and the authority actually making the appointment.

(3) The principle of irremovability of the Judiciary, and their consequent security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence he is, particularly if he is seeking reappointment, subject to greater difficulties and pressures than a judge who enjoys security of tenure for his working life.

(4) The reconciliation of the principle of irremovability of the Judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be clearly laid down and that the procedure for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial. The grounds for removal should be only:

- (i) physical or mental incapacity;
- (ii) conviction of a serious criminal offence;
- (iii) moral obliquity.

Where, as in a number of countries, there is a possibility of removal of a judge for some other reason or in some other way (e.g., by legislative vote or by impeachment) it is conceived that the independence of the judges is preserved only to the extent that such process of removal is seldom if even exercised.

(5) The considerations set out in the preceding paragraph should apply to:

- (i) the ordinary civil and criminal courts;
- (ii) administrative courts or constitutional courts, not being subordinate to the ordinary courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other judicial functions (juries, assessors, Justices of the Peace, etc.) should only be appointed and removable in accordance

with the spirit of these considerations, in so far as they are applicable to their particular position; all such persons have in any event the same duty of independence in the performance of their judicial function. As emphasised in the section of this Working Paper dealing with the Executive and the Rule of Law, such administrative tribunals should be under the supervision of the ordinary courts or (where they exist) of the regular administrative courts.

(6) It must be recognised that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of Judicial business and that it may, subject to the limitations on delegations of legislative power which have been discussed in the first section of this working paper, delegate part of this responsibility to the Executive. Such measures however should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.

(7) It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs under the general supervision of the courts and within such regulations governing the admission to and pursuit of the legal profession as may be laid down by statute.

(8) The lawyer should be free to accept any case which is offered to him, unless his acceptance of the brief would be incompatible with his obligation not to mislead the Court or give rise to a personal conflict of interest.

(9) While there is some difference of emphasis between various countries as to the extent which a lawyer may be under a duty to accept a case it is conceived that:

(i) wherever a man's life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;

(ii) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client unless his obligation not to mislead the Court and not to become involved in a personal conflict of interests so requires;

(iii) a lawyer should be free without fear of the consequences to press upon the Court any argument of law or fact which does not involve a deliberate deception of the Court.

(10) An obligation rests on the State to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This obligation may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full

implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience, a question which cannot be altogether disassociated from the question of adequate remuneration for the services rendered.

## **RECAPITULATION OF THE SUMMARIES AND CONCLUSIONS OF THE DISCUSSION PRESENTED IN THE WORKING PAPER**

### **General Introduction**

1. The Rule of Law is a convenient term to summarize a combination of ideals and practical legal experience concerning which there is over a wide part of the world, although in embryonic and to some extent inarticulate form, a consensus of opinion among the legal profession.
2. Two ideals underlie this conception of the Rule of Law. In the first place, it implies without regard to the content of the law, that all power in the State should be derived from and exercised in accordance with the law. Secondly, it assumes that the law itself is based on respect for the supreme value of human personality.
3. The practical experience of lawyers in many countries suggests that certain principles, institutions and procedures are important safeguards of the ideals underlying the Rule of Law. Lawyers do not however claim that such principles, institutions and procedures are the only safeguards of these ideals and they recognize that in different countries different weight will be attached to particular principles, institutions and procedures.
4. The Rule of Law, as defined in this paper, may therefore be characterized as: "The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men."

### **First Committee: The Legislative and the Rule of Law**

1. In a society under the Rule of Law both majority and minority alike, accept minimum standards or principles regulating the position of the individual within society.
2. The necessary existence of such minimum standards or principles implies certain limitations on legislative power. Whether such limitations are embodied in a written Constitution or whether they are only the accepted conventions of legislative behaviour will depend on the political and legal conditions of different countries; but a lawyer who is concerned with the Rule of Law cannot disclaim



interest in such limitations merely because within his particular society their ultimate sanction may be of a political nature.

3. It cannot be said categorically that, even where limitations on legislative competence are included in a written Constitution, the concept of the Rule of Law automatically and inevitably involves the power of the courts to review legislation in the light of the Constitution; where such power, however, is successfully asserted it is of the greatest importance that the authority of the Court should not be indirectly undermined by devices which leave only the semblance of judicial control without the acceptance by the legislature of responsibility for changing the Constitution in an open way by the prescribed methods.

4. The legislature in a free society under the Rule of Law must:

- (a) abstain from retroactive penal legislation;
- (b) not discriminate in its laws as between one citizen and another, except in so far as the distinctions made can be justified in the particular circumstances of each society as necessary to, or as a necessary step in the establishment of, an ultimate regime of equal opportunity to all citizens;
- (c) not interfere with freedom of religious belief;
- (d) not deny to the members of society the right to responsible Government;
- (e) not place restrictions on freedom of speech, freedom of assembly or freedom of association, except in so far as such restrictions are necessary, to ensure as a whole the status and dignity of the individual within society;
- (f) not interfere with the procedural machinery ("procedural due process") whereby the above mentioned freedoms are given effect.

#### **Second Committee: The Executive and the Rule of Law**

1. In modern conditions, and in particular in large societies which have undertaken the positive task of providing for the welfare of the community, it is a necessary and, indeed, inevitable practice for the Legislative to delegate power to the Executive to make rules having the character of legislation. But such subordinate legislation, however extensive it may in fact be, should have a defined extent, purpose and procedure by which it is brought into effect. A total delegation of legislative power is therefore inadmissible.

2. To ensure that the extent, purposes and procedure appropriate to subordinate legislation are observed, it is essential that it should be ultimately controlled by a judicial tribunal independent of the executive authority responsible for the making of the subordinate legislation.

3. Judicial control of subordinate legislation may be greatly facilitated by the clear and precise statement in the parent legislation of the purposes which such subordinate legislation is intended to serve. It may also be usefully supplemented by supervisory committees of the legislatures before and/or after such subordinate legislation comes into effect. The possibilities of additional supervision over subordinate legislation by an independent authority, such as the Parliamentary Commissioner for Civil and Military Administration in Denmark, are worthy of study by other countries.

4. In the ultimate analysis the enforcement of duties whether of action or restraint owed by the Executive must depend on the good faith of the latter, which has the monopoly of armed force within the State; this is even true of countries which possess the advantageous traditional power of the courts to commit to prison for contempt of its orders.

5. But in any event the omissions and acts of the Executive should be subject to review by the Courts. A "Court" is here taken to mean a body independent of the Executive, before which the party aggrieved by the omission or act on the part of the Executive has the same opportunity as the Executive to present his case and to know the case of his opponents.

6. It is not sufficient that the Executive should be compelled by the courts to carry out its duties and to refrain from illegal acts. The citizen who suffers loss as a result of such omissions or illegalities should have remedy both against the wrong-doing individual agent of the State (if the wrong would ground civil or criminal liability if committed by a private person) and in any event in damages against the State. Such remedies should be ultimately under the review of Courts, as defined in the fifth paragraph above.

7. The ultimate control of the courts over the Executive is not inconsistent with a system of administrative tribunals as is found in many (especially Common Law) countries. But it is essential that such tribunals should be subject to ultimate supervision by the courts and (in as far as this supervision cannot generally amount to a full appeal on the facts) it is also important that the procedure of such tribunals should be assimilated, as far as the nature of the jurisdiction allows, to the procedure of the regular courts in regard to the right to be heard, to know the opposing case and to receive a motivated judgment.

8. The prevention of illegality on the part of the Executive is as important as the provision of machinery to correct it when committed. Hence it is desirable to specify a procedure of enquiry to be followed by the Executive before taking a decision. Such procedure may prevent action being taken which (being within an

admitted sphere of discretion allowed by the courts) if taken without such a procedure might result in grave injustice. The courts may usefully supplement the work of legislatures in insisting on a fair procedure antecedent to an executive decision in all cases where the complainant has a substantial and legitimate interest.

**Third Committee: The Criminal Process and the Rule of Law:  
Special Problems of the Relationship between the Executive  
and the Criminal Administration**

1. (a) A reasonable certainty of the citizen's rights and duties is an essential element of the Rule of Law. This is particularly important with regard to the definition and interpretation of offences in the criminal law, where the citizen's life or liberty may be at stake.

(b) Such certainty cannot exist where retroactive legislation makes criminally punishable acts or omissions which at the time they took place were not so punishable, or if punishable, involved a less serious penalty.

2. An accused person is entitled to be presumed innocent until his guilt is proved. The faith of a free society in the individual requires that the guilt of each accused should be proved *ad hominem* in his case. "Guilt by association" and "collective guilt" are inconsistent with the assumptions of a free society. Those who have the custody of arrested persons have a particular responsibility to respect the presumption of innocence.

3. The circumstances in which an arrest may be made and the persons so entitled to act should be precisely laid down by law. Every arrested person should be brought before an independent court within a very short period, preferably 24 hours, before which the legality of the arrest is determined.

4. Immediately on arrest an accused person should be informed of the offence with which he is charged and have the right to consult a legal adviser of his own choice. He should be informed of this right in a way appropriate to his education and understanding. This right should continue up to and during trial and during the period when an appeal may be pending.

5. Detention pending trial is only justified when exceptional circumstances are proved to the satisfaction of an independent court which should otherwise allow bail on reasonable security. Permission to detain beyond the period mentioned in para. 3 above should only be given by an independent court and such permission should be reviewed at reasonably short intervals, when the detaining authority should be required in court to justify the continued detention. Prolonged detention awaiting trial, for whatever reason, is a serious injustice to an accused person.

6. An accused person must have the right and power in practice to produce witnesses in his defence and the right to be present when they are examined.

7. An accused person must be informed in due time of the evidence against him, in order that he may adequately prepare his defence. He must have the right to be present (with his legal adviser) when witnesses for the prosecution are examined and the right to question them.

8. The function of the prosecution at all stages of the criminal process is to investigate and lay before the Court all the evidence bearing on the case whether favourable or unfavourable to the accused. The prosecutor should in particular inform the accused in due time of any evidence not being used by the prosecution which might benefit the accused.

9. No one should be compelled by the police, by the prosecuting authorities or by the court to incriminate himself. No person should be subjected to threats, violence or psychological pressure, or induced by promises, to make confessions or statements. It should not be possible to evade the obligations which arise from the foregoing principles by treating a person under suspicion as a witness rather than as an accused person. Information obtained contrary to these principles should not be used as evidence.

10. The search for evidence in private premises should only take place under authorization from a competent court. It should only be permissible to intercept with private communications such as letter and telephone conversations for the purposes of collecting evidence upon specific authority given in the individual case by a competent court.

11. The particular responsibilities of the police and prosecuting authorities during that part of the criminal process which precedes a hearing before a Judge require that the rights and duties of the police and prosecution should be clearly and unequivocally laid down by law. Different systems have evolved different ways of supervising and controlling the activities of the police and the prosecuting authority. Similar results may be achieved either mainly by the subordination of the police to the prosecuting authorities which are in turn ultimately under the direction of the courts or mainly by the internal discipline and self-restraint of the police and the traditions of fairness and quasi judicial detachment on the part of the prosecution; in the latter case the remedy of *Habeas Corpus* has proved an important procedural device for ensuring that detention is legally justified.

12. Every system of criminal procedure has its characteristic dangers. It is in all cases essential that where an accused person has been illegally treated he should have a personal remedy both against

the officials responsible and against the State in the name of which the officials have acted or failed to act. Evidence which has been illegally obtained should not be admitted at the trial of an accused person.

13. The prosecuting function necessarily involves the exercise of restraint and a sense of fairness which cannot be comprehensively reduced to precise formulation. Although it is the common practice to vest in the Executive the final responsibility for the conduct of prosecutions it is essential that the supreme prosecuting authority exercises his functions in an independent capacity rather than in pursuance of instructions given by the Executive.

14. The trial of accused persons must take place before an independent court. Special courts created *ad hoc* for a particular case or series of cases endanger fair trial or at the least create the pursuance of instructions given by the Executive.

15. The trial of accused persons should take place in public. Exceptions must be justified by law, the burden of proof resting on the prosecution to show that the conditions envisaged by the law are satisfied. Publicity in preliminary proceedings, where allowed, should not endanger fair trial by public discussion of the issues before they are decided in court.

16. The rule of law does not imply a particular theory on penal reform but it must necessarily condemn cruel, inhuman and excessive punishments.

17. In every case involving imprisonment or a substantial fine there should be a right of at least one appeal to a higher court against conviction and sentence.

18. The principles outlined above should be applied as far as the nature of the offence allows to charges of "contempt of court" and "contempt of Parliament". Those principles above which relate to fair questioning of accused persons are also applicable to procedures of investigation which do not in themselves form part of a criminal process but which may have for those concerned effects on their reputation and economic security comparable to conviction by a court.

#### **Fourth Committee: The Judiciary and Legal Profession under the Rule of Law**

1. An independent Judiciary is an indispensable requisite of a free society under the Rule of Law. Independence here implies freedom from interference by the Executive or Legislative with the exercise of the judicial function. Independence does not mean that the judge is entitled to act in an arbitrary manner; his duty is to

interpret the law and the fundamental assumptions which underlie it to the best of his abilities and in accordance with the dictates of his own conscience.

2. There are in different countries varying ways in which the Judiciary are appointed, reappointed (where reappointment arises) and promoted, involving the Legislative, Executive, the Judiciary itself, in some countries the representatives of the practising legal profession, or a combination of two or more of these bodies. In some countries judges are elected by the people but it would appear that this method of appointment, and particularly of reappointment, has special difficulties and is more likely to secure judges of independent character where tradition has circumscribed by prior agreement the list of candidates and limited political controversy. There are also potential dangers in exclusive appointment by the Legislative, Executive or Judiciary, and where there is on the whole general satisfaction with the calibre and independence of judges it will be found that either in law or in practice there is some degree of co-operation (or at least consultation) between the Judiciary and the authority actually making the appointment.

3. The principle of irremovability of the Judiciary, and their consequent security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law. Although it is not impossible for a judge appointed for a fixed term to assert his independence he is, particularly if he is seeking reappointment, subject to greater difficulties and pressures than a judge who enjoys security of tenure for his working life.

4. The reconciliation of the principle of irremovability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds for removal should be clearly laid down and that the procedure for removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be accorded to an accused person in a criminal trial. The grounds for removal should be only: (i) physical or mental incapacity; (ii) conviction of a serious criminal offence; (iii) moral obliquity. Where, as in a number of countries, there is a possibility of removal of a judge for some other reason or in some other way (e.g., by legislative vote or by impeachment) it is conceived that the independence of the judges is preserved only to the extent that such process of removal is seldom if ever exercised.

5. The considerations set out in the preceding paragraph should apply to: (i) the ordinary civil and criminal courts; (ii) administrative courts or constitutional courts, not being subordinate to the ordinary courts. The members of administrative tribunals, whether professional lawyer or laymen, as well as laymen exercising other judicial functions (juries, assessors, Justices of the Peace, etc.) should only

be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular position; all such persons have in any event the same duty of independence in the performance of their judicial function. As emphasised in the section of this Working Paper dealing with the Executive and the Rule of Law, such administrative tribunals should be under the supervision of the ordinary courts or (where they exist) of the regular administrative courts.

6. It must be recognised that the Legislative has responsibility for fixing the general framework and laying down the principles of organization of Judicial business and that it may, subject to the limitations on delegations of legislative power which have been discussed in the first section of this working paper, delegate part of this responsibility to the Executive. Such measures however should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.

7. It is essential to the maintenance of the Rule of Law that there should be an organized legal profession free to manage its own affairs under the general supervision of the courts and within such regulations governing the admission to and pursuit of the legal profession as may be laid down by statute.

8. The lawyer should be free to accept any case which is offered to him, unless his acceptance of the brief would be incompatible with his obligation not to mislead the Court or give rise to a personal conflict of interest.

9. While there is some difference of emphasis between various countries as to the extent which a lawyer may be under a duty to accept a case it is conceived that:

- (i) wherever a man's life, liberty, property or reputation are at stake he should be free to obtain legal advice and representations; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;
- (ii) once lawyer has accepted a brief he should not relinquish it to the detriment of his client unless his obligation not to mislead the Court and not to become involved in a personal conflict of interests so requires;
- (iii) a lawyer should be free without fear of the consequences to press upon the Court any argument of law or fact which does not involve a deliberate deception of the Court.

10. An obligation rests on the State to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This

obligation may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience, a question which cannot be altogether dissassociated from the question of adequate remuneration for the services rendered.



# **OBJECTIVES, ORGANIZATION, HISTORY AND ACTIVITIES OF THE INTERNATIONAL COMMISSION OF JURISTS**

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The International Commission of Jurists is a non-governmental and non-political organization which has consultative status, Category B, with the Economic and Social Council of the United Nations. It draws its support from judges, law teachers, practitioners of law and other members of the legal community and their associations.

## I. OBJECTIVES

The Commission is dedicated to the support and advancement throughout the world of the Rule of Law. It has defined this term as

*The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic background, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.*

The Commission's work thus focuses on the recognition and protection of human rights and fundamental freedoms in the classical sense. It realizes however that the formal observance of the rights of the individual is not enough. Anatole France commented once on "the majestic equality of Law that forbids rich and poor alike to steal bread and sleep under the bridges." Not less than any other responsible citizen can the jurist ignore the material problems of his community. In this perspective, the Rule of Law emerges as a dynamic concept which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to promote social, economic and cultural conditions under which his legitimate aspirations may be realized. Appreciating the need to reconcile personal freedom with social security, the Commission is determined, in the words of its President, Mr. Justice Vivian Bose, to "weave new threads of thought and fresh ideals into the old fabric in such a way as to retain its beauty and continuity without undermining its inner strength."

The Commission holds that equal justice cannot find its full expression except in a community protected by firmly established legal institutions, impartial judges and independent lawyers who are conscious of their responsibility towards society. In order to implement this principle, the Commission carries out its activities on two main levels:

(1) Promoting and strengthening the Rule of Law in all its practical manifestations—institutions, legislation, procedures, etc.;

(2) Defence of the Rule of Law through the mobilization of world legal opinion in cases of general and systematic violation of, or serious threat to, such principles of justice.

It is obvious that these two objectives complement each other. Both are indeed indispensable. Since the fundamental freedoms of the individual are everywhere equally precious and nowhere invulnerable, the vigilance of the lawyer must extend to all parts of the world. This concern for the defence of the principles of the Rule of Law has led the Commission to take appropriate action on such violations of human rights as the suppression of the 1956 revolution in Hungary and the systematic injustice that followed, the racial discrimination in South Africa, the Chinese oppression in Tibet, the recent political trials in Iraq, the want of civil rights in Spain and Portugal, etc.

In its activities designed to promote the Rule of Law, the Commission is keenly aware that even a formally correct procedure does not by itself provide all the legal safeguards necessary to a person whose social, political or economic situation constitutes an obstacle to his efforts to secure equal justice. The Commission believes that those who enjoy freedom under the law must use that freedom to remove in law and in fact every source of injustice, real or potential.

More specifically, the following basic principles underlie the work of the Commission:

a) In the field of *constitutional law*, the principles of the Rule of Law may be served by a written constitution incorporating the guarantees of civil and political rights and the correlative limitations on legislative power, or by the observance of established standards of behaviour based on universal respect for old traditions of a democratic exercise of legislative power; in either case, fundamental human rights must be implemented and protected by effective procedural measures.

b) In order to discharge its manifold and urgent administrative tasks in a modern society, the *Executive* has to be under certain conditions invested with authority and resources exceeding the limits set by the traditional concepts of the separation of governmental powers. Yet a freely elected Legislature must remain both the fountainhead and safeguard of civil liberties.

c) In the field of *criminal law*, a person accused of a crime is entitled to adequate legal advice, a fair trial and readily available legal remedies. None of these rights should be affected by the character of the offence, by the political or social status of the accused or by his economic position. Though the Rule of Law is not bound to any particular penal theory, it does necessarily condemn cruel, inhuman or excessive punishment.

d) An independent *Judiciary* and a strong *Bar* are indispensable requisites of a society under the Rule of Law. The duty of the judge is to interpret the law and the fundamental principles and assumptions that underlie it. In fulfilling this task, the judge should be guided by his conscience and remain free from any outside influence. The lawyer should be at liberty to accept any case which is offered to him and to press upon the court any proper argument without fear of the consequences. The Commission believes that equal access to law for rich and poor alike is essential to the maintenance of the Rule of Law. Adequate legal advice and representation should be provided to those who are not able to pay for it.

e) While concerned primarily with individual rights and the administration of justice in national societies, the Commission realizes that the growing interaction of political, social and cultural developments in the various states and continents requires consideration of related legal problems on an international scale. The establishment and protection of the Rule of Law in each country would considerably facilitate the recognition and implementation of these principles in the relations between States. On this basis, the activities of the Commission reach also into the field of *international law*. Thus, for example, it supports and works for the adoption of international conventions of human rights safeguarded by appropriate enforcing machinery.

## II. ORGANIZATION AND MEMBERSHIP

The Statute of the Commission limits the number of its Members to twenty-five. There are at present the following twenty-two Members:

Joseph T. THORSON (*Honorary President*)

President of the Exchequer Court of Canada; Member of the Privy Council of Canada; former Member of the Canadian House of Commons; former Dean of Manitoba Law School

Vivian BOSE (*President*)

Former Judge of the Supreme Court of India

Per T. FEDERSPIEL (*Vice-President*)

Attorney-at-Law; Member of the First Chamber of the Danish Parliament; Member of the Consultative Assembly of the Council of Europe; former Minister; former Delegate, United Nations General Assembly

José Thomaz NABUCO (*Vice-President*)

Member of the Bar of Rio de Janeiro

Arturo A. ALAFRIZ

Attorney and Counsellor-at-Law; Member of the Council, International Bar Association; President of the Federation of Bar Associations of the Philippines; President of the Philippine Lawyers' Association; former Professor of Law at the Philippine Law School and Arellano University of Manila; former Judge at the Court of First Instance

Giuseppe BETTIOL

Member of the Italian Parliament and Chairman of its Committee on Foreign Affairs; former Minister; Professor of Criminal Law at the University of Padua

Dudley B. BONSAI

Attorney-at-Law; immediate Past President, Association of the Bar of the City of New York

Philippe N. BOULOS

Governor of Beirut, Lebanon; Attorney-at-Law at the Court of Appeal and Cassation, former Minister of Justice; former President of the Court of Appeal

Juan J. CARBAJAL VICTORICA

Attorney-at-Law; Professor of Public Law at the University of Montevideo; former Member of the Uruguayan Parliament; former Minister of Interior

U CHAN HTOON

Judge, Supreme Court of Burma; Adviser to the Constituent Assembly of Burma on Constitution 1947 - 48; former Attorney-General of the Union of Burma

A. J. M. VAN DAL

Attorney-at-Law at the Supreme Court of the Netherlands

Sir Owen DIXON

Chief Justice of Australia; former Minister Plenipotentiary of Australia in Washington; Mediator between India and Pakistan, Kashmir Dispute (1950)

Osvaldo ILLANES BENITEZ

Judge of the Supreme Court of Chile

Jean KRÉHER

Attorney-at-Law at the Court of Appeal, Paris; former Chairman of the Executive Committee of the World Federation of United Nations Associations

Axel Henrik MUNKTELL

Member of the Swedish Parliament; Professor of Law at the University of Upsala

Paul-Maurice ORBAN

Professor at the Faculty of Law of the University of Ghent; former Senator; former Minister

Stefan OSUSKY

Former Minister of Czechoslovakia to Great Britain and France; former Member of the Czechoslovak Government

The Rt. Hon. Lord SHAWCROSS

Former Attorney General; former President of the Board of Trade; former Chief Prosecutor for the United Kingdom, International Military Tribunal at Nuremberg; former Delegate to the United Nations; former Chairman and present Member of the Bar Council of England and Wales; former Member of The Hague Court of Arbitration

Benjamin R. SHUTE

Attorney-at-Law, New York

Kotaro TANAKA

Chief Justice of Japan

Purshottam TRIKAMDAS

Senior Advocate at the Supreme Court of India; Secretary, Indian Bar Association; Member, Executive Council, Indian Law Institute; former Chairman of the Socialist Party; sometime Secretary to Mahatma Gandhi; former Delegate, United Nations General Assembly

H. B. TYABJI

Legal Adviser, State Bank of Pakistan; former Chief Draftsman, Ministry of Law of Pakistan; former Judge of the Chief Court of Sind

The Commission designates one of its Members to serve as President for a three year term. It may also create other offices and prescribe their period of service.

An Executive Committee of five members is elected from the Commission and acts on its behalf whenever the Commission is not in session. The responsibility for the practical work necessary for the realization of the Commission's objectives rests with the Secretary-General, appointed by the Executive Committee, and assisted in his task by the Administrative Secretary and a legal and administrative staff.

Since 1958, the Secretary-General has been Dr. Jean-Flavien Lalive of Switzerland, Member of the Geneva Bar, formerly General Counsel, United Nations Relief and Works Agency, Beirut, former First Secretary, International Court of Justice, The Hague.

Mr. Edward S. Kozera of the United States of America, formerly Lecturer in Government at Columbia University and former Fellow, Carnegie Endowment for International Peace, has been Administrative Secretary of the Commission since 1954.

### III. HISTORY AND DEVELOPMENT

The International Commission of Jurists grew from a Standing Committee of six members set up at an international legal congress held in West Berlin in July 1952. The original purpose of this committee was to follow up the inquiry made on the abuse of justice in East Germany and other East European countries. From the start it became apparent that an international body, established by spontaneous initiative and expressing the concern of the world legal community over violations of human rights, should not, and could not, limit its interest and concern to a specific area or system. A broader scope of action became imperative.

In 1952, a permanent Secretariat was established at The Hague, where the Commission was incorporated in 1955 as a non-profit-making and non-political legal entity under the laws of the Netherlands. In 1959, the Secretariat moved to Geneva, Switzerland.

The position of Secretary-General was held from 1952 to 1956 by Mr. A. J. M. van Dal, Attorney-at-Law at the Supreme Court of the Netherlands. In 1956, Mr. van Dal was succeeded by Mr. Norman S. Marsh, Barrister-at-Law, former Fellow of University College, Oxford, and Lecturer in Law at the University, who was Secretary-General of the Commission until 1958 and is at present Director of the British Institute of International and Comparative Law.

To further the application of the principles of the Rule of Law to concrete situations in various parts of the world and to promote the mutual exchange of ideas and experience, the International Commission of Jurists encourages and supports the creation of National Sections co-operating with the Commission on the basis of common purpose and interests. There are at present such sections in the following 26 countries:

Argentina, Australia, Belgium, Brazil, Canada, Chile, Denmark, Finland, France, Federal Republic of Germany, Ghana, Greece, India, Iran, Israel, Italy, Malaya, Netherlands, Nigeria, Norway, Philippines, Sweden, Turkey, United Kingdom, United States, Uruguay.

A number of new National Sections are in the process of being

constituted, while Working Groups, formed in preparation to the formal creation of a National Section, exist in several countries.

Keeping in close touch with the Secretariat, the National Sections supply materials on legal developments in their respective countries, undertake research on matters of particular concern to their members, hold local and regional meetings, organize public lectures, and occasionally hold joint sessions with other Sections to discuss matters of common interest and engage in other related activities. Pamphlets and special studies are published from time to time.

#### IV. THE ACTIVITIES OF THE COMMISSION

The aims and purposes of the Commission are accomplished in a number of ways: through publication of its regular periodicals and special reports, through meetings ranging from student seminars to international congresses, and by suitable action in cases where violations of the Rule of Law occur or are threatened. National Sections or Working Groups provide invaluable assistance in the Commission's world-wide efforts, and there are close relations with organizations which pursue objectives similar to those of the Commission.

Visits to various countries are frequently made for fact-finding purposes or to explain the aims of the Commission in public lectures and informal meetings.

##### 1. Publications

There are four categories of publications.

###### (a) *Bulletin of the International Commission of Jurists*

The first *Bulletin* of the Commission appeared in November 1954. It was printed in English, French and German and had a circulation of 14,000 copies. By way of comparison, issue No. 10 (February 1960) was distributed to 32,000 readers through one of its four editions (English, French, Spanish and German). The *Bulletin* is intended to reflect current events in the legal field and to project important recent developments, facts and situations against the background of the Commission's objectives. It reports not only on violations of the Rule of Law but also on favourable and encouraging developments as they may occur. It has become the most popular means of communication between the Commission and its thousands of friends.

###### (b) *Newsletter*

Since April 1957, a *Newsletter* has been published to keep the supporters of the Commission abreast of its organization and activities and of the work of the National Sections. Printed as the need arises, the *Newsletter* provides current information



on important steps taken by the Commission and on international reaction to its work.

(c) *Journal*

The number of the Commission's regular periodicals was completed in Autumn 1957 by the publication of the first issue of the *Journal of the International Commission of Jurists*, dealing on a scholarly level with manifold aspects of the Rule of Law and especially the administration of justice in different legal systems. The *Journal* appears twice a year and is distributed for a small subscription fee.

(d) *Special Studies and Reports*

In addition to the above-mentioned periodicals, the International Commission of Jurists publishes special studies on topics of serious and immediate concern, such as *The Hungarian Situation and the Rule of Law* (1957), *The Question of Tibet and the Rule of Law* (1959), and Reports of its Congresses.

From the date of the appearance of the first *Bulletin*, in 1954, to the middle of 1959, the International Commission of Jurists distributed a total of over one million copies of its publications. In considering this impressive figure, one has to keep in mind that the materials are being sent only to those recipients who specifically requested to be put on the Commission's mailing list or who have indicated a keen interest in its work.

## 2. Congresses and Meetings

The expanding scope of the Commission's interests and activities may best be measured by the agenda of, and participation in, the international meetings organized by the Commission.

(a) *Congress of Athens*

In June 1955, over 150 leading jurists from 48 countries assembled in Athens "to consider what minimum safeguards are necessary to ensure the use of the Rule of Law and the protection of individuals against arbitrary action of the State". The results of their deliberations were formulated in resolutions of the working committees of the Congress and, above all, in the memorable *Act of Athens* which spelled out the basic requirements that the State be subject to the law and that Governments respect the rights of the individual and provide effective means for their enforcement. (The text of the *Act of Athens* is reproduced elsewhere in this report)

(b) *Conference on Hungary*

In March 1957 the Commission summoned a Conference at The Hague to give urgent consideration to the tragic develop-

ments in Hungary. Under the chairmanship of the then Sir Hartley, now Lord, Shawcross, twenty-five leading jurists of 13 countries weighed the available written evidence and oral testimony given by recognized experts on Hungary. In a unanimous Resolution, the Conference arrived at the conclusion that the laws and decrees of the Hungarian authorities, after the suppression of the 1956 revolution, violated human rights in failing to provide the minimum safeguards of justice recognized by civilized nations. Copies of the Hague Resolution were sent to the signatories of the Geneva Conventions for the Protection of Victims of War (1949) and to the Bar Associations and Faculties of Law of all countries.

The views of the Conference on Hungary and of the Commission were presented orally in Geneva on March 13, 1957 by Sir Hartley Shawcross to the United Nations Special Committee on the Problem of Hungary. He then answered questions by the members of the Committee regarding the facts stated in the Commission's detailed study, *The Hungarian Situation and the Rule of Law*.

(c) *Vienna Conference*

In April 1957 the Commission convened in Vienna a European Conference attended by 158 jurists from 18 European countries. The subjects for discussion were "The Definition of and Procedure Applicable to a Political Crime" and "Legal Limitations on Freedom of Opinion". The Conference was preceded by a detailed inquiry in the form of a questionnaire answered from and for nearly all European countries.

(d) *Congress of New Delhi*

The Congress of Athens had recommended that the Commission should "formulate a statement of the principles of Justice under Law, and . . . endeavour to secure their recognition by international codification and international agreement". This ambitious undertaking was in large measure accomplished by the International Congress of jurists held at New Delhi which is fully reported in the present publication of which this description of the activities and programme forms a part.

### 3. International Inquiries

In cases of especial gravity and importance the International Commission of Jurists has initiated inquiries on an international scale. The events in Tibet in March 1959 focused attention on the situation in that country. On the basis of an investigation undertaken by Mr. Purshottam Trikamdas, a Member of the Commission, it was decided to publish a preliminary report (*The Question of Tibet and the Rule of Law*, July 1959) and to set up a *Legal Inquiry*

*Committee on Tibet* under the chairmanship of Mr. Trikamdas. After meetings in New Delhi (November 1959) and Geneva (June 1960), a final report was being prepared by the Committee.

#### **4. Observers**

The Commission has in many instances dispatched observers to report on situations implying a threat to, or actual violations of, the Rule of Law. Such trips were undertaken to Spain, Portugal, and on several occasions to South Africa. A number of similar missions are under preparation. The Commission's requests to admit observers have been repeatedly refused by the authorities of Hungary and, in one case, by those of Iraq.

#### **5. Missions and Visits**

The Commission believes in the power of friendly personal relations with the widest possible circle of jurists across the world. On numerous occasions, extended journeys were undertaken by the executives of the Commission with most gratifying results. Mr. A. J. M. van Dal toured Latin America and the United States in 1956. Mr. Norman S. Marsh and Mr. Edward S. Kozera made a trip around the world in 1958. Dr. Jean-Flavien Lalive travelled widely in 1958 and the following years in Asia, the Middle East, Europe and Africa. Prominent Members or supporters of the Commission carried out good-will missions on its behalf in Africa, America and Asia as well as Europe.

In all countries, representatives of the Commission met with leading personalities of the Bench and Bar and in many they were received by the Heads of the respective States and members of their Governments. In some instances, the highest courts of the land were convened in special session for the occasion.

In Geneva, the Secretariat of the Commission is increasingly becoming a centre visited by jurists from all continents who are travelling in Europe and who are interested in familiarising themselves at first hand with the work and activities of the Commission and in discussing legal developments of common concern.

#### **6. Legal Technical Assistance**

The Commission is translating into action the positive interest expressed at the New Delhi Congress in the developments in newly independent countries of Asia and Africa. Acutely aware of the importance and complexity of the problems facing nations in search of a stable legal system and of an efficient judicial organization, the Commission holds itself at the disposal of all those who may wish to exchange views or secure information on questions raised by the building of a new constitutional structure and of new legal institutions. Representatives of the Commission have been recently

travelling in areas where "legal technical assistance" on a non-governmental basis appears indicated. Friendly personal relations and useful experience resulting from such visits are most valuable to the Commission and it is hoped that they may produce equal and permanent benefits to the countries in question.

#### **7. United Nations Activities**

The Commission is conscious of the rights and duties devolving on it by virtue of its consultative status with the Economic and Social Council of the United Nations. Observers of the Commission take part in international conferences on legal problems within its frame of reference, such as the United Nations Seminars on the Protection of Human Rights in Baguio City, Philippines (1958), Buenos Aires (1959), Tokyo, Vienna and London (1960).

The Commission's representatives regularly attend sessions of non-governmental organizations held at the United Nations headquarters in New York and in Geneva and they maintain contact with the Human Rights Division and other United Nations departments concerned with the promotion of justice throughout the world.

#### **8. International Exchanges**

Representatives and observers of the Commission have attended a number of important international meetings devoted to the problems of the Rule of Law and of the administration of justice. They also represented the Commission at congresses and conferences of international legal organizations and institutes as well as at annual meetings of Bar associations and other professional and learned societies.

A number of international organizations sent observers to the Commission's Congresses in Athens and New Delhi, and to the Vienna Conference.

Valuable exchanges of opinion and stimulating personal contacts on such occasions help representatives of the Commission to appraise recent currents of legal thought and, conversely, contribute to the understanding and evaluation of the Commission's work by leading members of the legal profession.

#### **9. Survey on the Practical Application of the Rule of Law**

The New Delhi Congress provided an opportunity for stating, in the form of definite rules which can be applied in practice, the principles, institutions and procedures by which the Rule of Law can be brought into being and safeguarded. The Congress thus represented a crowning achievement of a two-year endeavour. Yet it has also revealed the differences, both in substance and in emphasis,

existing in countries of varied stages of constitutional and legal development. To secure the fullest possible implementation of the principles adopted in New Delhi, the Commission has launched a new inquiry with the purpose of obtaining specific data on the actual operation of the legal system in individual countries. This study differs from the first research project of 1957 inasmuch as it puts special emphasis on the practical application of the principles agreed upon at the last Congress. It will thus permit the Commission to follow up the resolutions of New Delhi by keeping abreast of legislative action, judicial practice and administrative procedure in various countries. The results of the first inquiry will be published as will its periodic supplements which are intended to provide an international balance sheet pointing out progress and exposing setbacks in the preserving and strengthening of the Rule of Law.

#### **10. Seminars**

Another important result of the Congress of 1959 is the increased attention to law students and junior members of the legal profession. The Commission has successfully started a programme of seminars organized for the benefit of law students and post-graduate students from various countries. The first such meeting was held in Yvoire, France, in June 1959 and was attended by 26 participants from 17 European, Asian, African and American countries. Its subject, "The Rule of Law and Social, Economic and Political Development," provoked a most valuable discussion enlivened by the contributions of economists and political scientists whose viewpoint provided an interesting balance to the thinking and arguments of lawyers.

#### **11. Essay Contest**

Still in the field of promoting interest of the young generation in the Rule of Law, the Commission launched in 1959-1960 its first essay contest open to law school students and young lawyers on the theme *The Role of the Lawyer in the Economic and Social Development of his Country within the Framework of the Rule of Law*. Cash prizes will be awarded by an international awards committee consisting of distinguished jurists.

#### **12. Legal Information**

The headquarters of the Commission has become in recent years a centre of legal information. In this capacity, it is often approached by lawyers and scholars who desire to obtain material or data on specific legal subjects or to establish personal contacts with legal circles in foreign countries. Within the limits of its facilities, the Secretariat of the Commission acts in such cases as a clearing

house and has in many instances brought about valuable international co-operation in the fields of legislation, codification and academic study.

## **V. FINANCES**

In order to carry on its work, the International Commission of Jurists, a private organization, is dependent on contributions, subscription fees, gifts and bequests from Members, National Sections, professional and learned societies, private trusts and individuals. Since the formation of the Commission, it has received voluntary contributions from lawyers and lawyers' associations in some thirty countries. The Commission is grateful to all its friends who have extended financial assistance and who are thus making possible the successful pursuit of its objectives. The scope of the Commission's activities does however increase in proportion to the growing appeal and recognition of its work. Generous contributions from private individuals, organizations and institutions are indispensable to maintain and improve the Commission's effectiveness. Those wishing to make such contributions should send their cheques to the Secretary-General of the International Commission of Jurists in Geneva.

## **VI. CONCLUSION**

The steady expansion of the activities and of the geographical coverage of the International Commission of Jurists testifies to the urgent need felt in the international legal community for an organization dedicated to the promotion and practical application of ideals which alone can secure to humanity the blessings of peace under the law. An independent trustee of his nation's sense of justice, the lawyer can fulfil his noble mission only under the protection of, and in accordance with, the Rule of Law. It is with the realisation of their responsibility and mutual interdependence that lawyers around the world share in the spiritual community which the Commission is striving to establish. As a non-governmental organization, it provides the opportunity for the exchange of views and for the consideration of opinions which do not necessarily reflect the official attitude of any government or authority. Friends and supporters of the Commission are thus free to approach without prejudice viewpoints of others and to contribute to that valuable flow of ideas which, unrestricted by natural or artificial boundaries, constitutes the one great hope for permanent international understanding.

**NOTE ON  
PUBLICATIONS  
OF THE  
INTERNATIONAL COMMISSION OF JURISTS**

Listed below are some recent publications of the International Commission of Jurists which are still available on request.

**Journal of the International Commission of Jurists**, issued bi-annually.

Among the articles are:

*Volume I, no. 1, (Autumn 1957):*

The Quest of Polish Lawyers for Legality (Staff Study)  
The Rule of Law in Thailand, by Sompong Sucharitkul  
The Treason Trial in South Africa, by Gerald Gardiner  
The Soviet Procuracy and the Right of the Individual Against the State,  
by Dietrich A. Loeber  
The Legal Profession and the Law: The Bar in England and Wales, by  
William W. Boulton  
Book reviews

*Volume I, No. 2 (Spring-Summer 1958):*

Constitutional Protection of Civil Rights in India, by Durga Das Basu  
The European Commission of Human Rights: Procedure and Jurisprudence, by A. B. McNulty and Marc-André Eissen  
The Danish Parliamentary Commissioner for Civil and Military Government Administration, by Stephan Hurwitz  
The Legal Profession and the Law: The Bar in France, by Pierre Siré  
Judicial Procedure in the Soviet Union and in Eastern Europe, by Vladimir Gsovski and Kazimierz Grzybowski, editors  
Wire-Tapping and Eavesdropping: A Comparative Survey, by George Dobry  
Book Reviews

*Volume II, no. 1 (Spring-Summer 1959):*

International Congress of Jurists, New Delhi, India: The Declaration of Delhi, Conclusions of the Congress, Questionnaire and Working Paper on the Rule of Law, Reflections, by V. Bose and N. S. Marsh  
The Layman and the Law in England, by Sir Carlton Allen  
Legal Aspects of Civil Liberties in the United States and recent Developments, by K. W. Greenawalt  
Judicial Independence in the Philippines, by Vicente J. Francisco  
Book Reviews

*Volume II, no. 2 (Winter 1959-Spring-Summer 1960):*

Democracy and Judicial Administration in Japan, by Kotaro Tanaka  
The Norwegian Parliamentary Commissioner for the Civil Administration by Terje Wold

The New Constitution of Nigeria and the Protection of Human Rights and Fundamental Freedoms, by T. O. Elias  
Law, Bench and Bar in Arab Lands, by Saba Habachy  
Problems of the Judiciary in the "Communauté" in Africa, by G. Mangin  
Legal Aid and the Rule of Law: a Comparative Outline of the Problem, by Norman S. Marsh  
The "General Supervision" of the Soviet Procuracy, by Glenn C. Morgan  
Preventive Detention and the Protection of Free Speech in India, by the Editors  
The Report of the Kerala Inquiry Committee  
Book Reviews

**Bulletin of the International Commission of Jurists**, issued quarterly, publishes facts and current data on various aspects of the Rule of Law. Numbers 1 to 6 are out of print.

*Number 7 (October 1957)*: In addition to an article on the United Nations and the Council of Europe, this issue contains a number of articles dealing with aspects of the Rule of Law in Canada, China, England, Sweden, Algeria, Cyprus, Czechoslovakia, Eastern Germany, Yugoslavia, Spain and Portugal

*Number 8 (December 1958)*: This number deals also with various aspects of the Rule of Law and legal developments with regard to the Council of Europe, China, United States, Argentina, Spain, Hungary, Ceylon, Turkey, Sweden, Ghana, Yugoslavia, Iraq, Cuba, United Kingdom, Portugal and South Africa

*Number 9 (August 1959)*: The Organization of American States and Human Rights. Aspects of the Rule of Law in Algeria, Cyprus, Soviet Union, South Africa, Spain, Hungary, Kenya, Cuba, Iraq, Rumania, Nyasaland, East Germany. United Nations and the European Court of Human Rights.

*Number 10 (January 1960)*: Contains information on Ceylon, China, Czechoslovakia, Greece, India, Kenya, Poland, Tibet, and on United Nations and the World Refugee Year

**Newsletter of the International Commission of Jurists** describes current activities of the Commission:

*Number 1 (April 1957)*: Commission action as related to the South African Treason Trial, the Hungarian Revolution, the Commission's inquiry into the practice of the Rule of Law, activities of National Sections, and the text of the Commission's Questionnaire on the Rule of Law

*Number 2 (July 1957)*: A description of the Vienna Conference held by the International Commission of Jurists on the themes: "The Definition of and Procedure Applicable to a Political Crime" and "Legal Limitations on the Freedom of Opinion"

*Number 3 (January 1958)*: "The Rule of Law in Free Societies", a Prospectus and a progress report on an international Congress of Jurists to be held in New Delhi in January 1959



*Number 4 (June 1958):* Notes on a world tour (Italy, Greece, Turkey, Iran, India, Thailand, Malaya, Phillippines, Canada and United States), comments on legal developments in Hungary, Portugal and South Africa

*Number 5 (January 1959):* Preliminary remarks of the New Delhi Congress, summary of the "Working Paper on the Rule of Law", information on activities of National Sections

*Number 6 (March-April 1959):* The International Congress of Jurists held at New Delhi, India, January 5-10, 1959, summary of proceedings, "Declaration of Delhi" and Conclusions of the Congress, list of participants and observers

*Number 7 (September 1959):* The International Commission of Jurists: Today and Tomorrow (editorial), Essay Contest, Survey on the Rule of Law, Legal Inquiry Committee on Tibet, United Nations, National Sections, organizational notes

*Number 8 (February 1960):* The Rule of Law in Daily Practice (editorial), Survey on the Rule of Law (a questionnaire), Report on Travels of Commission Representatives in Africa and the Middle East, Legal Inquiry Committee on Tibet, Essay Contest, National Sections

**The Rule of Law in the United States (1957):** A statement prepared in connection with the Delhi Congress by the Committee to Co-operate with the International Commission of Jurists, Section of the International and Comparative Law of the American Bar Association.

**The Rule of Law in Italy (1958):** A statement prepared in connection with the New Delhi Congress by the Italian Section of the International Commission of Jurists.

**The Rule of Law in the Federal Republic of Germany (1958):** A statement prepared in connection with the New Delhi Congress by the German Section of the International Commission of Jurists.

**The Hungarian Situation and the Rule of Law (April 1957):** Account of the Hague Conference on Hungary and compendium of the material submitted by the International Commission of Jurists to the United Nations Special Committee on the Problem of Hungary.

**The Continuing Challenge of the Hungarian Situation to the Rule of Law (June 1957):** Supplement to the above report, bringing the Hungarian situation up to June 1957

**Justice in Hungary Today (February 1958):** Supplement to the original report, bringing the Hungarian situation up to January 31, 1958

**The Question of Tibet and the Rule of Law, (July 1959):** Introduction, The Land and the People, Chronology of Events, Evidence on Chinese Activities in Tibet, The Position of Tibet in International Law, 21 Documents (The above is a preliminary report; a final report will be ready by the end of July 1960)

**International Commission of Jurists, Basic Facts, (June 1960):** a brochure on the objectives, organization and membership, history and development, activities and finances of the International Commission of Jurists

Thanks to the generosity of individual jurists and legal institutions in a number of countries, the Commission has been able, upon request, to distribute free of charge its publications. The unprecedented increase of its readers has now made it imperative to invite them to contribute, in a small measure, to the printing costs of the *Journal* by payment of a small subscription fee.