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International Congress of Jurists, New Delhi, India

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INTERNATIONAL COMMISSION OF JURISTS
GENEVA

EDITORIAL

THE RULE OF LAW IN A CHANGING WORLD

André Malraux recently reminded his audience, in the course of an admirable speech on the Acropolis, that the fundamental problem of our epoch was how to reconcile individual freedom with social justice. Some think that no such reconciliation is possible; that the social and technological progress which is essential for the greater well-being of the peoples, and which the peoples are demanding, has to be bought at the price of that continuous whittling down of individual liberties which is so alarming a feature of our times.

The 185 judges, lawyers and professors of law who came from 53 countries to take part in the Congress organized in Delhi in January 1959 by the International Commission of Jurists unanimously rejected this defeatist attitude. Recognizing that freedom and justice were two closely connected concepts deeply rooted in the mind of every human being, the Congress, in its well-known *Declaration of Delhi*,¹ reasserted the Rule of Law.² It was clear from the discussions which took place in Delhi that this concept, which the International Commission of Jurists is striving to promote and strengthen, contains three important elements:

- (1) It proceeds from a precise conception of man and of his relations with the State: the existence of fundamental rights and liberties, and the conviction that the State exists in order to serve man and must help him to attain his highest ends.
- (2) It implies an independent Judiciary and Bar and effective machinery for the protection of the rights and liberties of the individual.
- (3) Finally, it must make for the establishment of social, economic and cultural conditions which permit men to live in dignity and to fulfil their legitimate aspirations. This third element is a significant step forward which broadens the concept of the Rule of Law in order that it should correspond to the exigencies of a rapidly changing world. Whilst this aspect of the dignity of man has not in the past greatly occupied the attention of jurists as such, the point was made

¹ See below, page 7.

² The International Commission of Jurists understands the "Rule of Law" in the following sense: "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."

with considerable force at the Delhi Congress, particularly by participants from the new States in Africa and Asia, that adequate levels of living are essential to the full enjoyment of individual freedoms and rights. What is the use of freedom of speech, for example, to undernourished peoples, or freedom of the press to illiterate peoples? How can the benefits of the Rule of Law be achieved in the new societies, which have to build up institutions, adopt codes, and, in short, establish within a very short time a legal system to meet the needs of the modern world while they are still struggling to establish a bare minimum of material and cultural existence?

The remarks in this connection made in another article in this Journal by Mr. Vivian Bose, President of the International Commission of Jurists, will be read with great interest.

The discussions which took place in New Delhi brought out the complexity of these problems. It is difficult enough in itself to transplant institutions and procedures, which derive from the traditional conception of the Rule of Law, into the new societies which are in process of becoming legally and politically organized. The jurists of these societies have nevertheless shown the importance they attach to establishing a legal system which, while not necessarily an exact replica of Western institutions, would incorporate the guarantees of fundamental rights and freedoms which these institutions provide.

In preparing and organizing the Delhi Congress, the International Commission of Jurists set itself the aim of defining and clarifying the Rule of Law. This purpose was to a large extent fulfilled. The next of the *Conclusions* adopted by the four Committees of the Congress is given below.³

Experts in constitutional law, administrative law, penal law, judicial organization and procedure, as well as other jurists concerned with one or other of these disciplines, worked on the drafting of a body of rules and principles dealing with the Rule of Law in relation to the legislative, the executive, the criminal process, and the Judiciary and the Bar.

These *Conclusions* cannot and should not be regarded as final, nor as mere declarations of minimum standard for institutions and procedures. They should however be regarded as the guiding principles which, with any adjustments necessary in particular cases, are fundamental to the requirements of a human and humanized community.

³ Most of the readers of the Commission's publications will have already acquainted themselves with these documents from No. 6 of the Commission's *Newsletter* (March-April 1959). In view of the importance of these texts, it was felt that it would be useful to reprint them in a more permanent form in the present issue of the Journal (see pages 8-18 below).

The Delhi Congress represents an achievement as well as a beginning. It 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 next step is to put these principles into operation and implement them to the fullest possible extent, in the various countries; and in those places where they are already in force, to be vigilant in ensuring that they are respected. To this end, the International Commission of Jurists is to undertake a comprehensive enquiry which will make it possible to study, country by country, whether and to what extent the principles which appear in the Delhi *Conclusions* are in existence and are fully operative. When the reply is negative, partially or totally, it will be interesting to look into the reasons for this, and – with attention to substance rather than to appearances – to see whether other solutions have been found and whether this state of affairs can be explained or justified by local conditions or by other circumstances. The International Commission of Jurists hopes that it will once again receive the enthusiastic co-operation which thousand of jurists gave it in the past years, when they replied to the "Questionnaire on the Rule of Law", so that the success of this enquiry may be assured.

In order to assess the replies, it will be necessary to make wide allowances for local conditions and existing legal systems, since the goal is to seek for flexible, combined solutions, based on institutions which already exist in the countries concerned and which can rapidly take root, rather than to put forward pre-established formulas from outside. The assistance of jurists in all the countries concerned will be particularly useful for this inquiry, and for the purpose of drawing conclusions from it and following it up.

The immediate objective of the International Commission of Jurists, following the Delhi Congress, has thus two aspects. With regard to the substantive law, it will be a question of co-operating at a non-governmental level with jurists in the new State communities with a view to seeking solutions to the institutional and legal problems which fall more specifically within the Commission's sphere of action. One result of this work will be that it will contribute to the development of international law, by providing an opportunity for the creation of new "general principles of law" in the technical sense of the words. A further consequence will be to expand further the area in which the concept of a world-wide Rule of Law can operate.

As regards method, the endeavour to synthesise and adapt, which has been mentioned above, will take the form of developing and further organizing the community of interests of jurists throughout the countries and at the same time supporting and strengthening

the existence of an independent Judiciary and Bar. Among other things, the Commission has been particularly concerned, in recent months, to make its work and aims known to young jurists, students, probationary lawyers and so forth, in order to win their support. The results have already been substantial, as can be seen from the great number of requests for information and the welcome accorded to plans for organization on a regional basis of symposia, conferences, seminars.

Moreover, readers of the various publications issued by the International Commission of Jurists have been able to follow the two parallel and complementary trends of its work: on the one hand, the promotion of the Rule of Law in all its practical forms – that is, with respect to institutions, legislation and procedures; on the other hand, the mobilization of world legal opinion in cases of systematic and general violation of this principle. The *Conclusions* reached at Delhi provide the Commission with a broad basis for inquiry with these two objects primarily in view. It is an inquiry to be undertaken in a spirit of liberal understanding of the problems which may be peculiar to any given country, but it should never be forgotten that man the world over has the same essential dignity, the same inalienable rights, and that no community claiming to live under the Rule of Law can systematically deny him these.

JEAN-FLAVIEN LALIVE

THE DECLARATION OF DELHI

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 exerciseable 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

[Preliminary note. When the International Commission of Jurists decided to undertake a world-wide enquiry in order to clarify and define the Rule of Law, it formulated a "Questionnaire" which was published in "Newsletter" No. 1 of the Commission (April 1957) and was sent to jurists, lawyers and legal institutions throughout the world. The answers received were used for the preparation of the "Working Paper", which served as a basis for the Congress of New Delhi.

In order to ensure a full understanding of the Conclusions adopted in Delhi, we think it convenient to reproduce here the Questionnaire as well as a summary of the Working Paper – The Editors]

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 matters 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?

E. 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 SUMMARY OF THE WORKING PAPER ON THE RULE OF LAW¹

1. The Meaning of the Rule of Law

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 in inarticulate form, a consensus of opinion among all jurists. 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.

In the *Working Paper*¹ it is recognised that human personality requires not only a theoretical acceptance of the individual's spiritual and political freedom but also the provision of a minimum standard of education and economic security. It is however pointed out that when attention is shifted from the Rule of Law as an ideal to the realisation of the Rule of Law in practice the lawyer as such cannot determine the speed and precise direction of economic or social change. This is sometimes expressed by saying that the lawyer is primarily concerned with negative rights – i.e., with freedom from State interference – and not with positive rights, i.e., with claims which the individual may make upon the State for, e.g., a certain standard of employment, level of education or other social benefits. Such a formulation may however be dangerously misleading if it suggests that the Rule of Law, in as far as it is a specifically legal ideal, has no concern with positive rights. The Rule of Law as here understood is based on respect for human personality and as such must be interested in the minimum material standards of individuals although it cannot always lay down precise rules as to the methods by which such standards may be attained.

¹ As is mentioned above (cf. p. 19), on the basis of the replies to the Questionnaire on the Rule of Law, a *Working Paper* was prepared for the participants in the New Delhi Congress. The way in which it was written is described by Mr Norman S. Marsh, formerly Secretary-General of the Commission, in a later article in this Journal (p. 43). This *Working Paper* will be published in full in the final report on the Congress, which is now in preparation. But for the convenience of both the participants and the numerous supporting members of the Commission and readers of its publications, a Summary of the Working Paper was published in *Newsletter No. 5* (January 1959). This Summary is reproduced here with a number of footnotes which had been left out of the Newsletter. This Summary will no doubt facilitate the study and understanding of the Conclusions.

The Rule of Law so far discussed is ultimately based on a philosophical conception of man and society. In the sense used in the *Working Paper*, however, this is only one part, although a very necessary part, of the Rule of Law. Legal experience suggests that certain principles, institutions and procedures are a necessary means for realising the ideals underlying the Rule of Law. In this pragmatic field however dogmatism is out of place. Legal institutions which would be regarded as essential to the Rule of Law in some countries are more critically judged or are indeed non-existent in other countries with an equal pride in the Rule of Law. Moreover, it is important not to take a too exclusively legal view of the working of a society; effective protection of the worth and dignity of the individual may come as much from the political and spiritual traditions of a society and from the extra-legal means for the venting of grievances as from the most perfectly devised legal machinery.² Nevertheless a survey of legal institutions, procedures and traditions in many countries suggests there are a number which may be said to occupy a key position. If all are absent in a particular country it is doubtful whether the Rule of Law can be said to exist in that country.

The *Working Paper* concludes the discussion of the fundamental nature of the Rule of Law with the following definition of the Rule of Law:

"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."

2. The Legislative and the Rule of Law

The *Working Paper* considers the relationship between the

² 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. See Nils Herlitz, *Public Law*, Spring 1958, p. 50. Similarly, in countries with Parliamentary traditions comparable to those of the United Kingdom the possibility of asking questions of Ministers in the legislative assembly concerning the conduct of their departments may be an important method of exercising control over the administration. In a paper submitted to the Chicago Colloquium on the Rule of Law. (See p. 44 *infra*). Dr. A. L. Goodhart, Master of University College, Oxford, stated that in the United Kingdom each member of Parliament writes on the average ten letters per day asking questions of different ministries.

Legislature and the Rule of Law, both with regard to the form in which restrictions on legislative power are expressed and in respect of the substance of such restrictions. It reaches the following conclusions:

a. 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.

b. 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.

c. 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.³

d. The Legislature in a free society under the Rule of Law must:

- (i) abstain from retroactive penal legislation;

³ For example, the American Report on the Rule of Law submitted to the International Commission points out that 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 prescribed by the Constitution. The Report continues as follows: "When there are flexible numerical limits in a court of last resort, the Legislature and the 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 favourably 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."

(ii) 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;⁴

(iii) not interfere with freedom of religious belief;

(iv) not deny to the members of society the right to responsible Government;⁵

(v) 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;

(vi) not interfere with the procedural machinery ("procedural due process") whereby the above mentioned freedoms are given effect.

3. The Executive and the Rule of Law

Consideration is then given to the main institutions and procedures, referred to above as "procedural due process", by which the values implicit in the Rule of Law are realised.

⁴ See, for example, *State of West Bengal v. Anwar Ali*, All India Reports (1952) S. C. 75, where Bose J. said "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." The *Working Paper* proceeds to point out that the concept of "equality before the law" may be either a purely formal principle implying only that those persons shall be treated as equal whom the law regards as equal or a principle of substance; in the latter event we are concerned with a moral judgment which cannot be exhaustively defined within the confines of any constitution. The value of the concept would appear to lie in the necessity which it places on the legislature to justify its discriminatory measures by reference to a general scale of moral values.

⁵ The *Working Paper* points out that it is not concerned with the deliniation of the different units which may be held to constitute a separate society in respect of which the right to responsible government is asserted. It is however considered necessary to emphasise that the Rule of Law cannot be divorced from the right to responsible government, a point of view expressed in a well known passage in *The Law and the Constitution* by Sir Ivor Jennings (Fourth edition, p. 60) where he says that the intangible values of a free country "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."

The broad heading of the Executive covers both its law-making and administrative functions, the legal methods of control over these activities and the remedies available to the individual where the Executive exceeds or misapplies its powers or fails to carry out a duty imposed on it by law. A survey of the law and practice of a number of European, Asian and American societies leads to the following conclusions:

a. 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.⁶

b. 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.

c. Judicial control of subordinate legislation may be greatly facilitated by 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.⁷

d. 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

⁶ Thus the Italian Constitution lays down that "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." This is substantially the position in the United States. In India a distinction is recognised between the usurpation of the "essential legislative function" and "conditional legislation", but the precise limits of the latter are not free from doubt (see Basu, *Commentary on the Constitution of India*, Vol. 2, 3rd ed., p. 248).

⁷ See the article by the present holder of the office of Parliamentary Commissioner in the *Journal of the International Commission of Jurists*. Vol. I, No. 2 (Spring-Summer 1958), p. 224.

advantageous traditional power of the Courts to commit to prison for contempt of its orders.

e. 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.

f. 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 a 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 paragraph e. above.

g. 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

h. The prevention of illegality on the part of the Executive is as important as the provision of machinery to correct it when com-

⁸ Thus, referring to the United Kingdom, the *Working Paper* draws attention to the Tribunals and Inquiries Act, 1958 which *inter alia* contains: (i) provisions designed to improve the quality of the members of administrative tribunals, in particular by setting up a consultative and supervisory Council on Tribunals (ii) a provision for appeal on a point of law to the ordinary Courts from a number of tribunals (iii) an obligation on tribunals and ministers giving decisions to state reasons therefor. See also the remarks of an Indian report submitted to the International Commission: "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 round 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." It should be noted that by Article 136 of the Indian Constitution "the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, or order in any cause or matter passed by any Court or Tribunal in the territory of India."

mitted. 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.⁹

4. Criminal Process and the Rule of Law

There is no branch of administration, the institutions and procedures of which are more generally felt to involve the Rule of Law than the criminal process. The *Working Paper* particularly emphasises the practical importance in the criminal process of the rules and traditions which govern the prosecuting authority and the police.

It attempts to set out under the following propositions the broad principles applicable to the substance and procedure of Criminal Law in a free society under the Rule of Law.

a. (i) 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.

(ii) 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.

⁹ The common law view has generally been that it is desirable before an administrative decision is made that 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*. See *Revista del Instituto de Derecho Comparado* (Barcelona) No. 8-9, 1957. However, even in common law countries the Courts may limit the application of the maxim *audi alteram partem* where the administrative act involves grants, benefits or privileges on the part of the State, on the ground that the State is here bestowing a benefit to which the applicant has no right and so may decide whether or not to provide a remedy, and if it does so may limit the type of remedy. This attitude is increasingly criticised in the age of the Welfare State where government contracts and licences are common, on the ground that to say that the State is granting a privilege should not mean that the administration can arbitrarily deny it to particular individuals. A criticised English decision, an appeal to the Privy Council from Ceylon, is in this connection *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66.

b. 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.

c. 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.

d. 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.

e. 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 a very short period, preferably 24 hours, 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.

f. 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.

g. 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.

h. 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 prosecution should in particular inform the accused in due time of any evidence not being used by the prosecution which might benefit the accused.

i. 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

j. 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 letters and telephone conversations for the purpose of collecting evidence upon specific authority given in the individual case by a competent Court.

k. The particular responsibilities of the police and prosecuting authorities during that part of the criminal process which precedes a

¹⁰ In the English report on the Rule of Law submitted to the International Commission particular importance is attached to what are known as the "Judges' Rules". According to the Report these rules are rules of practice and of no binding authority, although the judge has a discretion to exclude any confession obtained contrary to their spirit. The effect of the rules is as follows: (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 may 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) no questions should be put to a person making a full statement save for the purpose of clarifying ambiguity; (v) persons in custody should not be confronted with each other or informed by the police of each others statements, the copies of their statements should be given to them, without comment. While the judges, rules are followed in a number of other common law jurisdictions within the Commonwealth, in some countries, as in India and Ceylon for example, no confession made to a police officer can be used against an accused person nor can any confession made while in custody to anyone be used unless made voluntarily before a magistrate (see in respect of India, Section 26, Evidence Act, and Section 164 of the Criminal Code of Procedure). In the United States any confessions obtained through threats or sustained pressure can be excluded under the due process clause of the Fifth and Fourteenth Amendments. Among civil law countries there is also a prohibition on the obtaining of evidence including confessions by unlawful means including evidence obtained by surprise or by a ruse or tricks, but security against improper pressure on a prisoner depends in practice, according to the French view, very largely on the control exercised over the judicial police by the *juge d'instruction*. The French report submitted to the Commission emphasises the changes recently introduced in France which have put an end to the ambiguous position of the *juge d'instruction*. The latter is now strengthened in his independent position, and although the police may commence investigations on their own initiative they must inform the prosecuting authorities of offences coming to their knowledge.

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.¹¹

The precise significance of the remedy of *Habeas Corpus* is not fully appreciated, at all events by laymen in countries where it operates, and is widely misunderstood outside the common law world. Its essential features are that it (i) provides a speedy method of access to the Court which (ii) may be invoked by anyone on behalf of the person detained, (iii) places the burden of proof on the detaining authority to justify the detention and (iv) effects a final order of discharge against which the detaining authority cannot itself appeal.

1. 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.

m. 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.¹²

¹¹ The precise significance of the remedy of *Habeas Corpus* is not fully appreciated, at all events by laymen in countries where it operates, and is widely misunderstood outside the Common Law world. Its essential features are that it (i) provides a speedy method of access to the Court which (ii) may be invoked by anyone on behalf of a person detained (iii) places the burden of proof on the detaining authority to justify the detention (iv) effects a final order of discharge against which the detaining authority cannot itself appeal.

¹² See the remarks of 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

n. 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.

o. 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.

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

q. 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.

r. 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 criminal process but which may have for those concerned effects on their reputation and economic security comparable to conviction by a Court.

5. The Judiciary and Legal Profession under the Rule of Law

The *Working Paper* links its treatment of the Judiciary and the Legal Profession by pointing out that 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. The *Working Paper* then proceeds to consider the special meaning which must be given to the words "independent" and "free" in relation to the

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 recognises the dignity and worth of man and on the place which it accords to the Rule of Law."

Judiciary and Legal Profession respectively in a society under the Rule of Law.

a. 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.

b. 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.¹³

c. 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.

d. 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.

¹³ See note 9, p. 50 of this *Journal*.

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.

e. 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 emphasized in the section of the *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.¹⁴

f. While it must be recognised that the Legislative has the 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 delegation of legislative power which have been discussed in the first section of the *Working Paper*, delegate part of this responsibility to the Executive, such measures should not be employed as an indirect method of violating the independence of the Judiciary in the exercise of its judicial functions.¹⁵

¹⁴ See n. (8) *supra*. The quality of the members of such 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 in many countries are often for a relatively short period of years and with no certainty of renewal may be regarded as "spoils" at the disposal of the Executive. See also Sir Carleton Allen's article in this *Journal*, p. 57, *infra*.

¹⁵ The distinction between the independence of judges as individuals and that of the Courts, which although not inviolate in their structure must also express the spirit of independence, has been emphasised by the Chief Justice of Japan in a recent survey of the administration of justice in that country (Kotara Tanaka, *The Democratisation of the Japanese Administration of Justice*, 1953, published by the Ministry of Justice, Tokyo). See also the experience of the Philippines in the note by V. J. Francisco in this *Journal*, p. 145.

g. It is essential to the maintenance of the Rule of Law that there should be an organised 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.

h. The lawyer should be free to accept any case which is offered to him, unless his acceptance of the case would be incompatible with his obligation not to mislead the Court or give rise to a personal conflict of interest.¹⁶

i. While there is some difference of emphasis between various countries as to the extent in which a lawyer may be under a duty to accept the 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 case 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.

¹⁶ See the remarks of Mr. Bolton in his article on "The Legal Profession and the Law: the Bar in England and Wales" in the *Journal of the International Commission of Jurists*, Vol. I, No. 1 (Autumn 1957) at p. 119: "it is of interest to note in this connection (i.e., concerning the obligation to accept a case) 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 Council departing from his role of advocacy and usurping the functions of the Court itself". Compare the article by M. Siré on the Bar in France in Vol. I, No. 2 of the *Journal of the International Commission of Jurists* at p. 244. On the position of the Bar generally in other countries recent relevant articles are to be found in the *Harvard Law Review*, Vol. 70, No. 61, (on the Bar of Japan by Richard Rabinowitz) and in the *American Journal of Comparative Law*, 1956, Vol. 5, No. 3 (on the Bar in the USSR by Samuel Kucherov).

j. 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.

REFLECTIONS ON THE DECLARATION OF DELHI

The *Declaration of Delhi* was drawn up with the assistance of jurists from 53 countries. As is natural, despite its length, it could only be general in its nature. It embodies the general features that those present regarded as desirable in countries that are governed by the Rule of Law; it was not possible to be more specific than that. But it must be recognised that nothing of so general a nature can be of immediate application in all its features to countries that are as widely separated in their stages of development, in their cultures and in their backgrounds, particularly in the constitutional, judicial, legal, economic and social spheres as those that are envisaged in the *Declaration of Delhi*. It will therefore be necessary to analyse the *Declaration* and ponder the answers that must be given to a number of specific questions and difficulties that arise in trying to apply the *Declaration* to certain specific areas and countries.

The *Declaration*, taken as a whole, sets out an ideal towards which all must work; but it is not based on mere theory: each aspect is grounded on matters that are in actual and active practice in one part of the world or another. It is evident then that, given the right circumstances, environment and atmosphere, they are workable propositions and not fanciful castles in the air. But there is no country in which all the matters listed are of present application; nor is it necessary, or indeed desirable, to transplant everything that works well in one country to another where the environment and circumstances are different. It is necessary to determine, however, which of the many principles set out in the *Declaration* are fundamental to the Rule of Law and which only recommendatory or desirable; also to sort out matters that are desirable in particular areas from those that are not.

The countries to which the *Declaration* was intended to apply can be divided into (1) those that are well advanced politically, socially and economically; (2) those that are not as well advanced but which have well established institutions and traditions based on patterns that are acceptable to the Rule of Law concept; and (3) those that are backward in all three respects.

Another classification would separate countries in which there are existing systems and traditions from those that are newly formed

and that are starting practically from scratch. Still another category is one in which existing constitutional procedures and practices have been thrown overboard but where the essences of the judicial process envisaged by the Rule of Law have been retained in their broad outlines.

In well developed countries that accept the Rule of Law as a basic way of life there is little to be done. Some may think a change here and an alteration there desirable, others may want to import a concept from some other country into theirs and make it their own. One example of this process is showing that there is no one way traffic in the interchange of ideas, is the tendency in England, and also in India, to lean towards administrative tribunals for particular subjects that require specialized knowledge. But basically there is little to be done in these countries so far as the Commission is concerned because traditions are so well established there that sudden change is unlikely.

In other areas, such as India, which have well established institutions and procedures that conform to the Rule of Law but which are not as well advanced socially, politically and economically, constant vigilance must be the watchword. The main endeavour in these areas must be to strengthen the hand of those who believe in the Rule of Law and thus to convince the people at large through lawyers and other leaders that *in the long run* this is the best and most desirable "way of life". In this way public opinion there will make it as impossible to overthrow existing institutions and traditions as in the more advanced areas of the world where the Rule of Law is accepted as the normal Rule of Life. But care must be taken to distinguish between the basic requisites of the Rule of Law and changes in the pattern of its structure that would appear to conform to the special needs of a particular country but which will not impair any of the essentials of the Rule of Law.

In undeveloped areas and in those that are starting with a clean slate it will be necessary to establish contacts and obtain a frank interchange of views. It would be unwise to expect set patterns of behaviour and thought. It would be equally unwise to expect rigid acceptance of other peoples' thoughts and customs and ways of life. Indeed, it is a moot point whether the Rule of Law can be imported wholesale into places that are not yet ready for its acceptance and whether it is either wise or desirable to make the attempt without making allowance for the slow processes of formation and growth. The elaborate Rules and Procedures and Concepts envisaged at Delhi assume a well established society and people living with a viable economy. Close and sympathetic consideration of the problems special to those countries is therefore called for and close collaboration with those who are trying to shape their destinies, whether as leaders at the top or as lawyers and teachers

of law and jurists in humbler walks of life. Our special task there will be to investigate and analyse, to help and advise, and to place all the material that we have, and our specialised experience, at the disposal of those who are interested in examining our concept of the Rule of Law and in discussing it with us.

And then there are countries that started with traditions with which we are familiar but which overthrew them overnight and resorted to practices that run counter to what we are accustomed to regard as the Rule of Law. It will be necessary here to distinguish between those that have no use for the Rule of Law and reject its principles outright and those that accept its basic principles but feel it necessary temporarily to violate the constitutional and political aspects of it while retaining the essences of the judicial procedure in its broad outlines in order to save the processes of the Rule of Law from being used to subvert it and bring about its annihilation. There can be no compromise on our basic principles and we can hold no truck with those that reject the things for which we stand. But we must view with sympathetic understanding the plight of those that accept our principles and ideals but who, *whether they be right or wrong*, feel it their duty temporarily to reject certain of the matters in which they also have ultimate faith in order that the things in which they believe and we believe can be preserved and ultimately restored in a cleaner and newer form. It is our duty to help them to keep alive the flame of their faith and help them along the thorny path that they must tread before they can reach our common goal.

In order to give practical effect to these various considerations and to those embodied in the *Declaration*, it will be necessary to ascertain the agencies within each country that will best foster and further our work in that area. While direct contact between the Commission and individuals in a country is desirable and must be maintained it is evident that with the very limited resources at our disposal we will not get far unless we enlist the active sympathy, support and co-operation of persons and bodies within the country itself who are in a position to influence local thought and action and who will be willing to do so. Our most important function in the future will be to inspire and advise and help, but the executive part of our work must be left largely to individuals and bodies in the country itself.

But here the pattern will differ in each area and country. In some, one agency will be able to accomplish what a similar agency in another may be powerless to perform. It must therefore be our task to ascertain from each country where our efforts will bear the most fruit and in what form our assistance and advice will be most acceptable.

But a word of warning : We must reach men's minds and hearts.

We must convince by the sincerity of our efforts and the truth and rightness of our beliefs. Mere propaganda as propaganda will fail in the long run. We are speaking to men of intelligence and integrity and good will. They will be quick to see through, and even quicker to sense, insincerity and humbug. It will be essential therefore to keep to facts, to sound and convincing reasons that will stand the test of probing and analysis, and to the truth as we see it and as we believe in it. Brute force and tyranny, fraud and chicanery may succeed for a time but they will never prevail over truth, sincerity and righteousness. You cannot fool "all the people all of the time" and "by your deeds shall ye be known". Ideas will go where bullets never will and the collective force of men's minds and hearts will triumph in the end over shoddiness and the temporary glitter of tinsel that is not gold.

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THE BACKGROUND TO THE CONGRESS OF NEW DELHI

INTRODUCTION

Merely to read the *Declaration of Delhi* and the appended *Conclusions*¹ of its different Committees leaves unanswered many questions. It may be asked in the first place what authority attaches to the opinions expressed, what preparation preceded the actual discussions at New Delhi and more generally what was the underlying purpose of the undertaking. Another approach would direct attention to the content of the *Declaration* and the *Conclusions* of the Committees and consider how far they may be thought to elucidate the title of the Congress, namely, "The Rule of Law in a Free Society". It is the purpose of this article to review the Congress in retrospect from these two points of view.

The Technique of Planning the Congress

It would however be wrong to assume that the *Declaration of Delhi* and its accompanying *Conclusions* were the achievement only of the discussions which took place at the Congress. They must be regarded rather as the culmination of a process which began with the formulation by the International Commission of Jurists of a Questionnaire on the Rule of Law in 1956.² This Questionnaire was in the course of 1957 widely distributed to lawyers and legal institutions in many parts of the world. 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 aroused 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

¹ See pp. 7-18.

² See pp. 19-22 of this *Journal*.

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 and views received, a draft *Working Paper on the Rule of Law* was prepared by the Commission in which it was possible to take into account not only the answers to the Questionnaire but also the work done by parallel international projects.³ In particular, valuable use was made of papers submitted to the Chicago Colloquium on the Rule of Law as understood in the West, organized by the International Association of Legal Science in September 1957; and in the application of the Rule of Law in criminal law and procedure much assistance was obtained from the record of the proceedings at the United Nations Seminar on the Protection of Human Rights in Criminal Law and Procedure held in Baguio City, Philippines, in February 1958.

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 at this stage it was thought inadvisable to attempt 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 Commission 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 1958.³ 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.⁴ 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 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 author of this article 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.⁵

³ The jurists in this Seminar included: Sir Carleton Allen, Q.C., formerly Professor of Jurisprudence in the University of Oxford; 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; A. K. Brohi, Barrister-at-Law, formerly Law Minister, Pakistan; Professor Georges Burdeau, University of Paris; C. K. Daphtary, Solicitor General of India; Gerald Gardiner, Q.C., Chairman of the Bar Council of England and Wales; Professor F. H. Lawson, University of Oxford; Professor Gustaf Petré, University of Stockholm, Secretary-General of the Swedish Delegation to the Nordic Council; Professor Bernard Röling, University of Groningen; as well as 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; Edward S. Kozera, former Lecturer in Government, Columbia University, now Administrative Secretary of the International Commission of Jurists; George Dobry, of the Inner Temple, Barrister-at-Law; Sompong Sucharitkul, Barrister-at-Law, formerly Professor in the Universities of Chulalongkorn and Tammasart, Bangkok. R. van Dijk, Ph. D. (Cambridge), LL.M. (Leiden) who had assisted in the preparation of the draft *Working Paper* was unable to be present at the Seminar. The last three mentioned are former members of the legal staff of the Commission. The Chair at the Seminar was taken by the author of this article.

⁴ 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*.

⁵ The *Working Paper* will be printed in full in the final report on the New Delhi Congress. The report is now in preparation.

A word may be said at this point about the principles on which participants were invited to the Congress, on the choice of subjects to be considered by the different Committees and on the distribution of the participants between these Committees. Although there had necessarily to be much flexibility to suit individual cases the guiding principles governing the choice of participants were fourfold:

- (a) the representation of different legal systems,
- (b) the juristic competence of the participant, particularly with a view to suitability for work in a particular Committee of the Congress,
- (c) the representation of the judicial, practising and academic branches of the legal profession and
- (d) the influence which the participant could have and was willing to exercise on legal and general opinion in his own country.

Each participant on being invited was asked to state his preference as to the particular Committee in which he wished to work, and it proved generally possible to meet his desires in this respect, without unduly swelling the number of one Committee at the expense of another. This result was no doubt partly due to the way in which the field for discussion was divided between the different Committees. The division was made to some extent on theoretical grounds connected with the subject matter. There was not and there could not be commitment to any dogmatic theory of the separation of powers but it was felt that the proper distribution of power is a cardinal problem for a free society. The work of the four Committees was therefore concerned with four centres of power in the modern State, not in any sense with an exclusive concern to restrict their function but merely on the basis of their factual existence. From a more practical point of view the distribution of subject matter in the four Committees was determined by the interest of the specialists who might be attracted to the discussions.

Thus, broadly speaking, Committee I, dealing with the Legislature, brought together the constitutional lawyers; Committee II – on the Executive – the administrative lawyers; Committee III – on the Criminal Process – the criminal lawyers; while Committee IV, on the Judiciary and the Bar, attracted many who had an overall concern with the themes of the Congress. However it was one of the most important underlying purposes of the Congress to avoid what is an increasingly common characteristic of international meetings, namely, departmentalization. This danger was avoided on the whole successfully, firstly by providing a relatively short general *Working Paper*, which was intended to be read by all the participants, and secondly by a full day in plenary session when the topics before the individual Committees could be discussed at large.

It may be thought useful to have set out in this way the procedure followed in planning the Congress at New Delhi. It may add some weight to the *Declaration of Delhi* and its appended *Conclusions* and it constitutes an experiment in the conference technique of voluntary international bodies, which may have wide interest and importance.

The Meaning of "The Rule of Law in a Free Society"

The idea of clarifying and formulating in a manner acceptable to different legal systems, operating in varying political, economic and social environments, the basic elements of the Rule of Law has been a fundamental purpose of the International Commission of Jurists ever since its foundation. Thus, 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 an encouragement to those peoples to whom the Rule of Law is denied." And at a Congress organized by the International Commission of Jurists at Athens in June 1955, 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."

The Congress at New Delhi took place in fulfilment of the task with which the Commission was thus entrusted and by the beginning of 1958 it had been decided to give to the Congress the above-mentioned title. The phrase calls for some explanation. We may first consider the term "Rule of Law" and afterwards explain its connection with the conception of "A Free Society".

The term "Rule of Law", it may be admitted at the outset, is not the clearest or happiest of phrases, but it 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 1948 declares that: "It is essential if man is not to be compelled to have recourse, as a last resource, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law." And in a rather vaguer way 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."

In the first mentioned of these two international instruments the Rule of Law is apparently put forward as a method of social organization necessary if an ultimate resort to force is to be avoided.

In the European Convention the nature of the Rule of Law is not explained but it seems to be thought of as something separate from political traditions, ideals and freedom. These two interpretations of the Rule of Law are closely associated with two characteristic matters of concern to all lawyers: the need for certainty in law and the methods and procedures of the legal process.

The Ideal of Legal Certainty

The association of law with certainty in human relations was known to the Greeks of antiquity who spoke of law 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 indeed an early use of the phrase in English "rule of law" directly combined with the ideal of certainty, when the English House of Commons petitioned King James I that they might be "guided and governed by certain rule of law". It is however the English lawyer Dicey who gave the phrase "Rule of Law" its classic formulation. He contrasted it with: "every system of Government based on the exercise by persons in authority of wide, arbitrary and discretionary powers of government." Discretion was, in Dicey's view the antithesis of certainty.

In the conclusions of Committee III it will be seen that the Committee laid particular importance, in the criminal law, where the citizen's life or liberty may be at stake, on the certain definition and interpretation of the law. However, certainty of the law is a value requiring protection in fields other than the criminal law. For example, the *Working Paper* in the section devoted to the Executive and the Rule of Law laid emphasis on the problems which arise in fixing the extent to which it may be possible to delegate to the Executive legislative powers. Committee II in the first clause of its conclusions spoke of the necessity of "carefully defining the extent and purpose of delegated legislation . . . and the procedure by which such delegated legislation is to be brought into effect," even when "public emergency threatening the life of the nation may require extensive delegation of powers."⁶ The same Committee had to deal with those wide discretions which are entrusted to the Executive as an inevitable and indeed necessary development of the modern Welfare State which Dicey, when he published his famous book

⁶ Thus the Italian Constitution lays down that "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." This is substantially the position in the United States. In India a distinction is recognised between the usurpation of the "essential legislative function" and "conditional legislation", but the precise limits of the latter are not free from doubt (see Basu, *Commentary on the Constitution of India*, Vol. 2, 3rd ed., p. 248).

"*The Law of the Constitution*" in 1885, imperfectly anticipated. In this field however it is interesting to see that the emphasis of the *Working Paper* and of the conclusions of Committee II shifts from certainty as an ideal to the second of the two factors mentioned above, namely, the methods and procedures of the legal process.

Fair Methods and Procedures

This shift of emphasis from certainty to methods and procedures corresponds with a widespread feeling about the Rule of Law in the modern world. The *Working Paper* revealed many examples. Thus, in the United Kingdom, it drew attention to the Tribunals and Inquiries Act, 1958, which gave legislative effect to most of the recommendations of a widely publicised Report of a Committee which sat under the chairmanship of Sir Oliver Franks.⁷ The particular problem with which that Committee had to deal – and it is by no means limited to the United Kingdom⁸ – concerns the organs before which control of, and remedies against, the Executive are established. It is sometimes referred to, especially in the Common Law world, as the problem of the administrative tribunals. The Tribunals and Inquiries Act contained: (i) provisions designed to improve the quality and independence of administrative tribunals, in particular by setting up a consultative and supervisory Council on Tribunals and Inquiries Act contained: (i) provisions designed to Courts from a number of tribunals; (iii) an obligation on tribunals and ministers giving decisions to state their reasons. Finally in this connection attention may be drawn to Clause V of the conclusions of Committee II where they state that: "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 the ordinary Courts." And in the same clause the Committee emphasizes the importance of a proper procedure before such tribunals, including, broadly speaking, in this conception most of the safeguards characteristic of what in the United States is called "procedural due process".

It is however by no means only in the field of administration that the necessity for proper methods and procedure is present. It is in a sense the underlying theme of the conclusions of Committees II, III, and IV of the Congress. It is only necessary to refer by way of example to the conclusions of Committee III setting out the minimum

⁷ Report of the Committee on *Administrative Tribunals and Inquiries*, H. M. Stationery Office, 1957, Command Paper 218.

⁸ See, for example, in the United States (where Congress has created directly or indirectly through delegation of power to the President over one hundred administrative and executive agencies) the Administrative Procedure Act of 1946.

procedural safeguards of an accused person. Yet the general pre-occupation of lawyers with methods and procedures should not hide the shortcomings of this approach. We may here mention only two major difficulties. In the first place the approach to the Rule of Law on an international basis by way of legal methods and procedures has to admit that there are great differences between countries in the methods and procedures which they use to secure more or less the same things. For example, it would probably be agreed that the methods used to obtain independent judges are of general importance. But if we examine the situation in different countries we find a great variety of methods. Some may appear to be more successful than others, but it would be rash to assume that what appears to be a successful method in one country would achieve the same results in another environment.⁹ Another example might be taken from this sphere of administrative law. It is doubtless desirable as a general principle that, in the words of Clause VI of the conclusions of Committee II of the Congress, "a citizen who suffers injury as a result of illegal acts of the Executive should have an adequate remedy in the form of either a proceeding against the State or against the individual wrong-doer, with the assurance of satisfaction in the latter case, or both." Yet it has to be recognised that in practice in some countries failure to realize completely this principle may be greatly mitigated by the existence of means of redress for the citizen other than by way of the Courts. 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

⁹ In most common law countries, with some exceptions with regard to elected State Judges in the United States, judicial appointments are made by the Executive. Federal Judges in the United States are, however, subject to approval on appointment by the Senate. In France under the Constitution of 1946 (and in Italy under a scheme envisaged under the new Constitution) the Judges were appointed by the President on the recommendation of the Superior Council of the Judiciary which consisted of representatives of the Executive, the Legislative, the Judiciary and the Legal profession. The scheme is retained with less power given to the Council under the new Constitution (See articles 64-66). In India Judges of the Supreme Court are appointed by the President but except in the case of the Chief Justice himself 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. The President acts on the advice of his ministers but the opinion of the Chief Justice of India is of the greatest importance. The role of the Chief Justice of India is vital but it is rather more difficult for him to guard against political appointments in respect of the High Courts than of the Supreme Court, as the Chief Justice cannot personally know as much about the personalities concerned.

of its officials.¹⁰ Similarly, in countries with parliamentary traditions comparable to those of the United Kingdom the possibility of asking questions of ministers in the legislative assembly concerning the conduct of their departments may be an important method of exercising control over the administration.

The second difficulty which arises in making the central point of a supranational conception of the Rule of Law a concern for legal methods and procedures is more fundamental. The point has been admirably illustrated by Dean Griswold of the Harvard Law School with regard to the South African Treason Trial: "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."¹¹ In other words, in a country where the laws observed are unjust or inhuman their certainty of expression and the excellence of legal methods and procedures will prove a poor consolation to their victims.

The inadequacy of legal methods and procedures if taken as the central point of the Rule of Law may be shown in another way. The effectiveness of many legal methods in fact depends on factors which lie outside the strictly legal sphere. In criminal procedure, however strictly enforced, there is bound to be in practice or in law a wide field of discretion left to the Police or to public prosecutors. Whether this discretion is reasonably exercised often depends in the last resort on public opinion exercised through political channels. It was this limitation of legal methods and procedure which Sir Ivor Jennings presumably had in mind when, in a well-known passage in *The Law and the Constitution*, he wrote that the intangible values of a free country "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."¹²

The Human Values of a free Society

It is at this point that the significance of the reference to "Free Society" in the general title of the Congress becomes apparent.

¹⁰ See Nils Herlitz, *Public Law*, Spring 1958, p. 50.

¹¹ See *The Times* (London), September 25, 1958.

¹² See fourth edition, p. 60.

It is a convenient phrase to express that underlying concern with human values which we have seen to be essential to the Rule of Law. A Free Society was taken in the *Working Paper* to be 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 the individual. A Free Society is thus primarily concerned with the rights of the individual. Broadly speaking, however, in the historical development of free societies the main emphasis has in the past been laid on the right of the individual to assert his freedom from State interference in his activities, a freedom which finds expression in such classical liberties as freedom of speech, assembly and association. Such liberties are sometimes called the negative rights of the individual. However, the recognition that rights of this kind without a certain standard of education and economic security may for large sections of the population in many countries be more formal than real has led to a greater emphasis being put on a second category of individual rights, sometimes called positive. These latter are concerned with the claim of every individual in the State to have access to the minimum material means (employment, social security, etc.) and to the educational facilities necessary for him to enjoy his so-called negative rights. The underlying connection between the Rule of Law and the rights of the individual seen both from a negative and positive point of view can be illustrated from Clause I of the conclusions of Committee I of the Congress in which it is stated: "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."

It is well to recognize, however, that, although doubtless necessary, the inclusion of a system of values in our conception of the Rule of Law raises two considerable difficulties. The first is less serious than it appears at first sight. It concerns the difference in approach between countries with a written constitution containing guarantees of individual rights, subject to judicial review and those countries without a written constitution or with a written constitution adherence to which cannot be enforced by the Courts. The lawyer who comes from a country of the first type tends to identify the Rule of Law with the legal enforcement of the particular values incorporated in his constitution, whereas a lawyer from the second type of country tends to argue that any consideration of what a legislature cannot or should do is a political matter for which as a lawyer he has no responsibility. He will not go beyond the legal doctrine of the sovereignty of the legislature. On the other hand there are many other indications, as in the actual discussion in New Delhi, that this

difference of approach need not lead to a difference in results. This is well seen in Clause II of the conclusions of Committee I which, taken in conjunction with Clause III, permits the following conclusions:

(a) There are general principles concerning the rights of the individual which are common or should be common to all so-called free societies ;

(b) Whether these principles are embodied in a constitution or not and whether or not they are subject to judicial review, a lawyer cannot divest himself of all responsibility for their content.¹³

The second difficulty is less easy to overcome. On the one hand if the ideal of a Free Society is accepted as the basis of the conception of the Rule of Law, it is impossible to ignore that aspect of man's dignity and worth which finds expression in a demand for a minimum standard of material well-being and educational opportunity. On the other hand, it is precisely the so-called positive rights which the traditional legal machinery is ill adapted to enforce, except sometimes indirectly by insisting that whatever benefits the State may bestow, it distributes them equally between its citizens.¹⁴ Moreover there is a danger that an interpretation of the Rule of Law which lays too great an emphasis on what the State should do for the individual may end by forgetting the individual in its enthusiasm for its plans of collective welfare, the development of which would mark the decline of a Free Society into something similar to the typical totalitarian State. It must also be recognised that there is a danger, if the Rule of Law is to include, or at all events to assume, a basis of economic and social justice, that the law and lawyers may find it difficult to assert that measure of detachment from the immediate policies of a party or group in power which is an important aspect of the legal function in society.

It would be wrong to claim that there is a neat and conclusive answer to these problems. The most that can be expected is the

¹³ Much depends on our initial definition of law. If law is merely those rules which are recognized by the Courts and enforced by the physical power of the State then the lawyer as such need have no concern with the restraints which in fact prevent a sovereign legislature from doing certain acts or with the factors which compel it to carry out certain activities. But if law is regarded as the sum total of rules which the great majority of the members of a Society accept as binding upon them in virtue of their membership of that society, then the lawyer may be prepared to take account of those unwritten and unsanctioned prohibitions or compulsions which in practice govern even a so-called sovereign legislature.

¹⁴ Thus, a positive right to education may as in the United States be in effect enforced by the Courts when they insist that white and coloured people must have equal educational facilities. See Cushman's *Civil Liberties in the United States*, 1956, New York, Cornell University Press, p. 221.

different dangers are always kept in mind. Particularly in the context of under-developed societies, it is essential to emphasize that the choice is not between social and economic progress and the retention of the traditional civil liberties of freedom of speech, association and the like but between either of these two alternatives and a free society which pursues both ends. The value of the discussions at New Delhi lay in the recognition of this fact and still more in the frank and practical spirit in which lawyers examined legal institutions in the light of their capacity to adapt themselves to the demands of such a free society.

NORMAN S. MARSH

THE LAYMAN AND THE LAW IN ENGLAND

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[The following article by a leading jurist of the Common Law world is the first of a series which it is hoped to publish in this Journal. The questions raised in this article are conceived to be of great importance in all countries although they may occur in a different form and context. The nature of his work must make the lawyer to some extent a specialist within society, but the legal profession will not maintain its position within society unless it has the confidence of the lay public. In this article and in later contributions attention is directed to institutions which in different ways involve the layman in co-operation with, and responsibility for the functioning of the legal process. Although the problems raised by jurists and lay assessors may be common only to a limited number of countries it is thought that lay participation in various types of administrative tribunals raises problems of general interest in all modern States — Editors.]

THE LAYMAN AND THE LAW IN ENGLAND

INTRODUCTORY

The law and the legal profession are no more beloved by the public in England than they have been in any country at any time; for there is a perennial antagonism in the average lay mind to those legal technicalities and refinements which sometimes appear to produce unfortunate disparities between justice and justice-according-to-law. While our older *jurisprudentes*, from Fortescue onwards, have been extravagant in their praises of all our legal institutions (to the fury of reforming iconoclasts like Bentham), our fictional literature has seldom shown lawyers in a favourable light; and it must be confessed that there have been long periods in our legal history when the strictures of critics and satirists, like Charles Dickens, have been amply justified. Even to-day, when most of the flagrant abuses of the past have been reformed, the law (at least on its civil side) is not endeared to the British citizen by its cost, which still remains high by comparison with many other countries, even in spite of recent extensions of legal aid to persons of small means.

Nevertheless, the Englishman is undoubtedly proud of his legal system – to the point, indeed, of believing it, in the manner of Dickens's Mr. Podsnap, to be incomparably the best and most just on earth. This is doubtless due largely to his notorious insularity of outlook, but there are also historical reasons for it, especially the peculiar prestige which has been enjoyed for some 800 years by the royally-appointed judges, whom we now call High Court judges.¹ They are appointed by what, to many foreign observers, must seem a strangely irrational method. There is no Ministry of Justice in England, and, though it has its advocates, there seems to be little popular demand for it. Judges are appointed by the Sovereign on the recommendation of the Lord Chancellor, who nominates them from members of the Bar entirely at his discretion, on what advice and on what principles

¹ There are at present 41 judges of the High Court (or, more correctly, the Supreme Court of Judicature), exclusive of the Master of the Rolls and the 8 Lords Justices (all being promoted puisne judges) who sit in the Court of Appeal. In the Queen's Bench Division there are the Lord Chief Justice and 24 others, in the Chancery Division 7, and in the Probate, Divorce and Admiralty Division the President and 8 others. All except the Chancery judges, besides despatching the business in the metropolis, travel the Circuits of Assize for civil, criminal and matrimonial business. They are often recruited by the appointment from the Bar of Commissioners who enjoy the same status during the period of their appointment.

of selection is never revealed. Once appointed, the judge is secure in his office during good behaviour, and ever since the Act of Settlement in 1702 rendered the judiciary independent of royal or political favour, no English judge has been removed from office for incompetence or misconduct. The judge is complete master of his court, and receives from the Bar the utmost deference – in the opinion of some critics, more than is good for his vanity. He has severe powers of punishment for any contumacy or disrespect in the face of his court. In his official robes and in the observances of his court a good deal of traditional ceremony emphasizes the dignity of his office, which automatically carries with it a knighthood and in the highest court a peerage. In large measure he is exempt from public criticism, on pain of contempt of court. Regarded merely as a symbol of “the majesty of the law”, he is certainly impressive and even decorative, and he is so regarded by the average British citizen.

The respect which he commands extends its influence to all English courts, even those very numerous magistrates’ courts which will presently be described, where the judges are for the most part ordinary citizens. It is seldom that any court needs to discipline a refractory advocate, litigant, witness or accused person. This general attitude, it is believed, is of immense support to the whole administration of justice as indicating public confidence in its spirit and functioning.

Among many others which might be mentioned, there are three things in particular which the British citizen expects, and indeed demands, from the courts of law.

In the first place, he expects complete impartiality in his judge. Among our somewhat hazy and cautious rules of natural justice, there is none more rigorously insisted upon than the exclusion of bias, or even the suspicion of bias. No legal *cliché* is more frequently quoted than that “justice must not only be done, but must manifestly be seen to be done.” It is sometimes carried to rather fanciful extremes, but it is incontestably a healthy doctrine in itself. Again, it is regarded as fundamental that nothing must be said or done which may influence, for better or for worse, the course of justice. Public comment, especially if prejudicial, on any case *sub judice* is regarded as a gross contempt of court, speedily and severely punishable. In this respect English practice stands in sharp contrast to that of the United States and many other countries. “Newspaper trial” is abhorrent to public opinion in England.

Secondly, if he is accused of a criminal offence, he confidently expects an acquittal unless the prosecution has proved its case beyond reasonable doubt. In every criminal trial this principle is insisted upon over and over again by the judge and by counsel not only for the defence but for the prosecution. It is not the fashion of contemporary English advocacy for the representative of the Crown to strive to obtain a conviction at all costs, and ferocity of prosecution, such as

existed in earlier days, is not only frowned upon professionally but is likely to turn a jury against the advocate who indulges in it. The "onus of proof" is a granite pillar of the criminal law.

Thirdly, the British citizen, while of course looking to the courts to vindicate his rights in general, expects from them in particular the protection of his personal liberty. Montesquieu, viewing our constitutional system at a crucial stage in its history, opined that the British national genius lay in the pursuit of liberty. It may well be doubted whether this has been true at all periods of our history, but in modern English law – though only as the result of long struggle – the "natural" rights of personality claim special sympathy and defence. Habeas corpus, though it has had a chequered history, is the ancient bulwark, and it is significant that any application to an English court "concerning the liberty of the subject" takes priority over all other business. As will be mentioned, any excess of police powers provokes strong and immediate public reaction, usually reflected in Parliament. False imprisonment of the person, even for the shortest time, is a tort which may involve heavy damages. The law is hardly less solicitous for good fame than for bodily freedom; the English law of libel is as strict as any in the world, and it is not difficult for anybody who has suffered aspersion, especially by a newspaper, to recover substantial damages from a British jury. In all these matters the British citizen looks to the courts as his ready and vigilant protector.

Such, then, are some of the "Anglo-Saxon attitudes" towards the law, and they have been mentioned because they are bound to reflect themselves on such occasions as the layman is required to take part in the actual administration of justice. To these we will now turn.

I. The Jury

The first and most obvious occasion is when the citizen is summoned as a jurymen, possibly in a civil action in the High Court or County Court, but far more probably in the trial of an indictable offence in one of the superior criminal courts.

The average Englishman regards "trial by jury" as a peculiarly British institution, and he would be surprised to learn that, according to most historians, it was, in its origin, a foreign importation for which the Englishman is indebted to his only Conqueror. The jury has passed through remarkable transformations which cannot be described here. In the most general terms, it has evolved from a group of neighbourhood witnesses with special local knowledge of the matter in question to a body of twelve citizens (why *twelve* nobody knows, though many have speculated)² who, far from being witnesses, are

² In the County Court the number, again for obscure historical reasons, is eight, and it will appear later that it varies in other jurisdictions, e.g., the coroner's, and in lunacy.

presumed to know nothing whatever of the case in hand except what will be revealed in the course of the trial. Any attempt to inform them privately, or to influence their decision, by bribery, threat or otherwise, is the misdemeanour of "embracery". They are sworn to "hearken to the evidence", and in accordance with it to return a true verdict, which must be either "Guilty" or "Not guilty" – that and nothing more.³ They must be unanimous in their conclusion. In a civil action the parties may, but are not bound to, agree to accept a majority verdict, but in England (it is otherwise in Scotland) this is not permitted in a criminal case. If the jury fail to agree, the whole case must be retried before a different panel, and if after a second trial there is still no agreement, it is usual for the Crown to enter a *nolle prosequi*, which is virtually equivalent to abandoning the charge. For their verdict the jurymen are neither required nor allowed to give their reasons, though they may be permitted, within limits, to add a "rider", e.g., recommending a convicted prisoner to mercy or calling attention to some feature of the case which may be of public concern. If a verdict of guilty is perverse, as being "contrary to the weight of evidence", it may be (but rarely is) quashed by the Court of Criminal Appeal, but the jurymen are no longer, as once they were, punishable for their obduracy. Against a perverse verdict of acquittal there is no appeal whatever.

The qualifications for jury service are strangely archaic, not having been altered since 1825. The jurymen or jurywoman must be on the electoral roll and must hold freehold property of the annual value of not less than £10, or be a leaseholder for not less than twenty-one years at an annual rental of not less than £20; or else a householder residing in property of annual value not less than £30 in London or Middlesex or £20 in any other part of the country. Persons so qualified are marked on the electoral lists and from them the panels of jurors are drawn by procedures which it would be tedious to describe. Owing to the change in the value of money since 1825 the property qualification – which in other legal connections is not nowadays regarded with favour and which has disappeared from the franchise – is of small importance; but the limitation to householders excludes a large number of the "floating" population and, what is perhaps more important, it also debars the majority of married women, many of whom might be very useful jurors.⁴

Even more remarkable than these antique qualifications are the exemptions from jury-service. These were introduced by the Juries

³ The Scots verdict of "Not proven" is unknown in England. The "special" and apparently contradictory verdict of "Guilty but insane" means that the jury finds as a fact that the accused committed the act charged against him, but was not responsible for it, and he is then detained during the Queen's pleasure (i.e., in practice, until restored to sanity), in a special institution as a "criminal lunatic".

⁴ The part played by women on the jury will be mentioned later.

Act, 1825, before which date there do not appear to have been any exemptions. They exclude, besides many categories of officials, all practising members of the professions of the law, medicine and the church, all peers and Members of Parliament, and all members of the armed forces. No doubt the policy of the legislature has been that these are occupations which ought not to be interrupted by the sometimes heavy demands of jury-service, but it is difficult to see why that consideration should not apply with equal force to the merchant or shopkeeper whose interests may suffer severely from prolonged absence from his affairs. Another anachronistic exclusion is that of all persons over the age of sixty (the lower age limit being 21). There is no other situation, so far as I am aware, in which it is assumed nowadays that sixty years mark the limit of efficiency, and the rule seems all the more inappropriate because men and women of elderly years, besides being more experienced, are more likely to have free time for jury-service than younger persons who are still establishing themselves in their vocations.

By way of contrast to these exemptions and exclusions, persons of notoriously bad character are not disqualified. It was settled as recently as 1950⁵ that a convicted felon, or, indeed, a person who has spent the greater part of his life in prison, is entitled to serve as a juror (though, of course, he may be challenged if his character is known to the defence).

The whole system would appear to need overhaul, but there does not seem to be any popular demand for reform. The general result is that the privilege, or duty, of jury-service is not as common or as widespread an attribute of citizenship as is often supposed. In the pungent words of Mr. Justice Devlin,⁶ the British jury "is not really representative of the nation as a whole. It is predominantly male, middle-aged, middle-minded and middle-class." Well, the "middle of the road" is still proverbially regarded as the safest course (though the modern motorist may hold a different view), and it has been a favourite British platitude that the middle class is "the backbone of the nation". This mediocrity may be some guarantee of average common sense, which is the quality most commonly attributed to, and required of, the jury. It is certain, however, that a British citizen may go through his whole life without ever being summoned for jury service, and it is rare to meet anybody who has been summoned more than once.

One type of person who seems to be satisfied with the jury as it is at present constituted is the accused. He has the right of seven peremptory challenges of the jurors – i.e., without giving any reason for his objection – and an unlimited number of challenges "for cause" –

⁵ *R. v. Kelly*, (1950) 2 Q.B. 164.

⁶ *Trial by Jury*, 20.

i.e., for some reason which he alleges and which then has to be examined and adjudged by an archaic process known as the *voir dire*. He, or his advocate, can therefore, if he wishes, employ delaying tactics which might be an intolerable embarrassment to the court, and it is well known that in the United States this manoeuvre is sometimes a serious impediment to justice. In England it is almost a dead letter; challenges are extremely rare and are seldom known to delay a trial. If they were common, it would be difficult, perhaps impossible, for our criminal courts to get through their work.

The function of the jury, it is always said, is to decide issues of fact, while that of the judge is to lay down matters of law. But this is not as simple a dichotomy as it sounds; every lawyer knows that there are whole territories where law and fact merge into each other so closely that it is impossible to distinguish sharply between them. This is observable in one particular respect in which the English judge possesses a most important power. When the prosecution has presented its case, the defence may claim that the facts to which the Crown witnesses have testified do not disclose "a case to answer" – i.e., that these allegations, even if uncontradicted, cannot sustain the charge. The judge then becomes in reality a judge of facts; he may say that, *as a matter of law*, the jury could not possibly or reasonably find the accused guilty on what the prosecution has charged against him. He then "takes the case away from the jury", directing them there and then to return a verdict of not guilty. A curious position then arises; on the one hand, a verdict is an absolute requirement for the conclusion of a jury trial, and on the other hand a jury is not bound to accept the judge's direction. It is a moot point what happens if the jury defies the judge – it is certainly not punishable nowadays if it does so – but in practice the situation never arises, and it would be difficult to find an instance in modern times of a jury disregarding the legal direction of a judge, though there are probably many instances of its having misunderstood it. The jury has a power parallel to that of the judge, for if it considers the case for the prosecution insubstantial, it may itself "stop the case", indicating that it does not wish to hear any further evidence for the defence.

It goes without saying that these circumstances are comparatively rare, because prosecutions are not commonly instituted on evidence so flimsy that it can be dismissed out of hand in this manner. Assuming that the trial pursues its usual course and that the case has been fully presented by both sides to the jury, it is the modern practice (apparently not older than the eighteenth century) for the judge to sum up the case not only on the law but on the evidence.

The manner in which this is done obviously varies with individual judges. The ideal summing-up is one which, while explaining in as simple terms as possible the relevant law, concentrates the attention of the jury on those points of testimony which are most pertinent

to the issue of guilt or innocence. Theoretically, this exposition should be completely impartial and objective, but it is humanly impossible for a judge to analyse a set of facts, and the rival interpretations which counsel have invited the jury to place upon those facts, without giving at least a hint of the way in which his own mind leans. The judge's common formula, "You may think, members of the jury", often amounts in reality to saying, "it must be obvious to you, unless you are very stupid". It is not usually very difficult to say that the judge has summed up for or against the prisoner. If he is too hostile, and gives the impression of being anxious for a conviction, it is a commonplace among practitioners that he will probably antagonize the jury and produce a defiant acquittal. And, however manifest his own inclination may be, there are certain warnings in favour of the accused which he must always give as a matter of routine, on pain of reversal by the Court of Criminal Appeal. The commonest of these has already been mentioned – insistence on the onus of proof which lies on the prosecution; another, almost as obligatory, is a warning against the evidence of accomplices, or of any uncorroborated testimony, especially of children, or of women in sexual cases. When a judge admonishes that "it would not be safe to convict" on certain types of dubious evidence, an acquittal almost certainly follows.

It is because a summing-up of evidence can scarcely ever escape being in some measure subjective that in some countries – e.g., in many parts of the United States – it is forbidden, the judge being limited to directions on the relevant law. There does not seem to be any demand in England for a change in the present system, but, since nobody knows what happens in the jury-room, it is difficult to generalize about the effect of the summing-up on the collective mind of the jury. Three things may safely be said: first, that the jury will listen to the judge with respect and attention; secondly, that it will accept without question and will endeavour to comprehend (though how far it does so nobody can tell) the law which the judge expounds; but thirdly, that it will not be coerced into a verdict against its understanding and conscience. The summing-up is the "last word" in the case. If counsel have resorted to rhetoric or to plausible sophistries, the cold, detached analysis of an experienced judge is a salutary antidote which should send the jury to their deliberations in a frame of mind balanced between ingenious rival contentions.

Summing-up both comprehensively and clearly is no easy task. There is no more common ground of appeal than a misdirection of the jury, often of a highly technical nature, and some judges are so conscious of the shadow of the Court of Criminal Appeal looming over them that their directions resolve themselves into a series of cautions and qualifications which leave the jury merely perplexed; but on the whole judicial technique in this matter is highly skilled and studiously fair.

In recent years the British jury has come under the close examination of two distinguished jurists in two different series of Hamlyn Lectures – Mr. Justice Devlin (“Trial by Jury”) and Dr. Glanville Williams (“The Proof of Guilt”). Sir Patrick Devlin, while under no illusions about the defects of the jury, appears on the whole to believe in it as part of the machinery of criminal justice; Dr. Williams, who would prefer the Continental system of trial before a “college” of judges, or a judge sitting with lay assessors, is far more critical, and to the present writer it seems that there is much substance in many of his strictures. Dr. R. M. Jackson⁷ is no less sceptical than Dr. Williams.

In a sense, the jury is its own most severe critic, for in recent years it has notably declined in scope, without any public protest. The Grand Jury, or jury of presentment, formerly examined every indictment to determine, under the direction of the Judge of Assize, whether or not it was a “true bill” – i.e., whether it disclosed a *prima facie* case to answer – and it also served as an occasion for the judge to comment on the general state of the peace. Its usefulness, however, was long since superseded by the functions of examining magistrates (of whom more later) and to some extent by those of the Director of Public Prosecutions, and it became merely a picturesque and somewhat expensive survival, which was abolished in 1933.⁸ The jury of trial, however, survives and is no longer strictly speaking the “petty” jury, as it was known for centuries to distinguish it from the Grand Jury. The distinction has also virtually disappeared between the “special” and the “common” jury. The former required a higher vocational and property qualification than the common jury, and, since 1949,⁹ it survives only in commercial causes in the City of London. In practice, it is hardly ever employed even in that jurisdiction, since businessmen appear to prefer the decision of a single judge, or, much more frequently, to avoid litigation altogether in favour of arbitration. The most notable decline, however, is in ordinary civil actions, including the very numerous ones based on negligence, in which there is often a sharp conflict of evidence. The present rule is that in an ordinary civil action it is at the discretion of the judge (which is hardly ever invoked) whether or not a jury shall be empanelled, but in certain types of suit either party has the right to demand jury-trial. In general terms, these are complaints which involve some reflection on the character of the defendant – fraud, malicious prosecution, libel and slander, seduction, breach of promise of marriage; and a cynic may suspect some significance in the fact that these are all kinds of litigation in which emotional or rhetorical appeals may find the most tempting opportunities to sway susceptible minds. To put it quite bluntly, in such suits the

⁷ *The Machinery of Justice in England* (2nd ed., 1957).

⁸ Administration of Justice (Miscellaneous Provisions) Act, 1933.

⁹ Juries Act, 1949.

aim of counsel for the plaintiff is often to "inflamm the damages" by sentimental considerations which are either irrelevant, or at best merely incidental, to the legal issue. This is no very flattering commentary on the vaunted "common sense" of the jury.

Although there has been a marked decline in the use of the jury in civil cases there is one form of legal process in which the jury is still an important factor, viz. the coroner's inquest into "violent or unnatural" deaths. This is a very ancient institution of English law, certainly as old as the 13th century (4 Edw. I, 1276) and possibly much older; it is now governed by Acts of 1887 and 1926, and by a code of Rules, the most recent of which was issued in 1953. Under the present law, whenever a coroner has reason to believe that the death of an individual has been caused by culpable homicide (murder, manslaughter or infanticide), by a railway, road or air accident, by certain specified industrial accidents or diseases, or by circumstances which threaten "the health or safety of the public"; or when death (including death by execution) has occurred in a prison; he is bound to summon a jury for the inquest. While this means that juries are required for a considerable number of inquests, there are also a great many in which it is unnecessary to summon them. The jury must be of "good and lawful men" (and now of women), and it is customary to take them from the immediate neighbourhood in which the death has occurred. The number is not less than seven and not more than eleven, and they need not be unanimous; the coroner may accept a majority verdict if the minority is not more than two. In the main, the qualifications and exemptions are the same as those which have already been mentioned; but there are a few historical divergences – thus there are no age-limits (though it is unheard-of to summon persons under the age of 21) and there is no right of challenge, since, of course, nobody is on trial. The verdict of a coroner's jury may be of great importance, because if it attributes criminal liability, especially for homicide, to a named person, that individual can be immediately committed for trial by the coroner, who thus supersedes the functions of examining magistrates. In summing up the law and the evidence to the jury, the coroner proceeds in much the same way as a judge.

There is another historic function which the coroner is occasionally called upon to exercise – the inquest of treasure trove. Its object is to determine, according to principles of law which need not now be discussed, whether concealed or buried treasure (sometimes of great antiquity) shall vest in the Crown or in the first finder of it. For this inquest also a jury is necessary, constituted in the same way as the ordinary coroner's jury.

Juries may be empanelled in County Courts on substantially the same principles as in the High Court, save that the number is eight only; but the jurisdiction of the County Courts is entirely civil, and juries are employed in it even more rarely than in the civil jurisdiction

of the High Court. The jury appears in a few other connexions which need only brief mention. In rare cases in Probate, it may be summoned, at discretion, in a dispute concerning a will. It very seldom appears nowadays in divorce petitions, but may do so in strongly contested suits, especially when damages are claimed against a co-respondent on an allegation of a wife's adultery. Either on the application of the alleged lunatic or at the discretion of the judge, a jury of not more than 24 and not less than 12 may be sworn on a judicial inquisition into lunacy; but this is extremely unusual. For historical reasons the jury has no place in Chancery jurisdiction; nor is it now employed in Admiralty, though there the judge, as we shall see, may sit with nautical assessors, who advise him on technical matters.

On the whole, then, the jury has lost much of its importance in English law. Even in criminal jurisdiction, its function has greatly diminished. As we shall see, the vast majority of criminal prosecutions in England never come before judge and jury at all, being heard and disposed of by magistrates. And in a considerable majority of indictable charges which do come before the superior courts, either because they are required to do so by law or because the accused so elects, the plea is guilty. In that event no jury need be empanelled, and all that remains is the sentence of the court.

But if this celebrated "palladium of liberty" has in latter days lost something of its ancient prestige, it still receives a considerable meed of homage. Many judges and practitioners of great experience constantly affirm their faith in its essential sanity, and their testimony is not lightly to be disregarded, even if they are not always consistent in their examples of the jurymen's wisdom and unwisdom. How does the juror himself regard his contribution to the administration of justice? It is no pleasant prospect which faces him. The law has never been kind to its lay assistants. In times past jurors have been subjected to every kind of physical discomfort calculated to hasten them to a conclusion; even to-day little is done to soften their lot, and it is only since 1949 that they have been given some compensation for their loss of time and earnings.¹⁰ In some modern trials, especially those arising out of commercial frauds, they may be detained and segregated for many days. It is difficult to judge how they regard this thankless civic duty. Dr. Williams suggests that most of them groan at the prospect; Sir Patrick Devlin, on the other hand, is of opinion that the average citizen welcomes the opportunity of making his contribution to a vital public service, even at the cost of his own

¹⁰ Travelling and subsistence allowances and compensation, according to a statutory scale and subject to conditions, for loss of earnings and for special expenses: *Juries Acts, 1949 and 1954*. The object of these Acts is merely to recoup out-of-pocket expenses; the jurymen is still unpaid for his actual services, which are regarded as a civic obligation.

convenience. The experience, it is said, stimulates his sense of civic responsibility and, since he is usually unfamiliar with the processes of law, it may also have a certain piquancy of novelty. The fact probably is that generalisation is impossible and that different individuals regard the duty in different ways, according to their circumstances and perhaps their temperaments. What seems fairly certain is that few jurymen treat their duties, whether they like them or not, casually or impatiently.

Whatever the weaknesses of the jury, and even if its reputation partly rests on mere superstition (as Dr. Williams seems to suggest), there can be little doubt that it is an article of faith with the public at large, and that any proposal to change or abolish it would meet with the most strenuous resistance. This is not merely a traditional dogma, but is probably based on the conviction, which the present writer believes to be justified, that the British jury is seldom hostile to the prisoner at the bar and that it conscientiously tries to preserve those safeguards which English law generously – perhaps too generously – affords an accused person. In that sense it still has a claim to be regarded as a genuine protector of liberty.

II. The Peace

Every British citizen is, in the eye of the law, a guardian of the peace. The notion of the King's Peace goes back to Anglo-Saxon times and has had a long and chequered history. For many centuries England endeavoured, by means of various devices which cannot here be described, to make the community responsible for policing itself. None of these expedients was really successful, and the result was that throughout the greater part of its history England, which constantly prides itself on being "a law-abiding people", was in fact a very lawless country. At the beginning of the nineteenth century it had probably the worst reputation in Europe for criminal activity, great and small. Yet there was the most powerful opposition to a professional, whole-time police force, because average English opinion was convinced that it would be an instrument of governmental oppression. It was not until 1829 that Sir Robert Peel defied this opinion by establishing the first Metropolitan Police Force, soon to be imitated throughout the country. It was many years before the "Bobbies", under the wise and patient policy of the first Commissioners, Rowan and Mayne, succeeded in breaking down popular prejudice. To-day that antagonism has disappeared. There can be no question that the British police force has the support and approval of all well-affected lieges, and even the grudging respect of the criminal classes. To the present writer it seems equally clear that the development of an honest and efficient constabulary, taken in conjunction with improving social conditions, has had a most marked effect on "law-abidingness".

Unfortunately, since the war the rate of serious crime in England gives cause for grave concern, but the general condition of law and order is very different from what it was 150, or even 100, years ago.

It has always been a firm principle of our law that the policeman is primarily a citizen. He is not an officer of the Crown; the force to which he belongs is not even nationally organized, but is under local county or borough control, subject to certain co-ordinating but limited powers which are possessed by the Home Secretary. Though he is now the principal agent for the detection and prosecution of crime, the policeman has few powers greater than those of the ordinary citizen. For the citizen is himself, in some sort, a policeman. In theory, he is obliged, on pain of "misprision", not to conceal any felony known to him¹¹ – much less to compound it; and though it might be going too far to say that he is bound to restrain a breach of the peace, he commits an offence if he fails to assist an officer of the peace when called on to do so. Again, the regular police force (at present numbering some 69,000 in England and Wales) is supplemented by a considerable body of volunteer Special Constables, who may be called upon for particular occasions or in times of emergency. There are no less than 57,000 of these volunteers at present, and their services are quite often called upon for special occasions. They are unpaid, and they give up a considerable amount of their time to training in elementary police duties. They come from all ranks of the community. In short, it is the doctrine of our law that all subjects are in duty bound to the Sovereign to maintain her peace, which is the symbol of the general good order of the community.

The attitude of the public to the police has two characteristic, if apparently contradictory, aspects. On the one hand, the "Bobby" is a national boast, sometimes with a high degree of complacency; on the other hand, nothing provokes such instant and passionate protest as any abuse or excess of police powers, or even the adoption of methods which are considered "unsporting" – for it seems to be a principle of a games-loving nation that the criminal should have a "sporting chance" in his contest with his respectable fellow-citizens! Thus the policeman is always on a razor's edge. For example, in dealing with accused or suspected persons, he is governed by a code, now quite extensive and complicated, known as the Judges' Rules. It is mainly designed to provide safeguards against obtaining admissions and confessions by improper inducements or ruses. Interpreted with strict orthodoxy, it undoubtedly makes the policeman's task difficult, but it is on the whole well observed, and it certainly enjoys general approval. In brief, British public opinion, while proud of its

¹¹ Prosecutions for this offence, however, are practically obsolete. In any case, it relates only to felonies, not misdemeanours – a highly technical distinction in English law.

custodians of the peace, shows a firm and alert determination to *custodere custodes*.

III. The Justices of the Peace

The Sovereign's own chosen commissioners, below the degree of judges, to uphold her peace are her magistrates, whose essential function is indicated by their title – Justices of the Peace. They date from at least the 14th century, and probably earlier, and the statute of 1361 which conferred on them their general powers and duties is still in force and is occasionally invoked. They are appointed to the Commission of the Peace by the Queen on the recommendation of the Lord Chancellor, who is himself assisted by local and confidential Advisory Committees of his own appointment. Unlike the High Court Judges, they are removable from office at the Sovereign's pleasure, though in fact such disciplinary action is extremely rare. Save in a few exceptional circumstances, their court ("petty sessions") must consist of not less than two and not more than seven members, under a chairman elected by themselves. They are entirely unpaid. The great majority are laymen without any previous training in the law. Whereas formerly they were mainly recruited from the property-owning classes, especially the county "squirearchy", care is taken to-day to ensure that they are representative of different *milieux* of society. Their age-limit is 75, or 65 in juvenile courts. There are to-day some 17,000 of them, sitting in nearly a thousand courts throughout the country in "petty sessional divisions" ordained by statute. In the counties they sit not only in these divisions, but also at Quarter Sessions (where trial is by jury) under the presidency of a chairman who is to-day almost invariably a barrister or High Court or County Court judge. In boroughs with a separate commission of the peace the justices sit only in petty sessions, Quarter Sessions in such places consisting only of a Recorder (a barrister of standing appointed by the Lord Chancellor) sitting with a jury.¹²

For hundreds of years the chief functions of the justices were almost more important in the administrative than in the judicial sphere. As judges they sat with juries at Quarter Sessions, as they still do in the counties, but they were also, for most common purposes, the local governors of the country, with a great variety of administrative or supervisory duties. Their powers have always been derived from statute, not from the Common Law, and Parliament gradually, and piecemeal, extended their jurisdiction to dealing with a number of minor offences "out of sessions" – i.e., in their own petty, as distinct

¹² Whether a borough or county borough has a "separate commission of the peace" is a matter of pure history, custom or royal charter, not of any fixed or statutory principle.

from Quarter, sessions, without the assistance of a jury. While this summary jurisdiction, as we now call it, thus grew steadily in scope, their local-governmental functions became inadequate as the population increased and as great urban concentrations developed with the industrial age. As the culmination of a long process, an Act of 1888 established the framework of England's present local government and at one stroke it deprived the justices of all their more important administrative powers. Meanwhile, however, statute had been continually expanding their summary criminal jurisdiction. The result to-day is that the administrative functions of the justices – principally the testification of documents, declarations and certificates – are of minor importance, while their judicial powers have grown hugely and seem constantly to multiply.

It is indeed an extensive and varied jurisdiction. Besides criminal offences, it includes such matters as juvenile delinquency, adoption, bastardy, guardianship of infants, liquor licensing (a very complex branch of the law) and various other forms of licensing, some aspects of lunacy and mental deficiency, and matrimonial causes. In the latter important and difficult sphere, the magistrates are confined almost entirely to complaints by wives, but they have powers not far short of those of the High Court itself – for example, by means of the “non-cohabitation clause” they can order what amounts to a judicial separation, as well as maintenance and custody of children; but they have, of course, no power to decree an actual dissolution of marriage.

For reasons of space it is clearly impossible to deal here with all these branches of jurisdiction, and the many other miscellaneous duties which fall to the lot of justices, and we shall confine ourselves to the largest part of magisterial jurisdiction, which lies in the criminal law.

We must, at the outset, distinguish between two main classes of criminal offences in English law – those which are indictable, i.e. are triable before a judge (or bench of magistrates sitting at Quarter Sessions) and jury, and those which are “of summary jurisdiction”, i.e. are triable to a conclusion by magistrates sitting as judges of fact, law and punishment. Every criminal charge comes before magistrates in the first instance.¹³ Of the indictable offences, some of the more grave, such as murder, manslaughter, rape, robbery, burglary and housebreaking, cannot be tried at petty sessions; but it is the duty of the magistrates to hear the evidence for the prosecution, recording it word for word in written depositions, and then to decide whether it discloses a *prima facie* case on which the accused *might* be found guilty by a jury. If so, the case is sent on to a higher court, Assizes or Quarter Sessions, for jury trial; if not, the accused is discharged there and then. In performing these duties the justices are known

¹³ Except, as previously mentioned, on a coroner's committal.

as examining magistrates, and nobody can be arraigned before a jury without this preliminary inquiry, at which the accused has full rights of defence, cross-examination and calling witnesses.

There is a much larger class of indictable offences – including the commonest of all, larceny – which *can* be tried by magistrates, but only with the consent of the accused. He is given the option of summary or jury trial, and if he elects the latter, the magisterial procedure must then be by examination and depositions, not by trial. The indictable offences in which this option is prescribed are specified by statute, and in addition the defendant has the same right when charged with any offence which is punishable with more than three months' imprisonment. It is the strict duty of the court to explain his option to him and to make sure that he understands it.

Finally, there is a large and miscellaneous class of offences "of summary jurisdiction" in which there is no right of trial by jury and which are heard and determined by magistrates. These are chiefly of the minor kind which are known in French law as *contraventions* and nowadays a large proportion of them are concerned with road traffic.

The magistrates' powers of punishment are, with very few exceptions, limited to a fine of £100, or six months' imprisonment for any single offence, or, on conviction of several offences, a total of twelve months' imprisonment. It sometimes happens that a defendant chooses summary trial for what appears to be a not very serious indictable offence, but if he is convicted or pleads guilty, his antecedents are invariably made known to the court, and it may then appear that he is a hardened offender with a long criminal record. In that event the magistrates are empowered, under a recent statute,¹⁴ to send the case, for sentence only, to Quarter Sessions, which have far larger powers of punishment than petty sessions. The accused must be warned of this possibility before he makes his election between summary or jury trial.

From any conviction by magistrates there is an appeal to Quarter Sessions on law, on fact, on sentence, or on all three, and the appeal is by way of a complete rehearing of the case. On a point of law there is an appeal, by way of a case stated by the magistrates (if they are of opinion that an arguable point of law has emerged), to the Queen's Bench Division. This recourse is open to the prosecution as well as the defence, and it is the only example in English criminal law of an appeal against acquittal. It is, however, only a limited appeal, for if the prosecution succeeds in its legal contention, that does not finally dispose of the matter; the case is sent back to the magistrates with a "direction to convict", but the penalty is left entirely to them. The magistrates' findings of fact are usually accepted by the Queen's Bench, but it is possible for that court to find, as a

¹⁴ Criminal Justice Act, 1948, s. 29.

matter of law, that the findings are perverse, as being contrary to the weight of evidence and therefore insufficient to support a conviction. This rarely happens, and is never allowable in case of an acquittal. In addition to these means of appeal, all magistrates' courts are subject to the prerogative orders of the Queen's Bench – mandamus, prohibition and certiorari. These cannot now be described in detail, but the commonest example of recourse to them is when the justices have mistaken or exceeded their jurisdiction, in which event their decision may be quashed by certiorari, and that is the end of the case, since the superior court in this instance has no power to substitute a sentence of its own, or to send the case back to the magistrates, even when the guilt of the accused is clearly established by the evidence.

If we reckon together offences of summary jurisdiction and those indictable offences in which the accused elects summary trial, the result is that something between 95% and 98% of the total number of criminal prosecutions in England are heard and determined by unpaid and for the most part lay magistrates; and it follows that only 2% or 5% of criminal charges ever come before judge and jury. If we then deduct the number of cases in the superior courts in which the accused pleads guilty, the proportion of those in which a jury is empanelled is probably less than 1%.

This, to most foreign observers, is an astonishing system. How, it is asked, can men and women with no legal training, with all sorts of different social backgrounds and experience, be satisfactory judges not only of evidentiary facts but of criminal law? For it is a mistake commonly made to suppose that magistrates need nothing more than "common sense". They do indeed need that quality, together with an unprepossessed judicial approach to the determination of facts, but points of law, some of them difficult and unsettled, are constantly arising before them. There are many bulky treatises on magisterial law, and that most commonly in use, Stone's *Justices' Manual* (now in its 89th edition), runs to over 3,000 pages of close print and cites thousands of statutory provisions and decided cases.

An intelligent and conscientious magistrate naturally learns, in the course of experience, a good deal of the law relevant to his office; for the rest, he is dependent on the advice of the Clerk to the Magistrates, who is legally trained and usually has the qualification of an admitted solicitor or (less commonly) barrister. These officials are of great importance in the administration of justice. They must have a ready and extensive knowledge of all branches of jurisdiction and procedure and must be ready in all matters to assist their justices without appearing to dominate the court. They must be administrators as well as lawyers, for they have many clerical and financial responsibilities and they control staffs of assistants which may range, according to the amount of business in the division, from two or three in country districts to twenty or thirty in cities. Their average standard of

competence is high and they are salaried not ungenerously, on a national scale. Considering the number of points on which they are constantly advising their magistrates and the variety of their administrative responsibilities, they make few mistakes. They are little known to the public and enjoy no conspicuous professional status. They are the "back room boys" of a large and important body of law.

No small part of the work of the justices is almost more social and humanitarian than legal. Every court has attached to it a Probation Officer, or several, male and female, in more populous districts, whose business it is, by personal influence, guidance and discipline, to try to reclaim the offender and to save him from falling into habitual crime. It is the well-established policy of magistrates' courts not to impose penalties, especially on the young and on first offenders, if probation seems likely to be effectual; and indeed they are forbidden by a recent statute¹⁵ to send any person under the age of 21 to prison, save in exceptional circumstances. Probation Officers, who are trained and qualified by Home Office standards, must be, and generally are, devoted persons with a real sense of social mission. The same is true of many magistrates who themselves are active in voluntary social work of various kinds, and they are frequently appointed because they have shown themselves to be public-spirited citizens in this respect.

Probation is not equivalent to "letting off". The probationer must comply with the conditions of his recognizance, which include general good behaviour and industry, and sometimes special conditions suitable to his case. If he disobeys them, he is liable to be reported to the court by the Probation Officer and punished or admonished. If he commits another offence during the period of probation (one, two or three years) he is liable to be punished both for that and for his original offence. Somewhat similar is the "conditional discharge", whereby the accused is not punished but is placed under a condition that if he commits another offence within a named period, usually twelve months, he will be liable to sentence both for the first and the second offence. Majority opinion seems to favour these methods rather than the "suspended sentence" which many countries have adopted.

In imposing monetary penalties the magistrates are required to have regard to the means of the accused and to give him, if it seems desirable, reasonable time to pay his fine. The principle of making the punishment fit not only the crime but the criminal is well established, and it is a frequent practice for the court to postpone sentence until it has received a report on the delinquent from a Probation Officer or a medical practitioner, or both. The court also has power,

¹⁵ Criminal Justice Act, 1948, s. 17.

which it frequently uses, to grant legal aid for defence in appropriate cases.

A special panel of the justices sits in the Juvenile Court, under a chairman elected by itself. Defendants under the age of 17 must be charged in this court,¹⁶ which has power to fine (sometimes making the parent responsible for payment), to place on probation, to send to one of the Approved Schools conducted by the Home Office, or, if the child is "in need of care and protection", "out of control" or (if a female) "in moral danger", to commit it to the care of the local authority. This court also has jurisdiction in the adoption of children. Delinquents between the ages of 17 and 21, in cases of serious or persistent offences, are liable to be sent to Borstal institutions by Quarter Sessions on the recommendation of magistrates, if they are certified by the Prison Commissioners to be suitable for this treatment, which is regarded as "training" rather than as punishment. Subject to the possibility of release on licence, its usual duration is three years.

So far, we have been concerned with the lay justices, often nicknamed "the Great Unpaid". There are, however, a number of stipendiary, legally-qualified magistrates who are whole-time officers and who sit alone. In London there are at present 26 of them, known as Metropolitan Magistrates and in the provinces there are at present 14. Boroughs and counties may apply for the appointment of a whole-time stipendiary magistrate, but there seems to be little public demand for them except in urban centres where magisterial work is heavy and continuous. The stipendiaries have the same powers and duties as all other magistrates, and are subject to the same rights of appeal. They are remunerated on a scale not far below that of County Court Judges and they are appointed chiefly from the Bar.

What is the general attitude of the British public towards this system of judgment by its fellow-citizens? The English "beak" is constantly under criticism, and, like the English "Bobby", is a favourite butt for satire and parody; but this means little in itself, since it is the habit of the British to make fun of all the institutions which they value most. The greatest weakness of the system is that among such a multiplicity of courts it is difficult to preserve any uniformity of competence, treatment and penalty, and this frequently gives rise to comment, not always unjustified; but this disparity seems to be inevitable when any considerable number of criminal courts are working simultaneously, and if it is true of justices, it is equally true of juries, and even of judges. From time to time there is an agitation in favour of whole-time stipendiaries, but, apart from the practical difficulty that it would be impossible to man so many courts with well-qualified

¹⁶ Unless they are charged together with adults before the ordinary court, in which case, if convicted, they can be remitted to the Juvenile Court to be dealt with.

professionals, it seems to be significant that the many areas which are entitled to have stipendiaries (as has been explained) are not disposed to ask for them. There are ample means of appeal from the decisions of justices, and sometimes, of course, they make bad mistakes of law or fact; yet the number of appeals is a microscopic proportion of the total number of decisions. As has been mentioned, the great majority of persons who are charged with indictable offences elect, when the law so allows, to be tried by magistrates rather than by juries, and though it might once have been said that this was because the justices have limited powers of punishment, that has ceased to be true since it has become possible to send a convicted person for sentence to a higher court. Making allowance for the distrust which so many laymen feel of all legal procedures, it is believed that the courts of summary jurisdiction enjoy a wholesome measure of public confidence and that few defendants feel that they have not had fair and just treatment from the prosecution and the court alike. It is probable, too, that the distribution of judicial responsibilities among a large body of citizens, who regard their appointment as a compliment to their civic status and reputation, helps to maintain a widespread respect for law and order, and it can be said with confidence that the great majority of magistrates take their duties seriously and do their best to administer justice conscientiously and humanely, often at considerable cost to their time, their convenience, and even their pockets. "Lay justice", like many British institutions, is such an accident of history and so unscientific in conception that it ought not, in theory, to work at all; but in fact it does somehow work with a surprising degree of success.

IV. Tribunals

There is another sphere in which many citizens now exercise what may fairly be called judicial functions. In England, as in most modern states, government and administration have become increasingly complex under the influence of a socialistic tendency in political theory, and even more by the great extension of government controls under the impact of war and post-war exigencies. One result has been that a large number of tribunals have sprung up as adjuncts to administration, most of them by statutory authority and some, chiefly in trade and commerce, spontaneously. Many are connected with the social services – national health, national insurance and assistance and family allowances; others with the control, now very strict in England, of land, housing, planning and agriculture; others again with transport, with national service, war pensions, and the nationalised industries. There are innumerable arbitration courts and boards throughout industry; most professions have domestic tribunals, some of them (e.g., in the medical and legal professions) with large disciplinary powers over their members. Similar powers are vested in a

considerable variety of Marketing Boards in various industries of primary agricultural production. Analogous to these tribunals, though not invested with judicial powers, are the very numerous Advisory Committees which have been established to assist nearly all departments of administration.

These adjudicatory bodies have grown so fast and so sporadically that they show little homogeneity, and a Committee on Administrative Tribunals and Inquiries (generally known as the Franks Committee, after its chairman, Sir Oliver Franks) has recently taken copious evidence about certain types of them which have been created by statute. The report of this Committee, published in 1957 (Cmnd. 218), is a constitutional document of the first importance, though unfortunately by its terms of reference it is limited to a part only of a very large and constantly growing field. The Committee has made numerous recommendations, many of which the Government has accepted and some of which are at this moment of writing the subject of legislation. The general effect of these recommendations is to revise the powers and procedures of these multifarious "adjudicating agencies", with a general view to greater uniformity, fairness and openness, and ampler means of appeal either to higher tribunals or to the ordinary courts in all matters touching the liberty and the property of the subject. These administrative concerns are too far-reaching to be discussed here, but one of the salient facts which have emerged from the inquiry is the surprisingly large number of citizens, who, in this administrative field, are engaged in what are really judicial duties.

Most of the more important tribunals, whose members are appointed either by the Lord Chancellor or by different Ministries, sit under the presidency of a legally qualified chairman, and some, like the Insurance Commissioner, the Transport Tribunal or the Lands Tribunal, are scarcely distinguishable from courts of law. The majority of members, however, are laymen, some of them paid by fees at a very moderate rate, many unpaid except for their expenses. They are selected either for their established reputation as responsible and public-spirited citizens, or for their experience and expert knowledge in particular fields. The Franks Committee has emphasised a principle which has sometimes been lost to view by the bureaucratically-minded - viz., that they are not mere appendages of the executive, but are persons who are adjudicating in a very real sense on the rights and duties of individuals. The Committee has recommended that normally they should be presided over by a legally-qualified chairman; but, as with the magistrates, there is no reason to believe that lay members of tribunals (preferably, as will be mentioned, under this guidance) are lacking in the necessary judicial approach to the matters which they are called on to decide.

There is at present no accurate record of the total number of

these tribunal members, but it is estimated by good authorities at some figure between 15,000 and 20,000. If, then, we reckon together the justices of the peace and the administrative "adjudicators" (many persons occupy both capacities) it would appear that in a population of about 50 million between 30 000 and 40,000 members of the British public are constantly deciding the rights and liabilities of their fellow-citizens, in addition to the many whole-time professional officers of the law. It is not known to the present writer how this proportion compares with that of other countries, but it is believed that it would be difficult to find elsewhere an analogy to this wide distribution of what may be called civic-judicial responsibilities. On the whole, the tribunals do their work well and impartially and to the satisfaction of the public, the more so because they are on the whole less dilatory, and certainly less expensive, than recourse to the ordinary courts. Their principal weakness is that they have grown up and multiplied at haphazard, and this has led to unsystematic variations in their constitutions, powers and procedures; but, as we have seen, these defects are now under review, with reasonable prospects of gradual reform – for all reform in England is gradual and, indeed, generally overdue.

V. Women and the Law

In 1919, after bitter struggle and much public scandal, a Sex Disqualification Removal Act placed women on an equal footing with men in most civic matters, including a share in the administration of justice. Since appointment to the Commission of the Peace is theoretically a royal prerogative, there was probably nothing at any time to prevent the appointment of women to the magisterial bench, but in practice it had very rarely happened. After 1919, however, it became common, and to-day about a quarter of the Justices of the Peace are women. Not a few are elected chairmen of their benches, and one of them is a whole-time Metropolitan Magistrate in London.

Women also became eligible as jurors, but their number is restricted because, as we have seen, they must be either property-owners or householders, and this excludes the majority of married women. Further, there are circumstances in which an all-male jury may be empanelled, and in any case the proportion of women on any jury must not exceed the proportion of women to men on the electoral roll. The result is that a jury of twelve in a criminal trial rarely contains more than one or two women.

There was considerable surprise and criticism when, during the 1914-18 war, a limited number of women police were introduced, as an experiment, in the Metropolitan area. They proved so useful and successful, however, that they were gradually recruited throughout the country, and there are now some 2,000 of them on the regular police establishment. It is the almost unanimous opinion that they

have fully justified themselves, especially in dealing with juveniles and female delinquents, and some of them have earned high commendation for the courage which they have shown in the performance of their duties.

It is a cherished masculine belief, or superstition, that women are either too sentimental or too illogical to possess the "legal mind". That view is not in the least supported by magisterial and police experience in England. It is beyond doubt that the feminine element has proved a valuable accession to summary justice, and indeed it has proved itself so well that it is now made obligatory by statute in at least two branches of jurisdiction, matrimonial and juvenile, where it is particularly appropriate. Nor is there any foundation for the fear which was formerly expressed that certain types of cases were unsuitable for feminine ears. Courts of law, especially criminal law, often have to deal with unsavoury matters and distressing aberrations, but experience has shown that women flinch no more than men from such disagreeable tasks and can be equally realistic and dispassionate about them. Again, in those collateral social activities which have been mentioned, aimed specially at the assistance and rehabilitation of offenders, many women magistrates are particularly assiduous. Any proposal to-day to disqualify Englishwomen from magisterial service would be as universally condemned as fifty years ago their appointment was violently resisted.

VI. Conclusion

There are certain other situations in which laymen may play an advisory part, as assessors, in judicial proceedings. Thus, in actions in Admiralty for damage to ships or for salvage, the judge sits with nautical assessors, known as Trinity Masters, though they may be, and frequently are, dispensed with by agreement of the parties; and in other actions in Admiralty assessors may be summoned – but again are rarely called upon – either at the request of the parties or by order of the judge. Their function is to advise upon technical questions of nautical skill and seamanship, but they have no power to determine any issues of law or fact; that responsibility rests solely with the judge, who, as has been mentioned, sits without a jury. On the other hand, if assessors are employed, their advice on technical questions precludes the calling of expert witnesses by the parties to the action.

Assessors with expert knowledge *may* be used to assist the court in various other jurisdictions – in the Court of Appeal, the Court of Criminal Appeal, the County Courts, and in certain ecclesiastical procedures of a disciplinary nature (only clergymen are qualified in this instance); and there is a general power under statute¹⁷ by which in any action in the High Court the services of assessors may be

¹⁷ Supreme Court of Judicature (Consolidation) Act, 1925, s. 98.

enlisted in appropriate circumstances. Except in Admiralty, however, all these provisions are of little practical importance. Thus, in the fifty years of the existence of the Court of Criminal Appeal, recourse has never yet been had to s. 9(e) of the Criminal Appeal Act, 1907, which empowers the court to invoke the assistance of "a person with special expert knowledge"; while in the Court of Appeal assessors never seem to be called upon, and in the County Courts they are virtually unheard of.

In any case, persons with special qualifications in technical matters are hardly representative of the general lay public, and for the most part they appear in the English legal system as witnesses, especially as medical or handwriting experts, and it must be confessed that they have earned an unenviable reputation for the sharp differences of opinion which may exist among them.

An interesting new departure is made by the Act of 1956 which has established the Restrictive Trade Practices Court. By that statute the Queen, on the recommendation of the Lord Chancellor, may appoint as members of the court, in addition to judges of the High Court, persons considered to be specially qualified by virtue of their "knowledge of or experience in industry, commerce or public affairs". This is one of the rare occasions (an analogy existed in the now defunct Railway Rates Tribunal) on which persons other than members of the Bar have been invested with a status not far short of that of a High Court judge, with the important exception that they are appointed only for a (renewable) term of years and, unlike the judges, are removable from office by the Lord Chancellor for inability, misbehaviour or the possibility of bias through a conflict of interests. Otherwise, they have full judicial powers and are not merely advisory assessors.

This new type of court may possibly be a precedent for others of the future. Thus, proposals have been made from time to time for the establishment of a general Administrative Court of Appeal, either as a division of the High Court or as a separate jurisdiction, and those who have advocated this scheme (such as the Inns of Court Conservative Association, Professor W. A. Robson, and the present writer) have generally contemplated that such a court should comprise lay members with special qualifications and experience in administrative affairs. So far, these projects have not found favour (they were rejected both by the Committee on Ministers' Powers in 1931 and by the Franks Committee recently), and possibly they will never bear fruit; but if they ever do, the interesting innovation in the Restrictive Practices Court may counteract the prejudice which prevails in some quarters against investing mere laymen with judicial functions.

Enough, it is hoped, has been said to show that lay members of the public in England, if carefully and impartially selected, do not justify this prejudice, and that they are perfectly capable of making

a valuable contribution to the administration of justice – indeed, it is no exaggeration to say that the system of adjudication, as it has developed in recent years, could not work efficiently without their co-operation. It is, however, highly desirable, in the opinion of the present writer, that they should always have the guidance of legally-trained presidents or colleagues. Some publicists fear that, so far as administrative tribunals are concerned, this professional element may lead to an excessive “legalism” of approach – to that *summum ius* which has been described by impatient doctrinaires as mere “judicial sabotage”; and it is of course true that legal training cannot of itself impart wisdom, and that a sensible layman is a better adjudicator than a hidebound, narrow lawyer. Even the most incompetent lawyer, however, is imbued by his education and experience with certain principles and methods which become instinctive to him and which do not come so readily to the layman with an earnest but hasty disposition towards “justice as between man and man” (or, even more commonly nowadays, justice as between man and the State) – such principles as judicial neutrality, patience, dismissal of prepossession, the assessment of evidence and of opposing contentions, resistance to mere emotion, and the orderly conduct of proceedings to the end that both sides may be fully and fairly heard. This “judicial approach” can be, and constantly is, grasped by laymen – in the experience of the present observer, it is swiftly and firmly apprehended by most justices of the peace – but it is greatly strengthened and instilled by legal influence. At all events, certain post-war experiments in tribunals too reminiscent of “people’s courts”, such as the Rent Tribunals, which have been constituted with little legal principle or definition to discipline their jurisdiction and discretion, have not led to happy results and are now generally discredited.

It is somewhat paradoxical that the lay element in the English legal system which is most famous and probably most cherished by the public at large – I mean the jury – has now become the least influential and possibly the least advantageous; but in other departments which have been here touched upon, it can be said with confidence that a considerable body of citizens in England, men and women – a select body, it is true, but of modest rather than preeminent qualifications, which might perhaps be described as average-plus – attest their faith in the law which governs them by rendering valuable, conscientious, and in many instances self-sacrificing assistance to its administration.

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LEGAL ASPECTS OF CIVIL LIBERTIES IN THE UNITED STATES AND THE RECENT DEVELOPMENTS

I. INTRODUCTION

The subject-matter of this article is very wide. There are an immense number of statutes and judicial decisions in the United States relating to civil liberties. The scope of this article must, necessarily, be drastically limited, but the effort will be to present certain basic rules and principles and some important implementations thereof.

This article does not review the thousands of decisions, rendered by the courts of the fifty States and by the lower federal courts, relating to civil liberties. It is devoted primarily to a discussion of principles stated in decisions of the United States Supreme Court, with emphasis on most recent decisions.

The term "civil liberties" is not susceptible of a precise definition. Generally, it refers to those fundamental freedoms of human beings, which historically have been associated with bills of rights and which today are embodied in bills of rights in federal and state constitutions and civil rights laws. It relates to provisions of constitutions and statutes which are directed at protecting the individual against oppression by government. They are the liberties which are essential to any enlightened scheme of "ordered liberty", and which enable the individual to enjoy the dignity of man. The civil liberties discussed in this article cover a wide field, but are not all-inclusive.

Conciseness is necessary here; but conciseness may eliminate qualifying comment necessary for preciseness. Little space can be devoted to important variations of factual detail in the specific cases. However, most of the statements expressed herein will be found in the opinions of the cited cases.

Any intelligent discussion of these matters requires some knowledge of the relevant rules of law.

There are two underlying and primary legal sources for the individual liberties enjoyed today by citizens of the United States: (1) the United States Constitution and (2) the Constitution of each

of the fifty States. In each of them are embodied bills of rights, generally and substantially similar but differing in details.¹

The secondary sources are (1) federal, state and municipal statutes and ordinances and (2) judicial decisions of federal and state courts interpreting and applying to specific factual situations the constitutional and statutory provisions. All of these, together, comprise an immense body of law, in which are to be found the principles defining and governing the nature, the extent, the limits and the specific applications of these liberties. The basic principles are relatively simple. It is in the continual process of the interpretation, implementation and application of these principles that complications and difficulties arise.

It is the legislatures and the courts which add the living flesh to the "bare bones" of such constitutional provisions. The courts must decide what these provisions were intended to mean and accomplish when adopted, and how they should be interpreted and applied to every new and current situation.

II. THE RULE OF LAW

a. Generally

"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (U.S. Const. Art. VI, Cl. 2).

The rights and liberties which citizens of the United States enjoy are not protected by custom and tradition alone; they have been jealously preserved from the encroachments of Government by express provisions of our written Constitution.²

Etched in stone in the pediment of the United States Supreme Court Building in Washington are the words "Equal Justice Under Law".

¹ For example, New York State has a Constitution containing a "Bill of Rights" which embodies all of the traditional individual freedoms and others; also a "Civil Rights Law" which embodies a separate "Bill of Rights" and articles directed against discrimination in places of public accommodation and amusement and protecting the right of privacy. (New York Constitution, Article I, Sections 1 to 18, McKinney's *Consolidated Laws of New York*, Book 2, Part 1 and Book 8).

² *Reid v. Covert*, 354 U.S. 1, 6-7 (1958). Cf. *Barron v. Baltimore*, 7 Pet. U.S. 243, 250 (1833).

In the recent *Little Rock School* decision that Court stated :

"The Constitution created a Government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal."³

In an earlier case, Mr. Justice Field stated :

"That only is a free government, in the American sense of the term, under which the inalienable right of every citizen to pursue his happiness is unrestrained, except by just, equal and impartial laws."⁴

Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.⁵

The first ten Amendments to the Constitution, adopted as they were so soon after the adoption of the Constitution, are in the nature of a bill of rights, and were adopted in order to quiet the apprehension of many, that without some such declaration of rights the government would assume, and might be held to possess, the power to trespass upon those rights of person and property which by the Declaration of Independence were affirmed to be inalienable rights.⁶

This principle has been aptly stated⁷ and recently restated by Mr. Justice Frankfurter in these words:⁸

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society . . . 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law.

* * *

³ *Cooper v. Aaron*, 357 U.S. — (September 29, 1958); 3 L.Ed. 2 nd. 5, 17.

⁴ *Slaughter House Cases*, 16 Wall, U.S. 36, 111 (1873), citing 1 Sharswood's Blackstone, 127, Note 8:

"Civil liberty, the great end of all human society and government, is that state in which each individual has the power to pursue his own happiness according to his own views of his interest, and the dictates of his conscience, unrestrained, except by equal, just and impartial laws."

⁵ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁶ *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312, 324 (1893);

cf. *U.S. v. Twin City Power Co.*, 350 U.S. 222, at 245-6 (1955).

⁷ *U.S. v. Mine Workers*, 330 U.S. 258, 307, 308, 311, 343 (1947), concurring opinion.

⁸ *Little Rock School Case* (*Cooper v. Aaron*, *supra*), concurring opinion.

"But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.'⁹ The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution.

* * *

"The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy."

"No man or group is above the law. Nor is any beyond its protection. These truths apply equally to the Government".¹⁰ "The Amendments embodying the Bill of Rights were intended to curb all branches of the Federal Government in the fields touched by the amendments, Legislative, Executive, and Judicial."¹¹

b. Rule of Law in Relation to the Judiciary

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (U.S. Const., Art III, Sec. 1).

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;..." (U.S. Const., Art. III, Sec. 2, Cl. 1).

As early as 1803, the Supreme Court referred to the Constitution as the "fundamental and paramount law of the nation" and declared, "it is emphatically the province and duty of the Judicial Department to say what the law is."¹² That decision declared the basic principle that the Federal Judiciary is supreme in the exposition of the law of the Constitution. That principle has ever since been respected by the Supreme Court of the country "as a permanent and indispensable feature of our Constitutional system."

It follows that the interpretations by the Supreme Court of the Constitutional provisions providing for and protecting civil liberties are of binding effect on the states, "anything in the Constitution or laws of any State to the contrary notwithstanding".

These principles, as to the rule of law, have been reiterated by the Supreme Court as recently as September 29, 1958 in the *Little*

⁹ Pound, *The Future of Law* (1937), 4 Yale Law Journal (1937), 1, 13.

¹⁰ *U.S. v. Mine Workers*, *supra*, Rutledge, J., at pp. 343, 385.

¹¹ *Reid v. Covert*, 354 U.S. 1, 17 (1958). *Adamson v. California*, 332 U.S. 46, 70 (1947), Black J., dissenting opinion.

¹² *Marbury v. Madison*, 1 Cranch U.S. 137 (1803).

Rock School decision¹³ holding that the prior decision of that Court,¹⁴ interpreting the Fourteenth Amendment to forbid states from barring children from public schools on account of race or colour, was binding on the states and all agencies of the states and could not be nullified, directly or indirectly, by state legislatures, state executives or state judicial officers. The Court stated: "The principles in that decision and the obedience of the states to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us."

c. Rule of Law in Relation to the Legislature

The Supreme Court has stated: "The Constitution is the Supreme Law of the land ordained and established by the people. All legislation must conform to the principles it lays down."¹⁵ Legislation, State or Federal, in conflict with the Constitution may, and must, be declared unconstitutional and void by the Court.

In a recent case, the Supreme Court pointed out that in some 81 instances since the Court was established it has determined that Congressional action exceeded the bounds of the Constitution; and it stated on this subject:

"We are oath-bound to defend the Constitution. This obligation requires that congressional enactments be judged by the standards of the Constitution. The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights.

* * *

"The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice.

"When it appears that an Act of Congress conflicts with one of these provisions, we have no choice but to enforce the paramount commands of the Constitution. We are sworn to do no less. We cannot push back the limits of the Constitution merely to accommodate challenged legislation."¹⁶

d. Rule of Law in Relation to the Military Power

"... the military should always be kept in subjection to the laws of the country to which it belongs. . . The established principle of every

¹³ *Cooper v. Aaron*, 357 U.S. (1958); 3 L.Ed. 2 nd 5.

¹⁴ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁵ *U.S. v. Butler*, 297 U.S. 1, 62 (1936).

¹⁶ *Trop v. Dulles*, 356 U.S. 86, 103, 104 (1958).

free people is, that the law shall alone govern; and to it the military must always yield.”¹⁷

“The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”¹⁸

“There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.”¹⁹

Military trials of civilians charged with crime, especially when not made subject to judicial review, are contrary to our political traditions and our institution of jury trials in courts of law. People of many ages and countries have feared and unflinchingly opposed the subordination of executive, legislative and judicial authorities to complete military rule. That fear has become part of our cultural and political institutions.²⁰

Courts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued.²¹ Our system of government clearly is the antithesis of total military rule. The founders of this country were opposed to governments which placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people’s throughout our history.

Legislatures and courts are not merely cherished civilian institutions; they are indispensable to our government. Military tribunals have no such standing.²²

Those who adopted the Constitution embodied their profound fear and distrust of military power, as well as their determination to protect trial by jury, in the Constitution and its Amendments.

Military trial of civilians “in the field” is an extraordinary jurisdiction and it should not be expanded at the expense of the Bill of Rights.²³

The remarks of Justice Murphy, in his concurring opinion in the *Duncan* case, *supra*, are pertinent:

“Abhorrence of military rule is ingrained in our form of government . . . This supremacy of the civil over the military is one of our great heritages. It has made possible the attainment of a high degree

¹⁷ *Dow v. Johnson*, 100 U.S. 158. (1879); *Duncan v. Kahanamoku*, 327 U.S. 304, 323 (1946).

¹⁸ *Ex parte Milligan*, 4 Wall. (U.S.) 2, 120-1 (1866); *Duncan v. Kahanamoku*, *supra*, at p. 331, concurring opinion.

¹⁹ *Toth v. Quarles*, 350 U.S. 11 (1955).

²⁰ *Duncan v. Kahanamoku*, *supra*, at p. 319.

²¹ *Ex parte Quirin*, 317 U.S. 1, 19 (1942).

²² *Duncan v. Kahanamoku*, *supra*, at p. 322.

²³ *Reid v. Covert*, 354 U.S. 1, 29 (1958).

of liberty regulated by law rather than by caprice. . . . Civil liberties and military expediency are often irreconcilable The swift trial and punishment which the military desires is precisely what the Bill of Rights outlaws. . . . But Militarism is not our way of life. It is to be used only in the most extreme circumstances. Moreover, we must be on constant guard against an excessive use of any power, military or otherwise, that results in needless destruction of our rights and liberties."

e. Rule of Law in Relation to Executive Power

Under the United States Constitution, with its carefully planned separation of powers and distributed authority as to the executive, legislative and judicial branches of the Government, the federal law making body is Congress (U.S. Const., Art. I, Sec. 1).

The President's function in respect of the law making process is limited to the recommendation and vetoing of laws. He cannot make laws.

The doctrine of the separation of powers was adopted "not to promote efficiency but to preclude the exercise of arbitrary power" and "to save people from autocracy". The conviction prevailed then that the "people must look to representative assemblies for the protection of their liberties"; and "protection of the individual . . . from the arbitrary or capricious exercise of power was then believed to be an essential of free government".²⁴

A president cannot, constitutionally, seize private property even when he believes an emergency exists.²⁵

As Judge Jackson said in the *Youngstown* case:

"The essence of our free Government is 'leave to live by no man's leave, underneath the law' - to be governed by those impersonal forces which we call law With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."

f. Rule of Law in Relation to Treaties

The Constitution is supreme over treaties. All treaties and laws enacted pursuant to them must comply with the provisions of the Constitution.

No agreement with a foreign nation can confer power on the Congress or on any other branch of the Government, which is free from the restraints of the Constitution. For instance, a treaty permitting United States military courts to try cases involving offenses committed in Great Britain by dependents of American servicemen

²⁴ *Myers v. U.S.* 272 U.S. 52, 293-4 (1926); *Brandies J.; Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613-4 (1952), concurring opinion.

²⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*.

is unconstitutional because it deprives such persons of their rights to a jury trial and other procedural safeguards under the Constitution.²⁶

g. Rule of Law: Relation of Federal Bill of Rights to the States

The federal Bill of Rights (U.S. Constitution, Amendments First to Tenth) was enacted solely to limit the powers of the Federal Government and not of the states. The Supreme Court originally, and up until 1922, so held.²⁷ Comparatively recently, the Supreme Court first tentatively assumed,²⁸ and then expressly decided that all of the liberties protected by the First Amendment – religion, speech, press, assembly and petition – were included in the “liberty” which the Fourteenth Amendment (adopted in 1868 after the Civil War) required the states to observe.²⁹

In respect of the other Amendments, Second to Eighth inclusive, the Supreme Court has not held that these have been incorporated bodily into the Fourteenth Amendment or are binding in all respects on the states. Represented on the Supreme Court bench have been two schools of thought, one the “incorporationist” school, a minority, maintaining that all provisions of the Bill of Rights are literally incorporated by reference into the Fourteenth Amendment and are obligatory upon the states and all of their agencies; and the “ordered liberty” school, a majority, maintaining that these amendments are not incorporated bodily into the Fourteenth Amendment but that under the “due process of law” requirement of the Fourteenth Amendment, the states must observe the basic principles of justice and fair play which lie at the foundation of a free society and are implicit in and the essence of the “concept of ordered liberty” – in other words, that the states are compelled to observe, by “procedural due process”, substantially the same standards of behaviour which these provisions of the federal Bill of Rights would require if directly applicable to them.³⁰ There is much

²⁶ *Reid v. Covert*, 354 U.S. 1, 16, 17 (1958); *Geofroy v. Riggs*, 133 U.S. 258 (1890).

²⁷ *Barron v. Baltimore*, 7 Pet. U.S. 243, 247 (1833); *Prudential Insurance Co. v. Cheeks*, 259 U.S. 530, 543 (1922).

²⁸ *Gitlow v. N.Y.*, 286 U.S. 652, 666 (1925).

²⁹ See, for example: *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (religion); *Board of Education v. Barnette*, 319 U.S. 624, 633 (1943) (speech); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (press); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly); *Bridges v. California*, 314 U.S. 252, 277 (1941) (petition); *Everson v. Board of Education*, 330 U.S. 1 (1947) (separation of Church and State).

³⁰ See, for example, *Adamson v. California*, 332 U.S. 46 (1947); *Feldman v. United States*, 322 U.S. 487 (1944) and *Palko v. Connecticut*, 302 U.S. 319 (1937) for statements of these conflicting views.

to be said, and much that has been said in the Court's opinions, for both of these schools of thought; but in any event, owing to the application to the states of these liberties through the due process of law clause in accordance with the "ordered liberty" theory and also by reason of bill of rights provisions in the various state constitutions, it can be said, in general, that all, or substantially all, of the basic liberties referred to in the Federal Constitution are available, directly or indirectly, to all citizens of the United States. The subject is far too complex for a definitive analysis here, but requires understanding in any consideration of civil liberties in the United States.

h. Rule of Law: The Problem of Federalism

The United States has a dual form of government. In every state there are two governments – the state and the United States. Each State has all governmental powers save such as the people, by their Constitutions, have conferred upon the United States, denied to the States or reserved to themselves. The federal union is a government of delegated powers. It has only such as are expressly conferred upon it and such as are reasonably implied from those granted. In this respect, this nation differs radically from nations where all legislative power, without restriction or limitation, is vested in a parliament or other legislative body, subject to no restrictions except the discretion of its members, and from nations where all power is vested in executives or the military.

The constitutional distribution of power in the United States, as between the nation and the States, including the distribution of judicial power in the United States and other federal courts and the judiciaries of the States, present problems non-existent in a unitary system of government. This must be understood in relation to the recognition and enforcement of the civil liberties of citizens having a dual, state – and – federal citizenship.

Civil liberty questions may be asserted originally in either a state court or a federal court, depending upon jurisdictional requirements, and they may be asserted under federal or state constitutions and statutes, or both. However, a state court cannot preclude review by the United States Supreme Court of a properly raised question under the Federal Constitution simply by rejecting or ignoring it or by resting its decision on an inadequate non-federal ground. An action or defense grounded on the United States Constitution is necessarily a question of Federal law, even if raised in a state court. The Supreme Court may determine for itself the sufficiency and substantiality of any pleaded federal right or defense and it is not concluded by the view taken thereon by a state court.³¹

³¹ *Staub v. City of Baxley*, 355 U.S. 313 (1958).

Amendment IX, stating "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"; and Amendment X, stating "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively or to the people," are reservations for the benefit of the States and the people, and are designed as a protection against undue extension of governmental powers by the establishment of rules for interpreting the Constitution restrictively, so as to narrow the scope of such powers.

III. CIVIL LIBERTIES IN RELATION TO THE INDIVIDUAL'S FREEDOMS OF EXPRESSION AND THE DEMOCRATIC WAY OF LIFE

The First Amendment of the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

This Amendment must now be read in conjunction with that part of the Fourteenth Amendment providing:

"No State shall . . . deprive any person of life, liberty or property without due process of law."

a. Generally

The fundamental rights and liberties embodied in the First Amendment, including the freedom of religion, separation of church and state, speech, press, assembly and petition, are protected by that Amendment from Congressional abridgment and by the Fourteenth Amendment from invasion by state action. The states and all of their agencies are as incompetent as Congress to enact laws, or give sanctions to acts legislative in character, which are in conflict with the provisions of the First Amendment.³² In many cases,

³² See e.g. *Staub v. City of Baxley*, 355 U.S. 313, 321, 325 (1958); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Thomas v. Collins*, 323 U.S. 516 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943) and *Board of Education v. Barnette*, 319 U.S. 624; *Everson v. Board of Education*, 330 U.S. 1 (1947).

including those just cited, these First Amendment rights have been said to occupy a "preferred status" in the constitutional scheme; are not to be infringed on "slender grounds"; and may be restricted only "to prevent grave and immediate danger to interest which the state may lawfully protect."

In a notable case the Supreme Court stated the principle in these words:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

"...freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect..."³³

In another case the Supreme Court stated:

"Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly. It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights..."³⁴

In two recent cases the principle has been stated as follows:

"We should never forget that the freedom secured by that Amendment – speech, press, religion, petition and assembly – are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities."³⁵

"The First Amendment provides the only kind of security system that can preserve a free government – one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us."³⁶

Any state or municipal ordinance which makes the peaceful enjoyment of these freedoms contingent upon the uncontrolled will of an official – as by requiring a permit or licence granted or with-

³³ *Board of Education v. Barnette*, *supra*.

³⁴ *Thomas v. Collins*, *supra*.

³⁵ *Speiser v. Randall*, 357 U.S. 513, 530 (1958), concurring opinion.

³⁶ *Yates v. U.S.*, 354 U.S. 298, 344 (1958); *Speiser v. Randall*, *supra*, at p. 532.

held in the discretion of such official – is an unconstitutional prior restraint upon the enjoyment of these freedoms.³⁷

b. Freedoms of Religion

The words, in the First Amendment, “respecting an establishment of religion, or prohibiting the free exercise thereof” embody two distinct but related concepts – the separation of church and state and the free exercise of religion.

The freedoms which are protected by the First Amendment from infringement by Congress are now among the fundamental personal rights and liberties which are also protected by the due process clause of the Fourteenth Amendment against invasion by State action. Thus, these rights of religious freedom cannot be violated by Congress or any state, or by any agency, subdivision, or official of the Federal or State governments, including boards and departments of education.³⁸

The religious liberty protected by the Constitution is essentially freedom of religious thought and expression. Freedom of thought, which includes freedom of religious belief, is basic in a society of free men.³⁹

1. Liberty of Religious Belief and Expression

The “religion” clause of the First Amendment has a dual aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute, but, the second, in the nature of things, cannot be.⁴⁰

The Supreme Court has held in several cases that this freedom is in a “preferred position” in our basic governmental scheme, and may not be infringed on any “slender ground”.⁴¹

³⁷ *Staub v. City of Baxley*, *supra*.

³⁸ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1939); *Douglas v. Jeannette*, 319 U.S. 157, 162 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Martin v. Struthers*, 319 U.S. 141, 143, 151–2 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945); *McCormick v. Board of Education* 333 U.S. 203 (1948).

³⁹ *Girouard v. United States*, 328 U.S. 61, 68–9 (1946).

⁴⁰ *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1939); *United States v. Ballard*, 322 U.S. 78, 86 (1943).

⁴¹ *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Follett v. McCormick*, 321 U.S. 573, 578 (1944); *Board of Education v. Barnette*, 319 U.S. 624, 538–9 (1943); *Thomas v. Collins*, 325 U.S. 516 (1945); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943).

The Supreme Court has repeatedly held that any attempt to restrict freedom of religion can be justified only by showing what is called "a clear and present danger" to a substantial interest of the State; only to prevent "grave and immediate danger to interests which the State may lawfully protect"; only by a "clear, public interest being threatened, not doubtfully or remotely, but by a clear and present danger."⁴²

The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position.⁴³

Religious freedom is available to believers and non-believers alike.⁴⁴

The government has no legitimate interest in protecting any or all religions from views distasteful to them, which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks on religious doctrine, whether they appear in publications, speeches, or motion pictures.⁴⁵

The Supreme Court has said:

"The essential characteristic of these liberties is that under their shield, many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."⁴⁶

In another, it said :

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."⁴⁷

All forms of religious activities are protected: "high" or "low" church services, or "preaching" or "no preaching", or church services or other forms of religious activities; and whether the activities occur in a church, a cathedral, a tent, a house, a store-front or a rented room, or in the streets or parks, or how funds are raised to support such activity, is immaterial.⁴⁸

The art passing around religious literature, occupies the same

⁴² *Cantwell v. Connecticut*, *supra*; *Thomas v. Collins*, *supra*; *Board of Education v. Barnette*, *supra*.

⁴³ *United States v. Ballard*, *supra*; *Murdock v. Pennsylvania*, *supra*.

⁴⁴ *Everson v. Board of Education* 330 U.S. 1 (1947); *McCullum v. Board of Education* 333 U.S. 203 (1948).

⁴⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁴⁶ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

⁴⁷ *Board of Education v. Barnette*, 319 U.S. 624, 642 1943; *First Unitarian Church v. Los Angeles*, 357 U.S. 545, 547-8 (1958), concurring opinion.

⁴⁸ *Prince v. Massachusetts*, *supra*, at p. 174; *Murdock v. Pennsylvania*, *supra*, at p. 109.

high estate as does worship in the churches, and preaching from the pulpits.⁴⁹

The streets and sidewalk, no less than the cathedral or the evangelist tent, is a proper place, under the Constitution for the orderly worship of God.⁵⁰

In *United States v. Ballard*, *supra* the Supreme Court said:

"Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.

* * *

"The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect (*Watson v. Jones*, 13 Wall. 679, 728).

* * *

"Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. (*Board of Education v. Barnette*, 319 U.S. 624). It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution."

It makes no difference how a religious group raises its funds, as to whether or not the religious activity is entitled to protection under the First Amendment. Freedom of religion is available to all, not merely to those who can pay their way.⁵¹

Because a sect is intolerant of other religions and disagreeably contentious and aggressive does not deprive it of the right of religious freedom. The right extends to the aggressive and disputatious as well as to the meek and acquiescent.⁵²

The Constitution permits unlimited freedom of religious belief, but not of religious acts. Religious freedom protected by the Federal and State constitutions does not include conduct which violates the criminal law, offends public morals or interferes with the legitimate exercise of the police power for the protection of public safety and health.⁵³

For example, the teaching and practising of polygamy or transporting women to the end of making them plural wives, on the ground such practices are one of the tenets of religion, cannot be sanctioned as a valid exercise of religious freedom, because polygamy is generally regarded as inimical to the public welfare and as an odious offense against society.⁵⁴

⁴⁹ *Murdock v. Pennsylvania*, *supra*, at p. 109.

⁵⁰ *Prince v. Massachusetts*, *supra*, at p. 174.

⁵¹ *Follett v. McCormick*, *supra*, at p. 576; *Murdock v. Pennsylvania*, *supra*, at p. 111.

⁵² *Cantwell v. Connecticut*, *supra*.

⁵³ *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

⁵⁴ *Davis v. Beason*, 133 U.S. 342 (1890); *Reynolds v. United States*, 98 U.S. 163 (1878); *Cleveland v. United States*, 329 U.S. 14 (1946).

A state can punish a member of a snake cult who fondled live poisonous snakes, even though he did so in the course of a religious service.

A state has the right to control the conduct and welfare of immature children, as by child labor laws, against the claim of their parents that they are exercising religious liberty by selling religious tracts at night on city streets. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.⁵⁵

Compulsory vaccination can be enforced against Christian Scientists even when it is opposed on religious grounds, because it is in aid of public health; a Christian Scientist student can be required to have chest x-rays for tuberculosis, in order to remain in a university. An RH baby can be taken from its parents and given a blood transfusion over the protests of Jehovah Witness parents. Fluoridation of water can be effected against claims of Christian Scientists that this is medication and against their religious tenets.

Children in the public schools cannot be compelled by law to take the flag salute where such an exercise would be a violation of their conscience and religious beliefs.⁵⁶ A State cannot punish a person who urged others, on religious grounds, not to join in such a flag salute.⁵⁷

In *Board of Education v. Barnette*, the Supreme Court said:

"We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

The right to engage in religious activities cannot be prohibited by arbitrary licensing laws. A law that places the matter of issuing permits or licences for the conduct of religious activities or meetings in the arbitrary discretion of an official is unconstitutional. Reasonable non-discriminatory regulations by governmental authority designed to preserve peace, order and tranquility have been held constitutional. Various ordinances have been held invalid, not because they regulated the use of parks and other public places for meetings and religious activities, but because they left complete discretion to refuse such use in the hands of officials. The Supreme Court has consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit

⁵⁵ *Prince v. Massachusetts*, 321 U.S. 158 (1944).

⁵⁶ *Board of Education v. Barnette*, *supra*.

⁵⁷ *Taylor v. Mississippi*, 314 U.S. 583 (1943).

upon broad criteria unrelated to proper regulation of public places.⁵⁸

The State may not prohibit all religious meetings in streets or in parks. It can only make reasonable regulations along that line, because the streets and parks are public places and the people have a right, generally, to use them for religious meetings. In brief, it is not a violation of the First Amendment not to permit persons to use such public places for religious activities and exercises provided the regulations relating to such use are reasonable and non-discriminatory and set up clear standards which are applicable to all alike.⁵⁹

The imposition of taxes, such as licence taxes, cannot be used to interfere with free exercise of religion.⁶⁰ A community may not suppress and a State may not tax religious views which may be unpopular, distasteful or annoying. Nor may Government deny a tax exemption because of a citizen's belief.⁶¹

2. Separation of Church and State

The purpose of the second clause of the First Amendment – respecting an “establishment of religion” is to maintain the basic American principle of separation of church and state. It was intended to erect a wall of separation of church and state in this country. In three recent notable cases, the *Everson*,⁶² *McCollum*⁶³ and *Zorach*⁶⁴ cases, the U.S. Supreme Court has discussed the historical background, purpose and meaning and the interpretation and application of this clause.

In the *Everson* and *McCollum* cases, the minimal meaning of this clause was thus stated:

“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs,

⁵⁸ *Kunz v. New York*, 340 U.S. 290 (1951); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Niemotko v. Maryland*, 340 U.S. 268 (1951); cf. *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Poulos v. New Hampshire*, 345 U.S. 395, 406–9 (1953).

⁵⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Murdock v. Pennsylvania*, 319 U.S. 105, 116; *Prince v. Massachusetts*, *supra*; *Niemotko v. Maryland*, *supra*; Cf. *Poulos v. New Hampshire*, *supra*.

⁶⁰ *Follet v. McCormick*, 321 U.S. 573 (1944).

⁶¹ *First Unitarian Church v. Los Angeles*, and *Speiser v. Randall*, 357 U.S. 513, 545 (1958).

⁶² *Everson v. Board of Education*, 330 U.S. 1 (1947).

⁶³ *McCollum v. Board of Education*, 333 U.S. 203 (1948).

⁶⁴ *Zorach v. Clauson*, 343 U.S. 306 (1952).

for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state'."

In the *Everson* case, a New Jersey statute, which authorized local school districts to subsidize, out of public funds, the bus fares of children to and from parochial schools was held not to be a violation of the First Amendment. The majority took the position that this was "public welfare legislation" for the "benefit of the children", and not for the "benefit of the schools", and that it could not prevent a State from extending its "general law benefits to all its citizens without regard to their religious beliefs". The dissenters asserted this law was a clear violation of the First Amendment in that tax funds were being used to aid religious schools in getting their children to school.

Generally speaking, in a majority of the state court decisions the use of tax moneys for transportation of children to parochial schools has been held unconstitutional. This is an active issue today.

In the *McCollum* case the Supreme Court held unconstitutional a "released time" system in the public schools of Champaign, Illinois, by which religious teachers went into the school buildings to conduct classes in sectarian religion, during compulsory school hours, for students released from secular study for the religious instruction at their parents' request, while students not so "released" were required to go to some other place in the building to pursue their secular studies.

This system was held to be "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith"; and it "was not separation of Church and State" for the state to permit its tax-supported public school buildings to be used for the dissemination of religious doctrines or to afford sectarian groups an invaluable aid in helping to provide pupils for their religious classes through use of the state's compulsory public school machinery.

In the *Zorach* case the Supreme Court held constitutional a system of "released time" by which public schools, upon request of parents, released the students sometime during the regular school day to go to religious centers outside the schools for religious instruction, while those students not released stayed in the classrooms.

This program, the Court said, did not violate the 1st Amendment on the ground that "the public schools do no more than accommodate their schedules to a program of outside religious in-

struction" and did not involve the use of coercion to get public school students into religious classrooms.

The majority said in part:

"... There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.

"... When the state encourages religious instruction or co-operates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be... preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. . . . The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here."

Numerous cases have arisen in the states over the use of hymns and prayers, including the Lord's Prayer, in the public schools usually in conjunction with Bible reading, with rulings both ways.

Cases have arisen in the states over Holy Day celebrations, Christmas carol singing, pageants and creches in public schools, and baccalaureate or graduation exercises of public schools held in a church and at which ministers, priests or rabbis have given sermons, prayers or invocations.

The teaching of religion at State supported universities is a matter in conflict.

A highly controversial problem today involves the reading of the Bible in the public schools of some states. This issue was argued in the Supreme Court recently, but was left undecided there on a technical jurisdictional ground.⁶⁵

There has been much litigation in the states over the question of whether the Bible, in its various versions, is a sectarian book, some cases holding it is and some holding not.

Many states have laws prohibiting sectarian books and literature in the public schools.

The wearing of religious garb by public school teachers has been held in several states to be an unconstitutional practice.

⁶⁵ *Doremus v. Board of Education*, 342 U.S. 429 (1952).

It has been held that the public schools may not be used as an agency to distribute the Bible to school children.⁶⁶

The use of public funds for religious schools or institutions has been held unconstitutional in many cases.

The combining of parochial schools and public schools has been held a violation of the principle of separation of church and state.

Generally, the civil courts will not take jurisdiction or decide ecclesiastical issues involving internal disputes of churches or religious denominations. That is, they will not construe religious canons or dictate discipline or regulate church trials. However, it is firmly established that a civil court has jurisdiction in religious controversies to determine civil and property rights among discordant religious factions.⁶⁷

In the *Kedroff* case, a state statute which attempted to transfer control of the Russian Orthodox Churches in North America from the supreme church authority in Moscow to authorities selected by a convention of the North American Church was held unconstitutional.

In *First Unitarian Church v. Los Angeles*,⁶⁸ it was held that a state could not deprive churches of tax exemption on property used for religious purposes because they would not subscribe to a type of "loyalty oath" on the ground this violated free speech and press under the due process clause of the 14th Amendment.

Parochial and private school systems received the approval of the Supreme Court in the famous *Oregon school case*.⁶⁹ Oregon's law requiring all children to go to public schools was held unconstitutional. This decision established the right of parents to send their children to private or parochial schools, instead of to the free public schools; but the states may regulate such parochial and private schools and require the maintenance of educational and other standards in them, comparable to the minimal standards of the public schools.

The question of whether public monies may be used for religious schools for so called "auxiliary services" (free textbooks, bus transportation, health services, free lunches, etc.) without violating the First Amendment, has often arisen, with varying decisions.

As said in *Everson v. Board of Education*, *supra*:

⁶⁶ *Tudor v. Board of Education*, 14 N.J. 31 (1953); certiorari denied, 348 U.S. 816 (1954).

⁶⁷ *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones* 13 Wall U.S. 674 (1872).

⁶⁸ 357 U.S. 545 (1958).

⁶⁹ *Pierce v. Society of The Sisters*, 268 U.S. 510 (1925).

"Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other to obtain public funds for the aid and support of various private religious schools."

These issues are constantly arising in every State. These issues are peripheral. Basically, throughout the United States, the separation of Church and State is a reality. No compromise on that basic issue is indicated or likely.

c. Liberty of Assembly and Petition

The rights of free people peaceably to assemble and to petition the Government for a redress of grievances, having their origin in the English Magna Charta and Bill of Rights of 1689, are protected against infringement by federal or state action.⁷⁰

It has been said that these rights are "cognate to those of free speech and free press" and "equally fundamental".⁷¹

The Supreme Court has said:

"The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect of public affairs and to petition for a redress of grievances." ⁷²

Peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for possible political action cannot be proscribed. Persons are entitled to assemble and to discuss the public issues of the day; and, thus, in a lawful manner, without incitement to violence or crime, to seek redress of alleged grievances. The need is imperative to preserve inviolate these rights "in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceable means." ⁷³

The public parks and streets may be used by citizens for purposes of public assembly, subject only to reasonable, non-discriminatory regulation thereof in the interest of all persons.⁷⁴

The right of petition is freely exercised by citizens of the United States, by letters, postcards, telegrams, petitions, personal visitations, telephone calls, placards, lobbying and other methods.

⁷⁰ *DeJonge v. Oregon*, 299 U.S. 353 (1937).

⁷¹ *DeJonge v. Oregon*, *supra*.

⁷² *U.S. v. Cruikshank*, 92 U.S. 542 (1875); *DeJonge v. Oregon*, *supra*.

⁷³ *DeJonge v. Oregon*, *supra*.

⁷⁴ *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939).

d. Liberty of Speech and Press

1. Generally

By the First and Fourteenth Amendments, neither Congress nor any State may make or enforce any law abridging freedom of speech or of press.⁷⁵

The protection given speech and press was fashioned to insure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. All ideas having even the slightest redeeming social importance – unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion – have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.⁷⁶

The vitality of civil and political institutions in our society depends upon free discussion. The right to speak freely and to promote diversity of ideas and programs is one of the chief distinctions that sets us apart from totalitarian regimes. The function of free speech under our system of society is to invite dispute; and it may best serve its high purposes “when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”⁷⁷

The aim of the historic struggle for a free press “was to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government.” That is the tradition behind the First Amendment. It expresses the confidence that the safety of society depends upon the tolerance of government for hostile as well as friendly criticism, that in a community where men’s minds are free, there must be room for the unorthodox as well as the orthodox views.⁷⁸

2. Scope of These Liberties

The rights of free speech and a free press are not confined to any field of human interest.⁷⁹

The First Amendment “assures the broadest tolerable exercise of free speech, free press and free assembly, not merely for religious

⁷⁵ *Staub v. City of Baxley*, 355 U.S. 313, 321 (1958); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938); *Winters v. New York*, 333 U.S. 507, 509 (1948); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946); *Gitlow v. N.Y.*, 268 U.S. 652, 666 (1925).

⁷⁶ *Roth v. U.S.*, 354 U.S. 476, 484 (1957) and cases cited.

⁷⁷ *Terminiello v. Chicago*, 337 U.S. 14 (1949); *DeJonge v. Oregon*, 299 U.S. 353 (1937).

⁷⁸ *U.S. v. Rumley* (concurring opinion), 345 U.S. 41, 56–7; *Grosjean v. American Press Co.*, 297 U.S. 233, 247 (1936).

⁷⁹ *Thomas v. Collins*, 323 U.S. 516 (1945).

purposes but for political, economic, scientific, news or informational ends as well.”⁸⁰

The liberty of the press is not confined to newspapers and periodicals, but embraces pamphlets and leaflets. The press comprehends every sort of publication which affords a vehicle of information and opinion and the fact that such publications are sold rather than given away is immaterial.⁸¹

It includes liberty of circulation and distribution, as well as publication.⁸² But freedom of the press does not include a right to raise money to promote circulation of newspapers by deception of the public.⁸³

Free press does not apply only to the exposition of ideas. Publications containing nothing of any possible value to society are as such entitled to the protection of free speech as the best literature.⁸⁴

Motion pictures and radio are included within the free speech and free press constitutional guaranties.⁸⁵

In a recent case,⁸⁶ Justices Douglas and Black pointed out that any system of censorship which requires a submission to a censor before publication of news items, editorials or cartoons in a newspaper, or novels, poems and tracts in a book, or manuscripts for plays for theatre or television in an actual production, “would be in irreconcilable conflict with the language and purpose of the First Amendment”; and added: “In this Nation every writer, actor or producer, no matter what medium of expression he may use, should be freed from the censor”.

The First Amendment preserves freedoms of speech in war as well as in peace. The right to criticize the Government and the handling of the war and the making of the peace is not questioned.⁸⁷

Freedom of the press includes the right to criticize judges and courts and not to be subjected to contempt proceedings by reason of such publications.⁸⁸

⁸⁰ *Douglas v. Jeannette*, 319 U.S. 157, 179, 181 (1943), Jackson J.

⁸¹ *Lovell v. Griffin*, 303 U.S. 444 (1938); *Breard v. City of Alexandria*, 341 U.S. 622 (1951).

⁸² *Lovell v. Griffin*, *supra*; *Winters v. N.Y.*, *supra*.

⁸³ *Donaldson v. Read Magazine*, 333 U.S. 178 (1948).

⁸⁴ *Winters v. N.Y.*, 333 U.S. 507 (1948); Cf. *Hannegan v. Esquire*, 327 U.S. 146, 153, 158 (1946).

⁸⁵ *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *U.S. v. Paramount Pictures*, 344 U.S. 131 (1948).

⁸⁶ *Superior Films, Inc. v. Dept. of Education*, 346 U.S. 587, 588 (1954), concurring opinions.

⁸⁷ *Hartzel v. U.S.*, 322 U.S. 681, 690 (1944).

⁸⁸ *Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).

3. Liberty from Censorship or Previous Restraint

The struggle for the freedom of the press was directed primarily against the power of the licensor.

The chief purpose of the constitutional guaranty of liberty of the press and of the speech was to prevent previous restraints upon publication and utterance, such as censorship and licensing systems.⁸⁹ This includes laws, ordinances or practices giving public officials discretionary power to grant licenses or permits to speak, or to distribute publications or literature, or to solicit citizens to become members of an organization.⁹⁰

It also includes systems whereby the granting of licenses or permits to use parks and other public places is put in the discretionary power of officials and is without reasonable, definite standards.⁹¹

Public authorities may regulate the use of streets and parks but they may not institute a licensing system which vests in an administrative official the discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.⁹²

The question has recently arisen as to whether motion picture films may be banned for public exhibition by state censors. The Supreme Court has held that a State may not ban a film on the basis of a censor's conclusion that it is "sacrilegious".⁹³ It has also set aside, without opinion, state censorships of motion pictures claimed to be "harmful" or "immoral".⁹⁴

While it does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places, nevertheless, the Supreme Court has not given encouragement to censorship of motion pictures before exhibition.⁹⁵

Liberty of speech and of press is not an absolute right, and the State may punish its abuse. Civil and criminal remedies remain available.⁹⁶ The protection against previous restraints is not "absolutely unlimited" — prior restraints may be effected as to publications that advocate unlawful conduct; but "the limitation is the

⁸⁹ *Near v. Minnesota*, 283 U.S. 697 (1931); *Superior Films v. Board of Education*, 346 U.S. 588 (1954) concurring opinion; *Patterson v. Colorado*, 205 U.S. 454 (1907); *Thomas v. Collins*, 323 U.S. 516, 540 (1945).

⁹⁰ *Kunz v. N.Y.*, 340 U.S. 290 (1951); *Lovell v. Griffin*, 303 U.S. 444 (1938); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Saia v. N.Y.*, 334 U.S. 558 (1940).

⁹¹ *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

⁹² *Kunz v. U.S.*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

⁹³ *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁹⁴ *Superior Films, Inc. v. Dept. of Education*, 346 U.S. 588 (1954); concurring opinion; *Commercial Pictures Corp. v. Regents*, 346 U.S. 587 (1954).

⁹⁵ *Burstyn, Inc. v. Wilson*, *supra*.

⁹⁶ *Near v. Minnesota*, 283 U.S. 697 (1931); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

exception" and "is to be closely confined so as to preclude what may fairly be deemed licensing or censorship".⁹⁷

4. Limitations on Free Speech and Press

The right of free speech and free press is "not absolute at all times and under all circumstances" and "does not mean that one can talk or distribute where, when and how one chooses", with impunity. The rights of others must be considered.⁹⁸

The oft quoted rule stated in the *Chaplinsky* cases is this:

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument'."

Libelous utterances are not constitutionally protected. A libel may be the basis for a civil suit for damages or a criminal prosecution. A conviction under a state "group libel law", i.e., a law punishing publications libelling a group by their race, creed or religion, has been upheld, where publication was in a public place and tended to cause a breach of the peace.⁹⁹

Obscenity is not within the area of constitutionally protected speech or press.¹⁰⁰ Obscene material is material which deals with sex in a manner appealing to prurient interest. "Sex" and "obscenity" are not synonymous. The portrayal of sex in art, literature and scientific work is not itself sufficient reason to deny the published material the constitutional protection of freedom of speech and press.¹⁰¹

In the *Roth* case, the Supreme Court upheld as constitutional the Federal Obscenity Statute (18 U.S.C. § 1461), directed against

⁹⁷ *Kingsley Books, Inc. v. Brown*, *supra*; *Near v. Minnesota*, *supra*; *Schenck v. U.S.* 249 U.S. 47 (1919); *Lovell v. Griffin*, 303 U.S. 444 (1938).

⁹⁸ *Roth v. United States*, 354 U.S. 476, 483 (1957); *Terminiello v. Chicago*, 337 U.S. (1949); *Breard v. City of Alexandria*, 342 U.S. 622 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Chaplinsky v. New Hampshire*, 315 U.S. 567, 571 (1942) and cases cited.

⁹⁹ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

¹⁰⁰ *Roth v. United States*, 354 U.S. 476, 485 (1957) and cases cited.

¹⁰¹ *Roth v. United States*, *supra*.

mailing obscene circulars and books, and the California Obscenity Law (§ 311, West's Calif. Penal Code Ann. 1955) directed against selling obscene and indecent books.

Where publications have been found by a Court, after trial, to be obscene, they may be destroyed or their further sale enjoined.¹⁰² The Supreme Court, without opinion, and by an equally divided Court (4—4), affirmed a ban in New York, after trial, of a book found obscene.¹⁰³

Very recently, the Supreme Court set aside a conviction in Michigan for the sale of a claimed obscene book, on the ground that the liberty of an adult to read a book may not be prohibited because the book may be unfit for a minor.¹⁰⁴

Door-to-door solicitation for the commercial purpose of selling publications may be prohibited to protect annoyance and privacy of homes,¹⁰⁵ although local restraints on door-to-door distribution and sale of religious, non-commercial literature have been held unconstitutional.¹⁰⁶

The use of loud speaker devices emitting loud and raucous sounds in public places, such as streets and parks, can constitutionally be prohibited or regulated in the public interest.¹⁰⁷

A street speaker can be prevented from causing public disorder, a riot, or an obstruction of vehicular and pedestrian traffic in the interest of maintaining peace and order on the public streets.¹⁰⁸

However, a speaker in a hired hall cannot be punished merely because his address stirs a public to anger, invites dispute or brings about a condition of unrest, because that is a legitimate function of free speech.¹⁰⁹

5. The Clear and Present Danger Doctrine

In numerous decisions, the Supreme Court has enunciated and applied the doctrine that any attempt to restrict the freedoms of speech, press, religion, peaceful assembly and petition could be justified only by a showing of "clear and present danger"; that is, that these freedoms can be restricted only to prevent grave and

¹⁰² *Kingsley Books Inc. v. Brown*, 354 U.S. 436 (1957).

¹⁰³ *Doubleday & Co. v. New York*, 335 U.S. 848 (1948), affirming 297 N.Y. 687 (1947).

¹⁰⁴ *Butler v. Michigan*, 77 S. Ct. 524 (1957).

¹⁰⁵ *Breard v. City of Alexandria*, 342 U.S. 622 (1951).

¹⁰⁶ *Martin v. Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

¹⁰⁷ *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Saia v. New York*, 334 U.S. 558 (1940).

¹⁰⁸ *Feiner v. New York*, 340 U.S. 315 (1951).

¹⁰⁹ *Terminiello v. Chicago*, 337 U.S. 1 (1949).

immediate danger to interests which the state or federal governments may lawfully protect.¹¹⁰

The Court has said that only an emergency could justify repression of these freedoms.

In these cases advocacy was distinguished from incitement, preparation from attempt, and assembly from conspiracy.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.¹¹¹

This classic "clear and present danger rule" was seemingly restricted in its force and reach, by a reformulated standard or test of "whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."¹¹²

In the *Dennis* case, the Supreme Court upheld the conviction of Communist party leaders for conspiracy under the Smith Act of 1940 (18 U.S.C. (1946 ed.), § 11) to organize the Communist party and to teach and advocate overthrow of the government by force and violence.

6. Liberty not to Speak

The Bill of Rights, which guards the individual's right to speak, does not leave it open to public authority to compel him to utter what is not in his mind. The very essence of the liberty guaranteed by the First Amendment is "the freedom of the individual from compulsion as to what he shall think and what he shall say, at least where the compulsion is to bear false witness to his religion." A flag salute is a form of utterance; and to compel a school child, against his religious conscience, to participate in a flag salute ceremony which includes a pledge of allegiance is a violation of the First Amendment.¹¹³

Neither a State nor the Federal Government can force a person to profess a belief or disbelief in any religion.¹¹⁴

¹¹⁰ *Schenck v. U.S.*, 249 U.S. 47, 52 (1919); *Whitney v. California*, 274 U.S. 357 (1927); *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Thomas v. Collins*, 323 U.S. 516 (1945).

¹¹¹ *Bridges v. California*, 314 U.S. 252 (1941).

¹¹² *Dennis v. United States*, 341 U.S. 494 (1951); Cf. *American Communication Association v. Douds*, 339 U.S. 382 (1950).

¹¹³ *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), dissenting opinion; overruled 319 U.S. 624, 642 (1943).

¹¹⁴ *Everson v. Board of Education*, 330 U.S. 1, 8 (1947); *McCullum v. Board of Education*, 333 U.S. 203, 210 (1948).

7. Liberty not to Listen and Freedom of Privacy

In a recent case,¹¹⁵ the Supreme Court held it was not a violation of the First or Fifth Amendments for a public transit company to broadcast to its "captive audience" in its busses and street cars radio programs of music, advertising and announcements. The Court indicated that the public regulatory body would be justified in limiting such activities if they interfered with the general public's convenience, comfort and safety and that such activities would violate the First Amendment if the broadcast was of objectionable propaganda.

In dissenting, Mr. Justice Black observed that subjecting such passengers to the broadcasting of news, public speeches or propaganda of any kind would violate the first Amendment. In dissenting, Mr. Justice Douglas referred to "the constitutional right to be let alone", and observed that "liberty in the constitutional sense must mean more than freedom from unlawful government restraint; it must include privacy as well if it is a repository of freedom. The right to be let alone is indeed, the beginning of all freedom." He further observed "freedom of religion, freedom of speech . . . give more than the privilege to worship, to write, to speak as one chooses; they give freedom not to do nor to act as the government chooses . . . If liberty is to flourish government should never be allowed to force people to listen to any radio program."

The privacy of the home can constitutionally be protected against door-to-door salesmen of commercial literature and citizens in public parks and streets need not be subjected to the blare of loud speaking devices.¹¹⁶

8. Taxes on Knowledge

The imposition of taxes cannot be used to suppress or prohibit free speech or press. Such "taxes on knowledge" are unconstitutional.

This includes any kind of taxes designed to limit circulation of newspapers, to restrict distribution of books or pamphlets, or to prevent dissemination of ideas.¹¹⁷

A community may not suppress or the state tax the dissemination of views because they are unpopular, annoying or distasteful.¹¹⁸

Nor may freedom of speech or press be suppressed by denying a tax exemption, even if such tax exemption is otherwise regarded

¹¹⁵ *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952).

¹¹⁶ *Breard v. City of Alexandria*, 341 U.S. 622 (1951); *Kovacs v. Cooper*, 336 U.S. 77 (1947).

¹¹⁷ *Speiser v. Randall*, 357 U.S. 513, 518 (1958); *Grosjean v. American Press Co.*, 296 U.S. 233 (1936); *Follet v. McCormick*, 321 U.S. 573 (1944); *Jones v. Opelika*, 316 U.S. 584, 604, 611 (1932); overruled, 319 U.S. 98 (1943).

¹¹⁸ *Murdock v. Pennsylvania*, 319 U.S. 105, 116 (1943).

merely as a "privilege". A discriminatory denial of an exemption for engaging in speech (mere advocacy) is a limitation of free speech.¹¹⁹

e. Liberty of Association

Our form of government is built on the premise that every citizen shall have the right, enshrined in the First Amendment, to engage in political expression and association. Exercise of these basic freedoms has traditionally been through the media of political associations. Any interference with the freedom of a party – however unorthodox or dissident – is simultaneously an interference with the freedom of its adherents.¹²⁰

As late as June 30, 1958, the Supreme Court stated that it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inescapable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. It is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters. There is a vital relationship between freedom to associate and privacy in one's associations; and inviolability of privacy in group association may be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs. Adherents of particular religious faiths or political parties could not be required to wear identifying arm bands organizations engaged in advocacy of particular beliefs cannot be compelled to disclose its membership list.¹²¹

IV. CIVIL LIBERTIES AND THE MILITARY POWER

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." (U.S. Const. Amendment II).

"No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." (U.S. Const. Amendment III).

In the United States, military power has always been kept subordinate to civil authority and the rule of law. The Second and Third Amendments are old symbols of the ever present American ideal of the supremacy of the civil power and the rule of law over the military power.

¹¹⁹ *Speiser v. Randall*, *supra*.

¹²⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 250-1 (1957).

¹²¹ *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958); Cf. *United States v. Rumely*, 354 U.S. 41, 56-8, concurring opinion (1953).

a. The Second Amendment is a limitation upon the power of the Federal Government, not of the States.¹²² This Amendment was bound up with the Colonists' suspicion of a federal standing army and the desire for an armed local state militia. It was designed to foster a well regulated militia as necessary to the security of a free state.¹²³ It created no right to bear arms, which right long antedated the adoption of the Federal Constitution.¹²⁴ The word "arms" means arms of a soldier or militia man. A state may prohibit any person from having a revolver, without a licence. The right to bear arms does not authorize carrying concealed weapons.¹²⁵

b. The Third Amendment was designed to protect a householder from any invasion of privacy by the military in peace time, and, except by law, in war time. It was prompted by the fear that the Federal Government might quarter large armies of armed troops among the people, as had the King of England before the American Revolution. No case has arisen under this Amendment and while it may seem "archaic", a time may come when it will be vital.

c. In several recent cases the Supreme Court has clearly delineated the relation of civil liberties to the military power. In *Reid v. Covert* and *Kinsella v. Krueger*¹²⁶ the Court held that civilian dependents of American service men, authorized to accompany them on foreign duty, may not, constitutionally be tried by American military-court martials in foreign countries for offences committed there. In the *Reid* case, the wife of a sergeant in the United States Air Force Base in England had been tried and convicted and sentenced there for murdering her husband, by an American court martial, under the United States Uniform Code of Military Justice. In the *Kinsella* case, the wife of a colonel in the United States Army in Japan had been tried, convicted and sentenced for the murder of her husband by a similar court martial.

The convictions were reversed and the defendants were released on the ground that the defendants were civilians and as such were entitled to trials in civilian courts, under civilian laws and procedures and with all of the safeguards of the Bill of Rights, including trial by jury, and could not constitutionally be tried by military tribunals under military regulations and procedures. The Court said that, under the Constitution, Congress had no power to enact a statute and the Executive Department had no authority to negotiate a treaty

¹²² *Moore v. Gallup*, 293 N.Y. 846 (1944); *Presser v. Illinois*, 116 U.S. 252 (1886).

¹²³ *Cases v. U.S.*, 131 F. (2d) 916; cert. den. 63 S. Ct. 1431; *U.S. v. Miller*, 307 U.S. 174 (1939).

¹²⁴ *Moore v. Gallup*, *supra*; *U.S. v. Cruikshank*, 92 U.S. 553 (1875).

¹²⁵ *Robertson v. Baldwin*, 165 U.S. 275, 281-2 (1897); *U.S. v. Miller*, *supra*.

¹²⁶ 354 U.S. 1 (1957), overruling and withdrawing *Reid v. Covert* and *Kinsella v. Krueger*, 351 U.S. 470, 487 (1956).

under which civilians abroad could be tried by military courts for offences committed there. The Court rejected the idea that when the United States acts against citizens abroad, it can do so free of the Bill of Rights. It said the elemental procedural safeguards embedded in the Constitution were secure against the "passing demands of expediency or convenience". It said the term "land and naval forces" in the Fifth Amendment of the Constitution refers to persons who are members of the armed forces and not to their civilian wives, children and other dependents; and that under the Constitution "courts of law alone are given power to try civilians for their offences against the United States".

In *Trop v. Dulles*,¹²⁷ the Supreme Court held unconstitutional an act of Congress (Sec. 401, subd. 9 of the Nationality Act of 1940, as amended) which provided that a citizen shall forfeit his citizenship by deserting the armed forces in time of war upon conviction by court martial and dishonorable discharge. In invalidating this statute as unconstitutional, the Court reversed the conviction on the ground that it was a violation of the Eighth Amendment because it prescribed a "cruel and unusual punishment".

In *Toth v. Quarles*,¹²⁸ the Court held that an ex-soldier could not, constitutionally, be subjected to trial by court martial for an offence committed while in the armed services, because he had become a civilian; and that the accused, being a civilian and charged with murder, a "crime" in the constitutional sense, was entitled to indictment by grand jury, a jury trial and the other protections contained in the Constitution and in the Fifth, Sixth and Eighth Amendments thereto. It stated that the constitutional grant of power to Congress to regulate the armed forces does not empower Congress to deprive civilians, including ex-servicemen, of trials under Bill of Rights' safeguards, such as trial by jury; and that court martial jurisdiction is restricted to persons who are actually members or part of the armed forces.

The Court has ruled that a court martial does not reach a draftee until and unless he is "actually inducted"; and for failure or refusal to be inducted, he is triable, not by the military but by the civil courts.¹²⁹

In *Duncan v. Kahanamoku*,¹³⁰ it was held that military trial of civilians in Hawaii during wartime was unconstitutional, despite government claims that the needs of defence made martial law imperative. In that case, immediately following the Japanese attack on Pearl Harbour, the Hawaiian Governor put the territory under martial rule and suspended the privilege of writ *habeas corpus*,

¹²⁷ *Trop v. Dulles*, 356 U.S. 86 (1958).

¹²⁸ *Toth v. Quarles*, 305 U.S. 11 (1955).

¹²⁹ *Billings v. Truesdell*, 321 U.S. 542 (1944).

¹³⁰ 327 U.S. 304 (1946).

the effect of which was to supplant civilian with military authority and to substitute military justice for the civil courts, although the territory had not been evacuated of civilians and the civil courts continued to be open and to carry on their other business. The defendants were tried and convicted by these military tribunals and their convictions were reversed and set aside. The Court held that the people of Hawaii were entitled to constitutional protection to the same extent as the inhabitants of the states.

In the famous *Milligan* case,¹³¹ the Supreme Court refused to sanction the military trial of civilians during wartime.

The *Milligan*, *Duncan* and *Toth* cases recognized and manifested the "deeply rooted and ancient opposition in this country to the extension of military control over civilians" and repulsed efforts to expand the jurisdiction of military courts to civilians.

In *Wilson v. Girard*,¹³² the Court held there was no constitutional barrier to a treaty under which the United States waived jurisdiction in favour of Japan to try a soldier for causing the death of a Japanese woman.

The Supreme Court has held that it has a right to inquire into the question of whether or not a military tribunal has legal authority to try such persons as Nazi saboteurs¹³³ or a Japanese army general on charges of violating the laws of war.

A military tribunal that tries an enemy war criminal must submit the question of its jurisdiction to the regular civil courts of the United States, although that tribunal's ruling on evidence, procedural method and determination on the merits are not reviewable by the civil courts.¹³⁴

V. CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE

The U.S. Constitution contains Amendments designed to protect people against arbitrary and tyrannical acts of the civil government, especially by establishing safeguards relating to procedures in criminal cases (Amendments IV, V, VI and VIII); and by preserving the right to a jury trial in civil cases (Amendment VII). Certain other provisions in the original Constitution were designed to the same end.¹³⁵ These Amendments will be discussed seriatim.

In the federal system of the United States, it is fundamental in enforcing criminal laws that the Federal Government and the States

¹³¹ *Ex parte Milligan*, 4 Wall. (U.S.) 2 (1866).

¹³² *Wilson v. Girard*, 354 U.S. 524 (1957).

¹³³ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹³⁴ *Yamashita v. Styer*, 327 U.S. 1 (1946).

¹³⁵ Art. I, Secs. 9, 10; Art. III, Secs. 2, 3.

function independently of each other, each within its own sphere.

As pointed out above, state action is not limited by Amendments IV to VII, which have been held to apply only to the Federal Government; and federal action is not limited by the guaranties in the State Constitutions. Nevertheless, the States, under the Due Process Clause of the Fourteenth Amendment, are bound to, and generally do, pursue "procedural due process" and "fair trial" methods in state criminal trials. To this point, brief reference will now be made.

a. Civil Liberties in Relation to Procedural Due Process of Law

The words "due process of law" occur in both the Fifth and Fourteenth Amendments. Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth Amendment.

The Supreme Court has made it clear that a denial by a state of rights or privileges specifically embodied in the federal Bill of Rights, including those relating to the administration of justice, may, in certain circumstances or in connection with other elements, operate in a given case, to deprive a litigant of due process of law in violation of the Fourteenth Amendment. The phrase formulates a concept which is less rigid and more fluid than the specific provisions of the Bill of Rights. Denial of due process is to be tested by an appraisal of the totality of facts in a given case. Thus, due process of law would be denied if criminal proceedings were conducted in such a manner as to be "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness or right". Whatever would be "implicit in the concept of ordered liberty" and "essential to the substance of a hearing" would be within the procedural protection afforded by the constitutional guaranty of due process.

Certain factors in criminal procedures have been regarded as fundamental and necessary to due process; while other factors have not been so regarded and permit variation in respect thereof in the criminal proceedings of the states. It is impossible to detail here all of the various elements that make up the essential fairness of procedure imposed by the due process clauses of the Constitution. There are many cases dealing with this subject.¹³⁶

For example, the knowing use of perjured testimony, use of coerced confessions, denials of assistance of counsel and lack of impartial juries have been held to constitute lack of due process.

¹³⁶ See: *Betts v. Brady*, 316 U.S. 455 (1942); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Adamson v. California*, 302 U.S. 46 (1947).

Recently, it has been said that due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his behalf, and be represented by counsel. A fair trial in a fair tribunal is a basic requirement of due process. Fairness requires an absence of actual bias in a trial of cases, by court or jury.¹³⁷ It is basic to due process that a person be given fair notice of the charges against him.¹³⁸

It has recently been held that due process is denied by a state which allows all convicted defendants to have an appellate review except those who cannot afford to pay for a transcript of the records of their trials.¹³⁹

Convictions obtained by means of entrapment, (such as by the use of agents provocateurs, stool pigeons and informers) induced by law enforcement officers will be vitiated for lack of due process, at least in federal courts.¹⁴⁰

In short, there is a constitutional right to procedural due process under the Constitution which cannot be violated by the federal or state governmental agencies. This is quite apart from the specific protections granted under federal and state constitutions.

Where an accused is not accorded due process of law by a state court, his conviction will be set aside by the United States Supreme Court.¹⁴¹

b. Fourth Amendment Liberties

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const., 4th Amend.

1. Searches and Seizures

The essential purpose of the Fourth Amendment is to shield a citizen from unwarranted intrusions into his privacy.¹⁴² Mere suspicion, or even probable cause for belief that certain articles subject to seizure are in a home or other place, does not of itself justify a search without a warrant. Especially is this so when the

¹³⁷ *In re Oliver*, 333 U.S. 257 (1948); *In re Murchison*, 349 U.S. 133 (1955).

¹³⁸ Cf. *Lambert v. California*, 355 U.S. 225 (1957).

¹³⁹ *Griffin v. Illinois*, 351 U.S. 12 (1956); *Eskridge v. Washington Prison Board*, 357 U.S. 214 (1958).

¹⁴⁰ *Sherman v. U.S.*, 356 U.S. 369 (1958); *Sorrells v. U.S.* 287 U.S. 435 (1932).

¹⁴¹ *Alcorta v. Texas*, 355 U.S. 28 (1957).

¹⁴² *Jones v. U.S.*, 357 U.S. 493, 498 (1958); *Johnson v. U.S.*, 333 U.S. 10, 14 (1948); *McDonald v. U.S.*, 335 U.S. 451, 455 (1948); *Giordenello v. U.S.*, 357 U.S. 480 (1958).

intrusion into a private home occurs in the nighttime.¹⁴³ An arrest and seizure will be set aside where the warrant is defective and based merely on hearsay information. A warrant for a search of premises or seizure of property may lawfully be issued by a court only on sworn evidence and must specify the property to be seized or the premises to be searched.¹⁴⁴

It is unreasonable searches and seizures that are prohibited. Reasonable searches may be made, incidental to a lawful arrest, without a search warrant. The right to search incidental to a lawful arrest is recognized, and such a search can include the office or other premises under the control of the accused where the crime is alleged to have been committed, as well as the accused's person.¹⁴⁵ The Government cannot use, directly or indirectly, evidence obtained by unreasonable searches and seizures by Federal agents to secure a conviction in a Federal prosecution, and cannot support a conviction on evidence obtained through leads from unlawfully obtained evidence. Such methods, the Supreme Court has said, are outlawed "because they encourage the kind of society that is obnoxious to free men".¹⁴⁶ However, approximately two-thirds of the States accept evidence obtained from illegal searches and seizures,¹⁴⁷ and the Supreme Court has held this is not a violation of due process.

A person cannot be lawfully arrested in his home by officers breaking in without first giving him notice of their authority and purpose. Such a forced entry without a warrant or prior notice is unlawful, and the evidence seized is inadmissible. In reversing a conviction based on such evidence the Supreme Court recently has said:

"From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest. Such action invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle . . . Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house."¹⁴⁸

¹⁴³ *Agnello v. U.S.*, 269 U.S. 20, 33 (1925); *Jones v. U.S.*, *supra*.

¹⁴⁴ *Giordenello v. U.S.*, 357 U.S. 480 (1958).

¹⁴⁵ *U.S. v. Rabinowitz*, 339 U.S. 56 (1950); *Harris v. U.S.*, 331 U.S. 145 (1947); *Agnello v. U.S.*, 269 U.S. 20 (1925).

¹⁴⁶ *Walder v. U.S.*, 347 U.S. 62 (1954); *Weeks v. U.S.*, 232 U.S. 383 (1914); *Agnello v. U.S.*, *supra*; *Silverthorne Lumber Co. v. U.S.*, 251 U.S. 385 (1920); *U.S. v. Di Re*, 332 U.S. 581 (1948); *Johnson v. U.S.*, 333 U.S. 10 (1948); *Trupiano v. U.S.*, 334 U.S. 699 (1948); cf. *Nardone v. U.S.*, 308 U.S. 338 (1939).

¹⁴⁷ *Irvine v. California*, 347 U.S. 128, 135 (1954); cf. *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁴⁸ *Miller v. U.S.*, 357 U.S. 301, 306-307 (1958); *McDonald v. U.S.*, 335 U.S. 451, 460-1, concurring opinion.

2. Wiretapping and Eavesdropping by Electronic Devices

In 1928 the Supreme Court held,¹⁴⁹ in a close decision, that the tapping of telephone wires did not constitute an unreasonable search and seizure within the meaning of the Fourth Amendment because it did not involve a physical invasion of the premises, and that evidence thus obtained could be used in a federal prosecution.

Thereafter Congress passed the Federal Communications Act,¹⁵⁰ which forbids any person to intercept any wire message, telephone or telegraph, without the sender's consent. (In some States, like New York, wiretapping is permitted (New York Const. Article I, Section 12) under court order upon a showing that evidence of a crime may be obtained.)

This statutory ban on wiretapping was applied to Federal officers as well as to private persons and evidence so obtained has been barred in Federal trials.¹⁵¹

Evidence from tapped interstate, as well as intrastate, communications, has been barred, as well as evidence which is the result of evidence itself obtained by wiretapping.¹⁵² But evidence obtained from illegal wiretapping, while barred in Federal courts, was held not barred in a state court criminal proceeding.¹⁵³

The Supreme Court has held that a "detectaphone" planted on an outer wall of a hotel room, and a microphone concealed in a bedroom, to hear conversations within such rooms, are not "searches and seizures" or "wiretapping" and do not constitute a violation of the statute or of the Fourth or Fourteenth Amendments; and evidence therefrom was held admissible, respectively, in a federal court¹⁵⁴ and a state court.¹⁵⁵ The same result was reached in respect of a radio transmitter concealed on the person of an officer and evidence obtained surreptitiously thereby in an accused's room.¹⁵⁶ In the *Olmstead* case, *supra* Mr. Justice Holmes, dissenting, called wiretapping a "dirty business". The dissents in the above cited cases have been sharp. The law in this field is now in a state of flux. The use of wiretapping equipment and of electronic "bugging" devices to intercept communications and to eavesdrop has caused much

¹⁴⁹ *Olmstead v. U.S.*, 277 U.S. 438 (1928).

¹⁵⁰ 47 U.S. Code §§ 501, 605.

¹⁵¹ *Nardone v. U.S.*, 302 U.S. 379 (1937).

¹⁵² *Nardone v. U.S.*, 308 U.S. 338 (1939); *Weiss v. U.S.*, 308 U.S. 321 (1939); *Goldstein v. U.S.*, 316 U.S. 114 (1942).

¹⁵³ *Schwartz v. Texas*, 344 U.S. 199 (1952).

¹⁵⁴ *Goldman v. U.S.*, 316 U.S. 129 (1942).

¹⁵⁵ *Irvine v. Calif.*, 347 U.S. 128 (1954).

¹⁵⁶ *On Lee v. U.S.*, 343 U.S. 747 (1952).

concern¹⁵⁷ and already statutes have been passed and more statutes are projected to protect the individual's privacy and rights from such use. The problem is to protect the individual's rights without unduly hampering law enforcement officers in apprehending crimes and criminals. In very recent decisions the Supreme Court has held that evidence obtained from wiretapping a telephone by a state law enforcement officer in accordance with state law and without participation by Federal authorities, is not admissible in a federal court criminal trial,¹⁵⁸ and that contents of a communication overheard by police officers on a regularly used telephone extension, with the consent of the person who is both the subscriber to the extension and a party to the conversation, are admissible in a criminal trial in a federal court.¹⁵⁹

In the *Schwartz* case, *supra*, Mr. Justice Douglas said of the prior decisions of the Supreme Court in this field:

"They impinge severely on the liberty of the individual and give the police the right to intrude into the privacy of any life."

This statement is fraught with much truth. The difficulties in the problem arise from the conflicts in state and federal jurisdiction, the conflict between individual rights and effective law enforcement and recent scientific advances in devising highly effective detecting instruments. Much study is now being devoted to possible solutions of the problem.

c. Fifth Amendment Liberties

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (U.S. Constitution, Amendment V).

1. Indictment by Grand Jury

Common law recognized two ways of initiating criminal proceedings; (1) by an "information" prepared by the prosecutor and (2) by a presentment or indictment of a grand jury.

As a grand jury is drawn periodically from the people, this

¹⁵⁷ *Irvine v. California*, 347 U.S. 128, 132, the Court said: "Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the black-mailer, or the busy body."

¹⁵⁸ *Benanti v. U.S.*, 355 U.S. 96 (1957).

¹⁵⁹ *Rathburn v. U.S.*, 355 U.S. 107 (1957).

provision was deemed necessary to protect citizens from government bureaucracy. Also, an indictment must be clear and precise, thus enabling adequate preparation of a defence.

A "capital" offence is one punishable by death. Whether or not a crime is "infamous" depends upon the severity of the punishment and is a flexible concept. Generally, the term covers "felonies" as distinguished from "misdemeanors".¹⁶⁰

An indictment by a grand jury based solely on hearsay evidence does not violate this Amendment, because the Amendment does not prescribe the kind of evidence upon which grand juries must act.¹⁶¹

Criminal contempts need not be prosecuted by indictment since they are not "infamous crimes" within the meaning of the Fifth Amendment.¹⁶²

The words "except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger" do not grant court martial power to Congress; they merely make clear there need be no indictment for such military offences as Congress can authorize military tribunals to try, under its power to make rules to govern the armed forces.¹⁶³ These words do not encompass persons who cannot fairly be said to be "in" the military service, such as wives, children and other dependents of servicemen.¹⁶⁴

2. Double Jeopardy

The federal government may not prosecute a person twice for the same offence, whether the first prosecution resulted in conviction or acquittal. While this constitutional provision does not restrict the states, nevertheless, all the states by their constitutional provisions or common law have the same rule.¹⁶⁵ Moreover, when a state puts a person in double jeopardy that is "so acute and shocking that our polity will not endure it", or where double jeopardy violates "fundamental principles of liberty and justice" or the "fundamental essentials of a trial", then the state violates the Due Process Clause of the Fourteenth Amendment.¹⁶⁶

Until his trial begins, a man is not put in jeopardy. No "double

¹⁶⁰ *In re Claasen*, 140 U.S. 200 (1891); *Fitzpatrick v. U.S.*, 178 U.S. 304 (1900).

¹⁶¹ *Costello v. U.S.*, 350 U.S. 359 (1956).

¹⁶² *Green v. U.S.*, 356 U.S. 165, 182-3 (1958).

¹⁶³ *Toth v. Quarles*, 350 U.S. 14 (1955).

¹⁶⁴ *Reid v. Covert*, 354 U.S. 1, 22, 23 (1957).

¹⁶⁵ *Brock v. North Carolina*, 344 U.S. 424 (1953); *U.S. v. Lanza*, 260 U.S. 377 (1922); *Jerome v. U.S.*, 318 U.S. 101 (1943).

¹⁶⁶ *Brock v. North Carolina*, *supra*; Cf. *Palko v. Connecticut*, 302 U.S. 319 (1937).

jeopardy" occurs when the accused, after conviction, appeals and obtains a new trial.

Where the same act violates both a federal and a state law, it is not "double jeopardy" to prosecute and punish the accused separately for each violation; but due to comity between federal and state enforcement agencies, this rarely occurs.

Where one act, such as a sale of narcotics constitutes multiple but distinct statutory offences, punishable separately, convictions and cumulative sentences for each do not constitute "double jeopardy".¹⁶⁷

That the same act may give rise to both a criminal and civil sanction involves no "double jeopardy".¹⁶⁸

No "double jeopardy" is involved where a person sentenced to electrocution for murder was prepared for electrocution, placed in the electric chair and subjected to a shock, which due to a mechanical failure, did not cause his death and was resented to electrocution at a later date.¹⁶⁹

The constitutional protection against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for the same offence.¹⁷⁰ The underlying idea, one that is deeply ingrained in at least the Anglo-American jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.¹⁷¹

Under the Fifth Amendment, a verdict of acquittal is final, ending a defendant's double jeopardy and barring subsequent prosecution.¹⁷² The Government cannot secure a new trial by means of an appeal, even though an acquittal may appear to be erroneous.¹⁷³ The defendant is placed in jeopardy once he is put on trial before a jury so that if the jury is discharged without his consent and before a verdict is returned, he cannot be tried again.¹⁷⁴

The Due Process Clause of the Fourteenth Amendment does

¹⁶⁷ *Pereira v. U.S.*, 347 U.S. 1, 11 (1953); *Gore v. U.S.*, 357 U.S. 386 (1957); *Blockburger v. U.S.*, 284 U.S. 299 (1932).

¹⁶⁸ *Helvering v. Mitchell*, 303 U.S. 391, 399; *Rex Trailer Co. v. U.S.*, 350 U.S. 148, 150 (1956); *Yates v. U.S.*, 355 U.S. 66, 74 (1957).

¹⁶⁹ *Francis v. Resweber*, 329 U.S. 452 (1947).

¹⁷⁰ *Green v. U.S.*, 355 U.S. 184, 187 (1957).

¹⁷¹ *Green v. U.S.*, *supra*.

¹⁷² *Green v. U.S.*, *supra*.

¹⁷³ *Green v. U.S.*, *supra*, and cases cited.

¹⁷⁴ *Green v. U.S.*, *supra*; *Wade v. Hunter*, 336 U.S. 684 (1949).

not necessarily forbid states from prosecuting different offences at consecutive trials, even though they arise out of the same occurrence, such as where an accused robbed four persons at the same time or where an accused murdered four persons at one time.¹⁷⁵ However, a state cannot permit the prosecution to appeal against a conviction of second degree murder and on retrial secure a conviction of first degree murder.¹⁷⁶

3. Self-Incrimination

The privilege against self-incrimination is a right that was hard earned by our forefathers. The reason for its inclusion in the Constitution and the necessities for its preservation are to be found in the lessons of history, such as the Star Chamber and Inquisition proceedings. It is a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. It must be liberally construed, particularly because of the presumption of innocence accorded a defendant in a criminal trial.¹⁷⁷ In *Regan v. New York*,¹⁷⁸ Mr. Justice Black stated that "the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized." To compel a person to convict himself out of his own mouth is contrary to the spirit and letter of the Fifth Amendment.¹⁷⁹

The accused may not be convicted on his own uncorroborated confession or his extrajudicial admissions or exculpatory statements. Sound law enforcement requires police investigations which extend beyond the word of the accused. This is because confessions may be false, coerced or induced or otherwise unreliable.¹⁸⁰

The self-incrimination clause has been held to apply directly only to the Federal Government, not to the states; but all states, constitutionally or by common law, recognize the privilege.¹⁸¹ However, under the Due Process Clause of the Fourteenth Amendment and as part of the concept thereunder of "ordered liberty" and "fair

¹⁷⁵ *Hoag v. New Jersey*, 356 U.S. 464 (1958); *Cuicci v. Illinois*, 356 U.S. 571 (1958).

¹⁷⁶ *Palko v. Connecticut*, 302 U.S. 319 (1937).

¹⁷⁷ *Quirin v. U.S.*, 349 U.S. 155 (1955); *Emspak v. U.S.*, 349 U.S. 190 (1955); *Ullman v. U.S.*, 350 U.S. 422 (1956); *Slochower v. Board of Education*, 350 U.S. 551 (1956).

¹⁷⁸ *Regan v. New York*, 349 U.S. 58, 68 (1955).

¹⁷⁹ *Curcio v. U.S.*, 354 U.S. 118, 128 (1957).

¹⁸⁰ *Smith v. U.S.*, 348 U.S. 147, 152 (1954); *Warszower v. U.S.*, 312 U.S. 342 (1941); *Opper v. U.S.*, 348 U.S. 84, 90, 91 (1954).

¹⁸¹ *Twinning v. New Jersey*, 211 U.S. 102 (1908); *Adamson v. California*, 332 U.S. 46, 52, 54 (1947); *Rochin v. California*, 342 U.S. 165 (1952); *Knapp v. Schwitzer*, 357 U.S. 371, 380 (1957).

trial", compulsion to testify by fear of hurt, torture or exhaustion and by coerced confessions is forbidden in state practice.¹⁸²

The use in a state criminal trial of a defendant's confession obtained by coercion – whether mental or physical – is forbidden by the Fourteenth Amendment. Convictions obtained on such coerced confessions will be vitiated as a violation of due process, even though there is other evidence sufficient to support a conviction. A confession by which life becomes forfeited must be the expression of a free choice. Below are a few of the many cases so holding.¹⁸³

Among elements which have appeared singly or in combination in cases of coerced confessions are the following: Arrest without a warrant; denial of hearing before a magistrate; failure to advise accused of his right to remain silent and to obtain counsel; holding incommunicado for several days (prolonged detention); threatening by a mob; physical beating; threats of violence; continuous relay questioning; psychiatric inducement; tender age; subnormal intelligence or ignorance; and insanity.

A confession may be coerced by the taking, under protest, of real evidence. For instance, police officers forcibly used a stomach pump on an accused to obtain evidence to convict him, and a blood test was taken by a skilled technician while an accused was unconscious to obtain evidence to convict him. There are samples of coerced confessions by the taking of physical evidence which are unconstitutional.¹⁸⁴

The privilege must be claimed. Its invocation does not require any special combination of words or the skill of a lawyer or any ritualistic formula, but words capable of being reasonably understood.¹⁸⁵

The privilege may be waived. It may be waived in various ways such as (1) by an accused in a criminal trial taking the stand to testify in his own defense; (2) by signing a "waiver of immunity"; (3) by testifying freely in a way to incriminate himself before trying to invoke the privilege.¹⁸⁶

The failure of an accused to testify in his own behalf does not create a presumption of guilt. Inference of guilt is not permissible. The

¹⁸² *Palko v. Connecticut*, 302 U.S. 319 (1937).

¹⁸³ *Leyra v. Denno*, 147 U.S. 556, 558 (1954); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Chambers v. Florida*, 309 U.S. 227 (1940); *Watts v. Indiana*, 338 U.S. 49 (1949); *Crooker v. California*, 357 U.S. 433 (1958); *Herman v. Claudy*, 350 U.S. 116, 118 (1956); *Ashdown v. Utah*, 357 U.S. 426 (1958); *Payne v. Arkansas*, 356 U.S. 560 (1958).

¹⁸⁴ *Rochin v. California*, 342 U.S. 165 (1952); *Breithaupt v. Abram*, 352 U.S. 432 (1957).

¹⁸⁵ *Quirin v. U.S.*, 349 U.S. 155 (1955); *Emspak v. U.S.*, 349 U.S. 190 (1955).

¹⁸⁶ *Rogers v. U.S.*, 340 U.S. 367 (1951).

privilege would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. The assumption that those claiming the privilege are either criminals or perjurers is wrong.¹⁸⁷

In a federal trial no court official may comment adversely on an accused's failure to testify and the trial judge is required to instruct the jury that no inference of guilt is justified. That, generally, is the rule in all American state courts.¹⁸⁸

Summary dismissal of a city employee for invoking the privilege against self-incrimination before a legislative committee, in refusing to answer questions concerning his membership in the Communist party, has been held to be a violation of due process.¹⁸⁹

The privilege has relation only to past acts and not to future acts; and it cannot be invoked in respect of a crime for which the person has been pardoned or which has been outlawed by the statute of limitations.¹⁹⁰

The privilege is purely personal. It cannot be invoked on behalf of, or in a desire to protect, others from punishment. It cannot be successfully invoked on such grounds as that the answer may tend to disgrace, humiliate or prejudice, but only on the ground of possible incrimination.¹⁹¹

It is not necessary that the answer would incriminate, but merely that it might reasonably do so. It is immaterial that guilt might be successfully refuted later upon a criminal prosecution. The proper standard to be applied in deciding whether particular questions are subject to a valid Fifth Amendment claim is the "real danger" against "imaginary danger" test.¹⁹²

The protection against self-incrimination is not limited to "criminal" proceedings. It extends to any official proceedings, including inquests, administrative hearings, Congressional committee investigations and grand jury proceedings, where testimony under oath may be compelled and in which a person is asked questions that might tend to incriminate him or lead to a criminal prosecution of him.¹⁹³

Witnesses in a Congressional committee investigation may invoke the Fifth Amendment in respect of questions concerning the Communist Party and employment by it,¹⁹⁴ or membership in it,

¹⁸⁷ *Slochower v. Board of Education*, 350 U.S. 551 (1956).

¹⁸⁸ *Bruno v. U.S.*, 308 U.S. 287 (1939); *Adamson v. California*, 332 U.S. 46 (1947).

¹⁸⁹ *Slochower v. Board of Education*, *supra*.

¹⁹⁰ *U.S. v. Kahriger*, 345 U.S. 22, 32 (1953).

¹⁹¹ *Rogers v. U.S.*, 340 U.S. 367 (1951).

¹⁹² *Emmpak v. U.S.*, 349 U.S. 190 (1955).

¹⁹³ *Brenner v. U.S.*, 343 U.S. 918 (1952); *Blau v. U.S.*, 340 U.S. 159 (1950).

¹⁹⁴ *Blau v. U.S.*, *supra*.

past or present;¹⁹⁵ or association with it,¹⁹⁶ or with Communist front organizations.¹⁹⁷ A refusal under the Fifth Amendment to answer a question as to alleged membership in the Communist Party or Communist front organizations is justified, as the answer might have tended to incriminate, and cannot be made the basis of a contempt proceeding.¹⁹⁸

A litigant in a federal civil action, who takes the stand and testifies in her own behalf, cannot claim the privilege against self-incrimination when cross-examined regarding matters made relevant by her direct examination, such as her connection with the Communist Party.¹⁹⁹

The historic function of the privilege against self-incrimination is to protect only the natural individual. A corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated. A custodian of corporate books may not withhold them on the ground that he personally may be incriminated by their production. This principle applies also to an unincorporated association, such as a labour union. But a custodian of such books cannot be compelled to condemn himself by his own oral testimony in absence of a grant of adequate immunity from prosecution. Such a custodian may be held in contempt for failing to produce subpoenaed corporation or association records in his control.²⁰⁰

A witness cannot invoke the self-incrimination privilege, if legal immunity from criminal prosecution has been conferred upon him by an immunity statute; and he may be prosecuted for contempt for refusal to testify, because once the reason for the privilege ceases, the privilege itself ceases. The immunity statute must grant complete and not partial immunity against criminal prosecutions.²⁰¹

In a recent case,²⁰² the Supreme Court held a witness who was granted immunity by a state against state prosecution may be compelled to testify in a state proceeding and cannot invoke the federal privilege against self-incrimination.

¹⁹⁵ *Bart v. U.S.*, 349 U.S. 219 (1955); *Quinn v. U.S.*, 349 U.S. 155 (1955); *Emspak v. U.S.*, *supra*.

¹⁹⁶ *Emspak v. U.S.*, *supra*; *Bart v. U.S.*, *supra*.

¹⁹⁷ *Emspak v. U.S.*, *supra*; *Bart v. U.S.*, *supra*.

¹⁹⁸ *Quinn v. U.S.*, *supra*; *Blau v. U.S.*, *supra*; *Emspak v. U.S.*, *supra*.

¹⁹⁹ *Brown v. U.S.*, 356 U.S. 148 (1958).

²⁰⁰ *Curcio v. U.S.*, 354 U.S. 118, 122 (1957); *Hale v. Henkel*, 201 U.S. 43 (1906); *Wilson v. U.S.*, 221 U.S. 361 (1911); *Ersgee Co. v. U.S.*, 262 U.S. 151; *U.S. v. White*, 322 U.S. 694 (1944); *Nilva v. U.S.*, 352 U.S. 385, 392 (1957); *U.S. v. Fleischman*, 339 U.S. 349 (1950).

²⁰¹ *Ullman v. U.S.*, 356 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1896); *Adams v. Maryland*, 347 U.S. 179 (1954); *U.S. v. Byan*, 339 U.S. 323 (1950); Cf. *Regan v. N.Y.*, 349 U.S. 58 (1955).

²⁰² *Knapp v. Schweitzer*, 357 U.S. 371 (1958); Cf. *Lerner v. Casey*, 357 U.S. 468, 478 (1958).

4. Just Compensation

Property owners are entitled to receive just compensation as the price of the taking of private property for public use.²⁰³ All kinds of property are subject to the power of eminent domain. The power must be exercised by the Government, and for a public, not private, purpose and use. The power can be exerted to obtain sites for public buildings, highways, parks, memorials and other like purposes.

d. Sixth Amendment Liberties

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the Assistance of Counsel for his defence." (U.S. Const. Amendment VI).

1. Right to a Speedy Trial

An accused is entitled, constitutionally, to a speedy trial. This right, derived from Magna Charta, is enforceable. Unnecessary delay in criminal prosecutions can cause dismissal of charges (Fed. Rules Crim. Proc. § 48-b).

Delay of justice can be a denial of justice. Evidence or witnesses may be lost. Unreasonable restraint of liberty may result where the accused is denied bail or is out on bail. Whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon the circumstances, but it must not be "purposeful or oppressive".²⁰⁴

For example, an accused was tried for treason in 1949 for acts done in 1942-5; his conviction was reversed in 1953; because of delay by the government, it was 1955 before his retrial was started. The second conviction was reversed and defendant was set free because of a violation of the Sixth Amendment.²⁰⁵ But too speedy a trial, precluding reasonable time for adequate counsel and trial preparation, is not due process of law.²⁰⁶

This is a personal right which may be waived.²⁰⁷

2. Right to a Public Trial

Persons accused of a crime have a right to a public trial under Federal and State Constitutions and laws.

²⁰³ *Berman v. Parker*, 348 U.S. 26 (1954).

²⁰⁴ *Pollard v. U.S.*, 352 U.S. 354 (1957).

²⁰⁵ *U.S. v. Provoo*, 250 F. (2d) 531 (1955); affirmed 350 U.S. 587 (1955).

²⁰⁶ Cf. *Powell v. Alabama*, 287 U.S. 45 (1932).

²⁰⁷ *Danziger v. U.S.*, 161 F. (2d) 299; certiorari denied 332 U.S. 768.

Moreover, the Due Process Clause of the Fourteenth Amendment prohibits a state court from sentencing a defendant without a public trial.²⁰⁸ This right may be waived.²⁰⁹

The Supreme Court, in the *Oliver* case, stated:

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage . . . The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber and to the French Monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolize a menace to liberty.

* * *

"It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."

In that case the Court said it had been unable to find "a single instance of a criminal trial conducted *in camera* in any federal state or municipal court during the history of this country." Therein the Court upset a conviction under Michigan's one-man, judge-grand jury system by which a defendant was tried and convicted, by a judge in secret and sentenced to jail for contempt of court for alleged false swearing. It is pointed out that our law, based upon centuries of tragic human experience, requires that before a man can be sent to a penitentiary, he is entitled to a speedy trial, to be present in court at every step of the proceedings, at all times to be represented by counsel or to speak in his own behalf, and to be informed in open court of every action taken against him, until he is lawfully sentenced; and that these are "basic rights".²¹⁰

There is some difference of opinion between the State and Federal Courts over what group of spectators, if any, can properly be excluded from a criminal trial. All courts have held that an accused is, at the very least, entitled to have his friends, relatives and counsel present, no matter with what offence he may be charged. Generally, courts do have some discretion to exclude persons in order to avoid overcrowding or disorder or, in certain types of cases, to safeguard public health, welfare and morality.²¹¹

3. Right to a Local Trial

An accused has a constitutional right to be tried in the Federal

²⁰⁸ *In re William Oliver*, 333 U.S. 257 (1948); Cf. *Gaines v. Washington*, 277 U.S. 81 (1928).

²⁰⁹ *U.S. v. Sorrentino*, 175 F. (2d) 721, certiorari denied 338 U.S. 868, 896 (1949).

²¹⁰ *Pollard v. U.S.* 352 U.S. 354, 364, (1957) dissenting opinion.

²¹¹ See *People v. Jelke*, 308 N.Y. 56 (1954); *U.S. v. Kobli*, 172 F. (2d) 919 (1949); *Tanksley v. U.S.*, 145 F. (2d) 58 (1944); *Gillars v. U.S.*, 182 F. (2d) 962 (1956).

District or state in which the offence was committed. The purpose is to fix the *situs* of the trial in the place where, generally, the friends and witnesses of an accused permanently reside.²¹² This right may be waived.

4. Right to a fair Trial

This has been discussed above. The right to a fair trial is a due process of law requirement in federal and state trials.²¹³

5. Right to an Impartial Jury

In addition to the Sixth Amendment, *supra*, the United States Constitution provides in Art. III, Sec. 2, Cl. 3:

"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; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

These provisions have been held not to be limitations on the States; but under the Due Process Clause of the Fourteenth Amendment, the States must accord an accused person a fair and impartial trial (most State Constitutions require a jury trial). The constitutional provision means the English common law trial by a jury of twelve persons and a unanimous verdict.

Such a jury must be drawn from a cross-section of the community. Held, by the Supreme Court, to be unconstitutional are juries from which are excluded specific races, such as Negroes or Mexicans, or women in states where eligible or daily wage earners.²¹⁴

An accused is entitled to a trial by an unbiased jury and procedures must be available for challenging prospective jurors for bias.²¹⁵

Inflammatory and prejudicial press publicity may create an atmosphere precluding a fair trial and causing reversal of a conviction.²¹⁶ The right of a free press in relation to the right of a fair trial is a lively civil liberties issue today in the United States. Trial by a mob-dominated jury is not a fair trial.²¹⁷ New York's "blue ribbon"

²¹² *Johnston v. U.S.*, 351 U.S. 215 (1956); *U.S. v. Johnson*, 323 U.S. 273 (1944).

²¹³ *Adamson v. California* 332 U.S. 46, 53 (1947) and cases there cited; *In re William Oliver*, *supra*.

²¹⁴ *Norris v. Alabama*, 294 U.S. 587 (1935); *Avery v. Georgia*, 345 U.S. 559 (1953); *Ballard v. U.S.*, 329 U.S. 187 (1946); *Thiel v. So. Pac. Co.*, 328 U.S. 217 (1946).

²¹⁵ *Cf. Frazier v. U.S.*, 335 U.S. 497 (1948); *Morford v. U.S.*, 339 U.S. 258 (1950); *Dennis v. U.S.*, 339 U.S. 162 (1950).

²¹⁶ *Cf. Shepard v. Florida*, 341 U.S. 50 (1951), concurring opinion; *Delaney v. U.S.*, 199 F. (2d) 107 (1952); *Maryland v. Baltimore Radio Shop*, 193 Md. 300 (1949); certiorari denied 333 U.S. 912 (1950).

²¹⁷ *Cf. Moore v. Dempsey*, 261 U.S. 86 (1923).

jury system in which a jury is drawn from a specially qualified panel has been held not a violation of the Federal Constitution.²¹⁸

6. Right to Confrontation of Witnesses

This is one of the basic protections secured by the Sixth Amendment. The "faceless accuser" has no place in federal criminal trials by the Sixth Amendment or in state criminal trials by the due process clause of the Fourteenth Amendment. This right includes the right of the accused to cross examine the witnesses against him.²¹⁹ Confrontation and cross examination under oath are essential if the American ideal of due process is to remain a vital force in our public life.²²⁰

7. Right to Compulsory Process to Obtain Witnesses

It is elemental that an accused has a right to have subpoenas issued for the purpose of obtaining available witnesses and documents in his favour.²²¹ This does not include non-resident alien witnesses.²²²

8. Right to Assistance of Counsel

While this provision of the Sixth Amendment has been held only to apply to trials in Federal courts,²²³ nevertheless, the Supreme Court has repeatedly held that the due process clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in criminal cases where there are special circumstances showing that without a lawyer a defendant could not have a fair and adequate defence.²²⁴

Rules applicable to federal trials (Rule 44, Fed. Rules of Crim. Proc.) provide that if a defendant appears in court without counsel, the Court must advise him of his rights to counsel and assign counsel to represent him unless he elects to proceed without counsel or is able to obtain counsel. A federal trial without competent counsel or an intelligent waiver of counsel bars a conviction of the accused.²²⁵

In reference to state criminal trials, the Supreme Court has said that an accused must be given reasonable opportunity to

²¹⁸ *Moore v. N.Y.*, 333 U.S. 565 (1948); *Fay v. N.Y.*, 333 U.S. 261 (1947).

²¹⁹ *In re Oliver*, 333 U.S. 257, 278 (1948).

²²⁰ *Peters v. Hobby*, 349 U.S. 331, 351 concurring opinion (1955).

²²¹ *United States v. Schneiderman*, 106 F. Supp. 731 (1952).

²²² *Gillars v. United States*, 182 F.2d 962, 978 (1950).

²²³ *Powell v. Alabama*, 287 U.S. 45 (1932).

²²⁴ See for example: *Wade v. Mayo*, 334 U.S. 672 (1948); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Palmer v. Ashe*, 342 U.S. 134 (1951).

²²⁵ *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938); *Walker v. Johnston*, 312 U.S. 275 (1941); *Glasser v. U.S.* 315 U.S. 60 (1942); *U.S. v. Morgan*, 346 U.S. 502, 512 (1954).

employ and consult with counsel, otherwise his right to be heard by counsel would be of little worth.²²⁶

If an accused is insane, his need of counsel is obvious.²²⁷

The right to counsel is not a right confined merely to representation during the trial on the merits. An accused "requires the guiding hand of counsel at every step in the proceedings against him". The constitutional right does not justify forcing counsel upon an accused who wants none.²²⁸

Assistance of counsel, unless intelligently waived by the accused, is an essential element of a fair hearing.

Where a person convicted in a state court has not intelligently and understandingly waived the benefit of counsel and where the circumstances show that his rights could not have been fairly protected without counsel, his conviction will be invalidated under the due process clause of the Fourteenth Amendment. If in any case, civil or criminal, a state or federal court arbitrarily refuses to hear a party by counsel, such refusal would be a denial of due process.²²⁹

The right to counsel includes opportunity to the accused to consult with counsel to prepare his defence; and an accused does not enjoy the effective aid of counsel if denied the right of private consultation with him before and during trial by the interception of the lawyer-client communications.²³⁰

A witness before a grand jury cannot insist, constitutionally, on being represented by his counsel, nor can a witness before other investigatory bodies.²³¹

9. Right to be Informed of the Nature and Cause of the Accusation

An accused must be informed of the nature and cause of the accusation sufficiently in advance of trial to enable him to determine the nature of the plea to be entered and to prepare his defence if one is to be made.²³²

²²⁶ *Chandler v. Fretag*, 348 U.S. 3 (1954); *Hawk v. Olson*, 326 U.S. 271, 277-8 (1945); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *House v. Mayo*, 324 U.S. 42, 46 (1945); *White v. Ragen*, 324 U.S. 760, 764 (1945).

²²⁷ *Massey v. Moore*, 348 U.S. 105, 108 (1954).

²²⁸ *Johnson v. Zerbst*, *supra*, at p. 463; *Powell v. Alabama*, 287 U.S. 45, 659 (1932).

²²⁹ *Moore v. Michigan*, 355 U.S. 156 (1957); *Reece v. Georgia*, 350 U.S. 85 (1955); *Carter v. Illinois*, 329 U.S. 173, 174 (1946); *Penn. ex rel. Herman v. Claudy*, 350 U.S. 116, 118 (1956); *Powell v. Alabama*, 287 U.S. 45 (1932); *Chandler v. Fretag*, 348 U.S. 3 (1954).

²³⁰ *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Coplon v. U.S.*, 191 F. (2d) 749 (1951).

²³¹ *In re Grogan*, 352 U.S. 330 (1957); *In re Black*, 47 F. (2d) 542 (1931); *Bowles v. Baer*, 142 F. (2d) 787 (1944).

²³² *Powell v. Alabama*, 287 U.S. 45 (1932); *In re Oliver*, 333 U.S. 257, 279 (1948); Cf. *White v. Ragen*, 324 U.S. 760, 764 (1945); *U.S. v. Cruikshank*, 92 U.S. 542, 557-558 (1875).

e. Seventh Amendment Liberties

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (U.S. Const. Amendment VII).

This Amendment relates only to trials in federal courts, not to state court trials. But, generally, similar rights are available in state civil trials. Neither Congress nor the federal courts may deprive a litigant of a right to a jury trial guaranteed by this Amendment. This applies only to actions at law – suits at common law – in contradistinction to "equity", "admiralty" and "maritime jurisprudence".²³³ "Trial by jury" refers to a jury of twelve men.

f. Eighth Amendment: Right to Bail and Freedom from Cruel and Unusual Punishments

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., Eighth Amendment).

This Amendment is a limitation on the Federal Government, not the states.²³⁴

1. Excessive Bail

While this is a limitation on the federal courts, all states have laws against excessive bail. The Federal Rules of Criminal Procedure (Rule 46-c) sets forth the traditional standards to be applied in each case: the amount of bail shall be such as will insure the presence of the defendant, having regard to the nature and circumstances of the offence, the weight of the evidence against the accused, his financial ability to give bail and his character. What is "excessive" depends on the facts of each case.

The purpose of bail is to assure the accused's presence in court to stand trial and to submit to sentence. Bail set at a figure higher than an amount reasonably calculated to fulfil this purpose is "excessive". Bail is basic to the American system of law.²³⁵ This Amendment means that a person may not be capriciously held by demanding bail in such amount that there is, in fact, a denial of

²³³ *Slocum v. N. Y. Life Ins. Co.*, 228 U.S. 364, 387 (1913), *U.S. v. State of Louisiana*, 339 U.S. 699 (1950); *Capital Traction Co. v. Hoff*, 174 U.S. 1 (1899).

²³⁴ *Siegel v. Ragen*, 88 Fed. Supp. 996; 180 F. (2) 785 (1950) certiorari denied 339 U.S. 990.

²³⁵ *Herzog v. U.S.*, 1955, 352 U.S. 844 (1956).

bail or detention without bail or without justifiable reason therefor.²³⁶ The Supreme Court recently said:

"This traditional right to freedom before conviction permits the unhampered preparation of a defence, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Stack v. Boyle* 342 U.S. 1 (1951).

In *Stack v. Boyle*, the Court held that in the absence of a showing by the Government justifying the same, the large amounts fixed as bail in a case involving twelve Communist party leaders did not square with "constitutional standards for admission to bail".

2. Cruel and Unusual Punishment

"Cruel and unusual" punishment usually implies something inhuman, barbarous or torturous or punishment unknown at common law.²³⁷ The constitutional protection is against cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.²³⁸ The Courts have held that punishment by death is not cruel, in itself, or by such methods as electrocution, hanging, shooting, beheading, lethal gas, imprisonment. Punishments are cruel when they involve torture or lingering death, such as burning at the stake, crucifixion, breaking on the wheel.²³⁹ The punishment of twelve years in irons at hard and painful labor for falsifying public records was held cruel and unusual in its excessiveness.²⁴⁰

In a recent case,²⁴¹ the Supreme Court held it to be unconstitutional, under this Amendment, for a native born American to be declared to have lost his United States citizenship and to have become stateless by reason of his conviction by a court martial for wartime desertion. The Court said that the exact scope of the constitutional phrase "cruel and unusual" had not been detailed by that Court, but the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The Court said:

"The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."

While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.

²³⁶ *Carlisle v. Landon*, 73 Sup. Ct. Rep. 1179 (1953).

²³⁷ *Rosenberg v. Carroll*, 99 Fed. Supp. 630 (D.C., N.Y., 1951).

²³⁸ *Louisiana v. Ex rel. Francis v. Resweber*, 329 U.S. 459 (1957).

²³⁹ *In re Kemmler*, 136 U.S. 436, 446-7 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1878); *Hernandez v. State*, 42 Ariz. 424; 82 P. (2d) 18 (1934).

²⁴⁰ *Weems v. U.S.* 217 U.S. 349 (1910).

²⁴¹ *Trop v. Dulles*, 356 U.S. 86 (1958).

The words of the Amendment are not precise and their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

g. Freedom from Ex Post Facto Laws and Bills of Attainder

"No Bill of Attainder or ex post facto Law shall be passed." (Art. I, Sec. 9, Cl. 3, U.S. Const.).

"No State shall . . . pass any Bill of Attainder, ex post facto Law . . ." (Art. I, Sec. 10, Cl. 1, U.S. Const.).

These constitutional provisions are directed against both federal and state governments.

1. Bills of Attainder

A bill of attainder is a legislative act which inflicts punishment on individuals or members of a group without a judicial trial. If the punishment is less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. The punishment referred to may be death, fine, imprisonment, confiscation of property, barring a man from his profession or forbidding payment of salaries of government employees.²⁴²

Recently in the *Lovett* case, the Supreme Court stated, "When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned . . . They intended to safeguard the people of this country from punishment without trial by duly constituted courts."

2. Ex Post Facto Laws

An ex post facto law is retroactive legislation that makes criminal and imposes punishment for an act which was innocent and not punishable when it was committed, or inflicts a greater punishment than was provided by law when the crime was committed. Such laws are unconstitutional.²⁴³

To open the door to retroactive criminal statutes would rightly be regarded as a most serious blow to one of the civil liberties protected by our Constitution.²⁴⁴

²⁴² *Cummings v. State of Missouri*, 4 Wall. U.S. 277, 323 (1867); *Ex parte Garland*, 4 Wall. U.S. 303 (1867); *U.S. v. Lovett*, 328 U.S. 303 (1946).

²⁴³ *Burgess v. Salmon*, 97 U.S. 381 (1876); *Fletcher v. Peck*, 6 Cranch U.S. 87 (180); *Cummings v. Missouri*, 4 Wall. U.S. 277 (1867); Cf. *Garner v. Board of Public Works of Los Angeles*, 341 U.S. 716 (1941).

²⁴⁴ *Rosenberg v. U.S.*, 346 U.S. 273, 290 (1953).

h. Right of Habeas Corpus

"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." (Art. I, Sec. 9, Cl. 2, U.S. Const.).

This right exists in all states. A writ of *habeas corpus* is a device by which an imprisoned person obtains from a judge a prompt decision on the legality of his imprisonment. It protects persons being held in custody indefinitely without a hearing on the legality of their detention. A state judge cannot issue a writ of *habeas corpus* on behalf of a federal prisoner; but a federal judge can determine by a *habeas corpus* proceeding whether a state prisoner is being denied his federal rights. The United States Supreme Court has granted many petitions for *habeas corpus* of state convicts alleging a denial of their constitutional rights in the state proceedings and trial which led to their convictions.

VI. THIRTEENTH AMENDMENT: FREEDOM OF LABOUR

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." (U.S. Const. Amendment XIII, Sec. 1).

This Amendment, adopted in 1865 at the end of the Civil War, abolished slavery and outlawed involuntary servitude. In 1867 Congress passed the Anti-Peonage Act,²⁴⁵ making it a crime to hold a person to service or labour under a system known as "peonage". Peonage is a status or condition of compulsory service based upon a real or alleged indebtedness. The Supreme Court has held unconstitutional all laws which have attempted to maintain and enforce, directly or indirectly, involuntary service or labour in liquidation of a debt or obligation.²⁴⁶

VII. FOURTEENTH AMENDMENT: CIVIL LIBERTIES IN RELATION TO DISCRIMINATORY PRACTICES

The Fourteenth Amendment provides in part:

"§ 1 . . . 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." U.S. Const. Amend. XIV, § 1.

²⁴⁵ Now, Federal Civil Rights Act, Title 42 U.S.C.A. § 1994.

²⁴⁶ *U.S. v. Reynolds*, 235 U.S. 133 (1914); *Pollick v. Williams*, 322 U.S. 4 (1944); *Bailey v. Alabama*, 219 U.S. 219 (1911); *Clyatt v. U.S.*, 197 U.S. 207 (1905).

The Fifth Amendment states in part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law; . . ." U.S. Const. Amend. V.

These constitutional provisions provide the basis for federal and state laws against discrimination between persons on account of race, colour and creed.

a. Discrimination in Public Education

One of the great advances in civil liberties in the past decade has been the decisions of the Supreme Court relating to racial discriminations, notably in the public schools. In the famous "School Segregation Cases" of 1954²⁴⁷ that Court held that segregation of white and negro children in the public schools in a state solely on the basis of race, pursuant to state laws permitting and requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment, even though the physical facilities of white and Negro schools may be entirely equal. These five cases arose in Kansas, South Carolina, Virginia and Delaware and in each, Negro children sought the aid of the court in obtaining admission to the public schools of their respective communities on a non-segregated basis. In each instance they had been denied admission to such schools attended by white children under laws permitting or requiring segregation according to race. The lower courts denied relief on the basis of the so-called "separate but equal doctrine" first announced by the Supreme Court in 1896.²⁴⁸ Under that doctrine equality of treatment was said to be accorded when the races were provided substantially equal facilities, even though those facilities be separate. The Court said:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."

Having found that segregation is unconstitutional under the "equal protection of the laws clause" of the Fourteenth Amendment, the Court found it unnecessary to decide whether segregation also violates the "due process clause" of the Fourteenth Amendment.

On the same day, however, the Supreme Court held that racial segregation in the public schools of the District of Columbia is a "denial of the due process of law guaranteed by the Fifth Amendment of the Constitution".²⁴⁹ It stated that "segregation in public education is not reasonably related to any proper governmental

²⁴⁷ *Brown v. Board of Education* (5 cases), 347 U.S. 483 (1954).

²⁴⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²⁴⁹ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

objective" and thus imposes on Negro children a burden that constitutes "an arbitrary deprivation of their liberty in violation of the due process clause". (The Fifth Amendment is applicable to the District of Columbia, but the Fourteenth Amendment applies only to the States.)

On May 31, 1955 the Supreme Court handed down its decree to implement its said decision of 1954 "declaring the fundamental principle that racial discrimination in public education is unconstitutional"; and the Court stated that "all provisions of federal, state or local law requiring or permitting such discrimination must yield to this principle".²⁵⁰ The Court pointed out that "substantial steps to eliminate racial discrimination in public schools have already been taken" and recognized that "full implementation of these constitutional principles may require solution of varied local school problems"; but, nevertheless, required that the defendants make "a prompt and reasonable start towards full compliance" and proceed "with all deliberate speed".

That implementation process is now proceeding in the Southern States, but only against much opposition and even government defiance in certain areas, as, for example, in Little Rock, Arkansas.

After the School Board of Little Rock had, for one year, put into operation, under force, a court-approved plan of integration,²⁵¹ the local United States District Court, on June 21, 1958, entered an order authorizing the Little Rock School Board to suspend that plan of integration until January, 1961; and on June 23, 1958 refused to stay the execution of its order. On an appeal taken directly to the United States Supreme Court, the latter Court on June, 30, 1958 referred the matter to the local United States Court of Appeals on jurisdictional grounds and suggested action by that Court "in ample time to permit arrangements to be made for the next school year".²⁵² Thereafter on September 29, 1958, in a landmark, unanimous decision in *Cooper v. Allen*,²⁵³ the Supreme Court refused to allow suspension in Little Rock of that plan of integration. The Court said in part:

"The controlling legal principles are plain. The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws. 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws.

* * *

²⁵⁰ *Brown v. Board of Education*, 349 U.S. 294 (1955).

²⁵¹ *Aaron v. Cooper*, 143 F. Supp. 855; 243 F. 2d 361 (1957).

²⁵² *Aaron v. Cooper*, 357 U.S. 566 (1958).

²⁵³ 357 U.S.—; 3 L.Ed. 2nd 5; Sept. 29, 1958; N.Y. Times Sept. 30, 1958.

"In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or colour declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive scheme for segregation whether attempted 'ingeniously or ingenuously.' *Smith v. Texas*, 311 U.S. 128, 132.

* * *

"State support of segregated schools through any arrangement, management, funds or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling v. Sharpe*, 147 U.S. 497."

The Little Rock public schools were thereupon ordered closed by state officials, rather than to have them integrated, and in attempted circumvention of the Supreme Court's decision, a "private" school corporation was organized and many of the Little Rock public school pupils are currently attending "private" segregated schools, apparently being supported by private funds. In the meantime, litigation is pending in the courts of Arkansas and in several other states over the failure of certain state officials to effect integration and over several methods devised by them in an effort to legally evade the Supreme Court decision. The issue is a momentous one. Under the rule of law that the Constitution is the supreme law of the land and the federal judiciary is supreme in the exposition of the law of the Constitution, the states and all of their agencies are legally required to, and should, abide by the Supreme Court decision.

In another recent decision²⁵⁴ the Supreme Court held that a Negro is entitled to a prompt admission to a graduate professional school of a state under the rules and regulations applicable to other qualified candidates. In earlier decisions, on the graduate school level, the Court held that Negro applicants were entitled to attend state-supported graduate schools without discrimination because of colour and indicated therein that segregated schools for Negroes could not provide them with equal educational opportunities.²⁵⁵

b. Discrimination in Housing

1. By Zoning

Segregation by the device of municipal zoning laws is unconstitutional. Municipal ordinances forbidding Negroes to occupy houses in blocks where the majority of residents are white, or except upon consent of a majority of the residents of the neighborhood, have been held unconstitutional as a violation of the Fourteenth Amend-

²⁵⁴ *Hawkins v. Board of Control*, 350 U.S. 413 (1956).

²⁵⁵ *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948); cf. *Missouri ex rel Gaines v. Canada*, 305 U.S. 337 (1938).

ment preventing interference with property rights except by due process of law.²⁵⁶

2. By Restrictive Covenants

Nothing in the Constitution forbids racial discrimination by private persons, as distinguished from actions of federal, state or municipal governments or other agencies.

The practice grew up of excluding Negroes and other races from privately controlled housing developments by another device – of restrictive covenants in leases or deeds, such as a clause restricting the use or occupancy of property by any person except of the Caucasian race. In recent years the Supreme Court has held that while such covenants are private and not unlawful *per se*, they are not enforceable in any court of law because such judicial enforcement would constitute state action in violation of the equal protection of the laws under the Fourteenth Amendment.²⁵⁷

The Court stated in the *Shelly* case that it cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property.

Moreover, a racial restrictive covenant may not be enforced by a legal action for damages, as for example against a white co-covenator who broke the covenant, because that too would violate the equal protection policy.²⁵⁸

These decisions rest on the principle that a primary purpose of the Fourteenth Amendment was to establish equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action, on the part of the states, based on considerations of colour or race. That principle applies also to the Federal Government.

The effect of these decisions is this. Voluntary adherence to restrictive covenants constitutes individual action only and violates no constitutional provision; but if a court gives its sanction to the enforcement of the covenant, by equitable relief or by way of damages, the Fourteenth Amendment is violated.

There is still widespread discrimination in housing, private and public, on account of race or colour, particularly in certain geographical areas; but in recent years millions of United States citizens have won their legal and constitutional right to live in housing on a non-discriminatory basis. In many states and communities discrimination has been outlawed by legislation or court decisions in public and public-assisted housing.

²⁵⁶ *Buchanan v. Warley*, 245 U.S. 60 (1917); *Harmon v. Tyler*, 273 U.S. 668 (1927); see also *Qyama v. California*, 332 U.S. 633 (1948).

²⁵⁷ *Shelly v. Kramer*, 334 U.S. 1 (1948); *Hurd v. Hodge*, 334 U.S. 34 (1948).

²⁵⁸ *Barrows v. Jackson*, 346 U.S. 249 (1953).

c. Discrimination in the Right to Vote

The rights of citizens of the United States to vote cannot be denied or abridged by the United States or by any state on account of race, color, previous condition of servitude or sex. (U.S. Const., 15th and 19th Amendments).

These Amendments were designed to prohibit discrimination in matters of suffrage on account of race, color, sex and previous condition of servitude. They banned discrimination in voting by both state and nation. They include any community, state or national election in which public issues are decided or public officials elected. They granted a new constitutional right and established a national policy of exemption from discrimination in exercising the right of suffrage.²⁵⁹

The right to vote in the states comes from the states; but the right of exemption from the prohibited discriminations comes from the United States. The first has not been granted or secured by the Constitution, but the last has been.²⁶⁰

Efforts have been made in southern states to disfranchise Negroes by various devices. Until recently, these efforts have been quite successful. Among these devices are technical registration and poll tax requirements, so-called "literary" tests (operated to qualify whites and to exclude Negroes) and "grandfather" clauses. The Supreme Court has invalidated such circumventing schemes as unconstitutional. Held unconstitutional have been "grandfather" clauses,²⁶¹ white "primary" elections from which Negroes were excluded;²⁶² and "literary" tests which were unfair either inherently or as administered.²⁶³

The Supreme Court also has invalidated state statutes turning over the functions of nominating candidates to political parties so that the party convention would exclude Negroes by rule instead of by statute.²⁶⁴ It has voided a scheme where the Democratic party, acting as if it were a private club, excluded Negroes from its primary elections.²⁶⁵ Recently held unconstitutional was the device called the "Jaybird Association", claiming to be a private club for white people only, which sought indirectly to operate as the Democratic party in selecting nominees for an election.²⁶⁶

²⁵⁹ *Terry v. Adams*, 345 U.S. 461 (1953).

²⁶⁰ *Terry v. Adams*, *supra*; *U.S. v. Cruikshank*, 92 U.S. 542, 555-6; *Ex parte Yarbrough*, 110 U.S. 651, 654-5 (1884); *Logan v. U.S.*, 144 U.S. 263, 286 (1892).

²⁶¹ *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. U.S.*, 238 U.S. 347 (1915).

²⁶² *Nixon v. Herndon*, 273 U.S. 536 (1927) and 286 U.S. 73 (1932).

²⁶³ *Davis v. Schnell*, 81 F. Supp. 872 (1949), *aff'd* 336 U.S. 933 (1949).

²⁶⁴ *Smith v. Allwright*, 321 U.S. 649 (1944).

²⁶⁵ *Rice v. Elmore*, 165 F. 2d 387 (1947); *certiorari denied* 333 U.S. 875 (1948).

²⁶⁶ *Terry v. Adams*, *supra*.

d. Discrimination in Selection of Juries

The Supreme Court has consistently held, in many cases, that a criminal defendant is denied equal protection of law under the Fourteenth Amendment if he is indicted by a grand jury or tried by a petty jury from which members of his race or colour have been excluded because of their race or colour.²⁶⁷ Under these authorities no state is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Federal Constitution forbids; and local tradition, in the selection of juries, cannot justify failure to comply with the mandate requiring equal protection of the laws. When a jury selection plan, whatever it is, operates to completely exclude representatives of any large racial group, indictments and verdicts returned by such a jury cannot stand.

e. Discrimination in Places of Public Accommodation

In several quite recent cases the Supreme Court has held that a state statute requiring segregation of white and coloured passengers on both interstate and intrastate motor vehicle carriers is invalid as an undue burden on interstate commerce; and that interstate railroad carriers cannot segregate or discriminate against white and coloured passengers.²⁶⁸ There have been other decisions holding that discriminations on account of race or colour in public parks, beaches and other places of public accommodation are constitutionally invalid.

VIII. CIVIL LIBERTIES AND CONGRESSIONAL INVESTIGATIONS

Following World War II there appeared a new kind of Congressional inquiry unknown in prior periods of American history, due principally to various investigations into the threat of subversion of the United States Government. Abuses of this investigative process led to abridgements of protected freedoms and a very trying period for civil liberties. The central theme of these recent cases has been the application of the Bill of Rights as a restraint upon the assertion of this form of government power.²⁶⁹

The Supreme Court has now ruled that Congress undoubtedly has the power, by itself or through its committees, to investigate matters and conditions relating to contemplated legislation. This power is co-extensive with the power to legislate. But this power

²⁶⁷ *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Reece v. Georgia*, 350 U.S. 85; *Hernandez v. Texas*, 347 U.S. 475 (1953); *Cassell v. Texas*, 339 U.S. 282; *Patton v. Mississippi*, 332 U.S. 463; *Pierre v. Louisiana*, 306 U.S. 354 (1939).

²⁶⁸ *Morgan v. Virginia*, 328 U.S. 378 (1946); *Henderson v. U.S.*, 339 U.S. 816 (1950); *Mitchell v. U.S.*, 313 U.S. 80 (1941).

²⁶⁹ *Watkins v. U.S.*, 354 U.S. 178, 195 (1957).

is subject to recognized limitations. It cannot be used to inquire into an individual's private affairs, unrelated to a valid legislative purpose, or extended to an area in which Congress is forbidden to legislate. It cannot be confused with any of the powers of law enforcement. It cannot be used to expose for the sake of exposure, to the detriment of private rights of individuals.

The Bill of Rights is applicable to such congressional investigations. The power to investigate is limited by the specific individual guarantees of the Bill of Rights, such as the freedoms of speech, press, religion, political belief and association, and the privilege against self-incrimination and freedom from unreasonable searches and seizures.²⁷⁰ When Congress seeks to enforce its investigating authority through the criminal process administered by the federal judiciary, i.e., by contempt proceedings, the safeguards of criminal justice become operative. A witness before a Congressional committee may refuse to answer questions not clearly pertinent to any authorized subject matter of the hearing and may not be convicted of contempt.²⁷¹

IX. RIGHT OF CITIZENSHIP

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." (U.S. Const., 14th Amend., Sec. 1, Cl. 1).

This is the basic constitutional provision crystallizing the right of citizenship. United States citizenship is thus the constitutional birth-right of every person born in this country; and, also, the constitutional right of every person lawfully naturalized. The Supreme Court has recently decided three important cases in this field.

In *Perez v. Brownell*,²⁷² it was held that Congress had power to provide (Nationality Act of 1940, Sec. 401(e)) that anyone who votes in a political election in a foreign State shall lose his United States citizenship. The Court refused to pass on the constitutionality of Congress' right (under Sec. 401(j)) to withdraw citizenship from one leaving the country in time of war or national emergency to evade the draft.

In *Trop v. Dulles*,²⁷³ the Supreme Court held unconstitutional an act of Congress (Nationality Act of 1940, Sec. 401(g)) providing that citizenship may be lost to a native-born American

²⁷⁰ *Quinn v. U.S.*, 349 U.S. 155, 160-1 (1955); *Watkins v. U.S.*, 354 U.S. 178 (1957); *U.S. v. Rumley*, 345 U.S. 41 (1953).

²⁷¹ *Sacher v. U.S.*, 356 U.S. 576 and *Watkins v. U.S.*, *supra*.

²⁷² 356 U.S. 44 (1958).

²⁷³ 356 U.S. 86 (1958).

because of his conviction by court martial for wartime desertion. This statute was held to be unconstitutional under the Eighth Amendment on the ground that punishment by taking away citizenship was a "cruel and inhuman punishment".

In *Nishikawa v. Dulles*,²⁷⁴ the Supreme Court refused to hold that a native-born American citizen, who was conscripted into the Japanese Army while on a visit to Japan, had thereby intended to voluntarily forfeit his United States citizenship and had lost it under Section 401, (e) of the Nationality Act of 1940. The Court held the burden was upon the Government to prove an act that shows expatriation by clear, convincing and unequivocal evidence. The burden of proof is just as it is in denaturalization cases.²⁷⁵

United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country.²⁷⁶ No conduct results in expatriation unless the conduct is engaged in voluntarily.²⁷⁷

In *Perez's* case, Chief Justice Warren stated:

"Citizenship is man's basic right for it is nothing less than the right to have rights. . ."

"Under our form of government, as established by the Constitution, the citizenship of the lawfully naturalized and the native-born cannot be taken from them.

"There is no question that citizenship may be voluntarily relinquished."

X. LIBERTY OF MOVEMENT WITHIN AND WITHOUT THE COUNTRY

a. The Right to Travel Within the Country

United States citizens have the right to travel freely across State lines. It has been said this is a right of national citizenship protected from state abridgment.²⁷⁸ Thus, the State may not lay a tax upon persons leaving or passing through that State or prohibit the entry therein of indigent persons.²⁷⁹ Of course, persons placed under legal restraint, such as persons on bail or parole, could not claim such freedom of movement.

²⁷⁴ 346 U.S. 129 (1958).

²⁷⁵ *Gonzales v. Landon*, 350 U.S. 920 (1955); *Baumgartner v. U.S.*, 322 U.S. 665 (1944); *Schniederman v. U.S.*, 320 U.S. 118 (1943).

²⁷⁶ *Gonzales v. Landon*, 350 U.S. 920 (1955); *Baumgartner v. U.S.*, 322 U.S. 665 (1944); *Schniederman v. U.S.*, 320 U.S. 118 (1943).

²⁷⁷ *Mandoli v. Acheson*, 344 U.S. 133 (1952); *Acheson v. Murata*, 342 U.S. 900 (1952); *Acheson v. Okimura*, 342 U.S. 899 (1952).

²⁷⁸ *Twinning v. New Jersey*, 211 U.S. 78, 97 (1908); *Edwards v. California*, 314 U.S. 160 (1941), concurring opinions of Douglas and Jackson, JJ.

²⁷⁹ *Crandall v. State of Nevada*, 73 U.S. (6 Wall.) 35 (1867); *Edwards v. California*, 314 U.S. 160 (1941); Cf. *Williams v. Fears*, 179 U.S. 270, 274 (1900).

b. Right to a Passport and to Travel Without the Country

The law is summed up in a very recent case,²⁸⁰ as follows:

"The right to travel is a part of the 'liberty' of which a citizen cannot be deprived without due process of law under the Fifth Amendment . . ."

"Freedom to travel is, indeed, an important aspect of the citizen's 'liberty' . . ."

"Freedom of movement across frontiers, in either direction, and inside frontiers as well, is part of our heritage. . . Freedom of movement is basic in our scheme."

While stating that it was not required to "reach the question of constitutionality", the Court observed, "we deal here with a constitutional right of the citizen" and "start with an exercise by an American citizen of an activity included in constitutional protection."

In that case the Secretary of State had denied passports to two citizens on the ground they were Communists or adherents to the Communist line and had refused to make a non-Communist affidavit. In a companion case,²⁸¹ decided the same day, a passport had been refused a citizen because it would be "contrary to the national interest" and due to his claimed associations with Communists and persons suspected of espionage. Both of these citizens were denied their freedom of movement solely because of their refusal to be subjected to inquiry into their beliefs and associations.

The Supreme Court held these grounds to be "impermissible"; and that the Secretary of State had no authority from Congress to withhold passports to citizens "because of their beliefs or associations" and could not "employ that standard to restrict the citizens' right of free movement".

The Court suggested that passports might be withheld from persons not owing allegiance to the United States or from persons engaged in illegal or criminal conduct; but that this "liberty" could be curtailed or regulated only under acceptable standards and powers subject to narrow construction.

In another recent case,²⁸² it was held that "the right to travel . . . is a natural right" and any restraints imposed thereon are subject to "procedural due process".

²⁸⁰ *Kent v. Dulles*, 357 U.S. 116 (1958).

²⁸¹ *Dayton v. Dulles*, 357 U.S. 144 (1958).

²⁸² *Schachtman v. Dulles*, 225 Fed. (2d) 938 (1955).

The Supreme Court upheld the right of the Government, immediately after Pearl Harbour, to confine citizens of Japanese origin in their residences under a curfew law and to exclude similar citizens from their homes on the West Coast and, thus, to restrict their freedom of movement; but this was held to be justified only "under circumstances of direct emergency and peril".²⁸³

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²⁸³ *Korematsu v. U.S.*, 323 U.S. 214 (1944); *Hirabayashi v. U.S.*, 320 U.S. 81 (1943).

NOTES

JUDICIAL INDEPENDENCE IN THE PHILIPPINES

Two centuries ago, Montesquieu published his celebrated work, "Spirit of Laws," in which he set forth the theory of the tripartite division and separation of the powers of government.¹ Two decades thereafter, the American people established a government based on Montesquieu's theory, and more than half a century ago, brought the same theory of government to the Philippines. In the light of the experience the Filipino nation has had under a tripartate form of government, and of what past and contemporary history has shown concerning conditions in totalitarian states, the Filipino people are fully convinced that the placing of the judicial power in a separate and independent branch of government, in combination with the practice of judicial review, is essential to the attainment of the Rule of Law. Thus, when they embarked upon the task of framing the Constitution of the Republic of the Philippines through a Constitutional Convention, they lodged the judicial power exclusively in one of the three grand and co-ordinate departments into which they divided the government (the other departments being the Executive and Legislative). They made the Judicial department to consist of a Supreme Court and such other inferior courts as may be established by law. Hence, the opening Section 1, Article VIII of the Philippine Constitution, entitled "JUDICIAL DEPARTMENT" reads :

SECTION 1. The Judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law.

In the implementation of this provision of the Constitution, the inferior courts have, through statutory enactments, been consti-

¹ "When the legislative and executive powers are united in the same person, or the same body of magistrates, there can be no liberty, because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty of the judicial power if it be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression. There would be an end of everything were the same man, or the same body, whether of nobles or of the people, to exercise these three powers, — that of enacting laws, that of executing the public resolutions, and that of trying the cases of individuals." *L'Esprit des Lois*, Bk. XI, Ch. 6.

tuted by the Philippine law-making-body, known as the Congress of the Philippines, so that today the present judicial system of the Philippines is composed of the Supreme Court, and the following statutory courts: a Court of Appeal, Courts of First Instance, each presided over by a judge, in the various judicial districts into which the Philippines has been divided, a Court of Industrial Relations, a Court of Agrarian Relations, a Juvenile and Domestic Relations Court and Municipal and Justices of the Peace Courts.

One of the main concerns of the Constitutional Convention, of which the writer was a Member and the Chairman of its Committee on Judicial Power, was to insure the independence of the Judiciary. The delegates to the Constitutional Convention were unanimous in the conviction that the independence of the Judiciary is the firmest and most massive pillar of a truly democratic government; that a republic without a judiciary sufficiently independent to check usurpation, to protect public liberty, and to enforce private rights, would be as absurd as a society organized without any restraints of law, and that, as Justice Story observed: "In human governments there are but two controlling powers, — the power of arms and power of laws. If the latter are not enforced by a judiciary above fear and above all reproach, the former must prevail, and thus lead to the triumph of military over civil institutions."

It is not enough, however, that the Judiciary be independent; it is necessary that its independence be secured and preserved by effective constitutional barriers against any possible encroachments of the Executive and the Legislative. As Alexander Hamilton said in the North Carolina Convention: "The executive not only dispenses the honors, but holds the sword, of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or the wealth of society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgment, and must ultimately depend upon the aid of the executive for the efficacious exercise even of its faculty. This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power, that it can never attack with success either of the other two, and that all possible care is requisite to enable it to defend itself against their attacks."²

To safeguard the independence of the Judiciary, the Constitutional Convention agreed that the compensation of the members of the Judiciary shall not be diminished during their continuance in office,

² Alexander Hamilton's *Federalist*.

since "in the general course of human nature, a power over a man's subsistence, amounts to a power over his will," and in the words of Chief Justice Marshall, "For the common good – to render the judge perfectly and completely independent, with nothing to influence or control him but God, and his conscience – his compensation is protected from diminution in any form, whether it be a tax or otherwise, and should be assured to him in its entirety for his support." Thus Section 9 of Article VIII of the Philippine Constitution provides in part:

SECTION 9 . . . They (the members of the Supreme Court and all judges of the inferior courts) shall receive such compensation as may be fixed by law, which shall not be diminished during their continuance in office . . .

It was also the unanimous sentiment in the Constitutional Convention that one of the means of insuring the independence of the Judiciary was to give the judges a long term and a secured tenure of office. For it cannot be denied that the Judiciary is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches who have the custody of the purse and the sword of the community; that few men possess firmness of character to resist the torrent of popular opinion or the strength of will to sacrifice present ease and public favor in order to earn the slow rewards of a conscientious discharge of duty; and that nothing, therefore, can contribute so much as the permanent tenure of office to that independent spirit in the judges which is essential in the performance of their arduous duty of administering justice without fear of favor.

The members of the Constitutional Convention voted unanimously that judges shall hold office until they reach the age of seventy years or become incapacitated to discharge the duties of their office. This is reflected in the following provision of the Constitution:

SECTION 9. The members of the Supreme Court and all judges of inferior courts shall hold office during good behavior, until they reach the age of seventy years, or become incapacitated to discharge the duties of their office.

The corollary to security in the tenure of office is the guaranty against the arbitrary removal of judges. It is quite obvious that if judges were removable at pleasure, whoever holds the power of removal could use such power to control them in the discharge of their duties. Impartial justice cannot be administered unless judges perform their duties in an atmosphere of perfect freedom. They must be free from the fear of losing their offices or their salaries so long as they obey the law and follow the dictates of their conscience. Unless judges are protected against arbitrary removal from office the Judiciary cannot count on good judges, – judges who not

only possess a mastery of the principles of law, but do their duties in accordance with law; self-respecting and independent judges like the erudite Coke who was removed from office three centuries ago because when asked "if in the future he would delay a case at the King's order," he replied, "I will do what becomes me as a judge." For that reason, the Constitutional Convention agreed that judges can be removed only on the ground of misbehavior and that the removal of members of the Supreme Court must be made through impeachment.³ The procedure prescribed in the Constitution, broadly outlined, is as follows: the Lower House of the Congress, that is, the House of Representatives, by a vote of two-thirds of all its members, refers the charges to the Upper House, known as the Senate. Trial of the charges is then held in that body, which thereafter renders judgment. The concurrence of three-fourths of all the members of the Senate is necessary for a conviction. Judgment in cases of impeachment will not extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the government, although the party convicted will nevertheless be liable and subject to prosecution, trial and punishment according to the penal statutes.

The method of removing members of courts inferior to the Supreme Court is not prescribed by our Constitution. It is, however, provided for in a legislative enactment known as the Judiciary Act. Thereunder the members of the Court of Appeals, like members of the Supreme Court, cannot be removed from office except by impeachment upon the grounds and in the manner provided for in the Constitution, while judges of first instance cannot be removed by the President of the Philippines except after proper proceedings where they shall be heard in their own defense, and except upon recommendation of the Supreme Court.

It is to be observed that attempts to circumvent these guaranties against arbitrary removal can be made through the abolition of the courts or their reorganization. Against such attempt the courts must be vigilant. The Supreme Court of the Philippines, in the exercise of its power of judicial review, has had an occasion to pass upon the constitutionality of an Act which in reorganizing the courts, abolished some of them, and as a consequence of which the judges of the abolished courts were weeded out from office. Although the opinion of the Supreme Court was divided, the majority held that the Reorganization Act was invalid on the ground that it contravened the constitutional provision regarding judicial security of tenure, and that the abolition of the offices of the judges was, in the final analysis, an indirect way of removing them through legislative enactment and

³ Article IX, Philippine Constitution.

an attempt against the independence of the local judicature. One of the Justices,⁴ speaking for the majority made the following remarks:

"Admittedly, section 7 Article VIII aims to preserve the independence of the judiciary. It assures that so long as they behave, they cannot be removed from office – no matter what party controls the Government – until they reach the age of seventy years or become incapacitated. To complete their independence from political control or pressure, it further assures them that their salaries cannot be diminished during their incumbency. (Sec. 9). Hence it may be asked, of what consequence is the assurance of tenure of office and of salary non-diminution, if anyway judges could be legislated out through a court re-organization? ... The Constitutional Convention wanted judges unafraid to lose their jobs or their salaries, unmoved and unswayed by any considerations, except the trepidations of the judicial balance."

Another Justice,⁵ reasoned thus :

"We can have no independent Judiciary if judicial tenure may be shortened or destroyed, by legislative reorganization, however well intentioned and well meant. There is real and grave danger of the Judiciary eventually being subservient to a Legislature that thru abolition of judicial posts by means of a judicial reorganization can unmake judges. And how could a Judiciary, which under a constitutional form of government, is supposed to act as a check against the Legislature for any violation of the Constitution, do so when such Judiciary is subservient to the Legislature it is supposed to check?"

Reference to this interesting case is made to show that in the Philippines the independence of its judicial department is of paramount importance.

To the safeguards mentioned above for insuring the independence of the judiciary must be added the rule which exempts of judges from civil liability for acts done within their legal powers and jurisdictions. The Philippine Supreme Court has adopted the rule "that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."⁶

Supplementary to this rule is the provision of the Civil Code of the Philippines that damages are not demandable from a judge, unless his acts or omissions constitute a violation of the penal statute.⁷

⁴ Justice Caesar Bengzon in *Ocampo, et al. v.s. Secretary of Justice, et al.*, XX *Lawyers Journal* 57.

⁵ Justice Marceliano R. Montemayor, *ibid.*

⁶ Bradley v. Fisher, 80 U.S. 335, quoted in *Alzua v. Johnson*, 11 Phil. 308.

⁷ Article 32.

It is gratifying to note that in their deliberations both Committee IV and the Plenary Session of the International Congress of Jurists at New Delhi were of the opinion that "an independent Judiciary is an indispensable requisite of a free society under the Rule of Law."⁸ Indeed, "when judges are not free, no man can be said to have rights, for the form of justice can be twisted to serve the tyranny of the numerous, the wealthy, or the powerful. One cannot be sure of always running with the pack; he may find himself the pursued rabbit. A man cannot tell when in a civil or criminal case he may be unjustly accused, the object of widespread calumny and popular hatred, with the result that his property, his liberty or even his life, is in danger. In that day his only refuge is a firm and independent judiciary, governed by conscience and not by clamor, and free to do justice even to a hated individual in the face of an angry crowd."⁹

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⁸ See pp. 15-16 *supra*.

⁹ Justice Lummuns in *The Trial Judge*, pp. 11-12.

BOOK REVIEWS

Fundamental Law of Pakistan: being an exposition and a critical review of the juridical, political and ideological implications of the Constitution of the Islamic Republic of Pakistan in the light of the Basic Principles of Comparative Constitutional Jurisprudence. By A. K. Brohi. [Karachi, Pakistan: Din Muhammadi Press. 1958. xxviii (Preface and Table of Contents), 799 (text) and 217 (appendices) pp.]

To do justice to this remarkable work it is necessary at the outset not only to emphasize its unusual character, which is inadequately conveyed in its main title, but also briefly to consider the legal position in Pakistan since the abrogation of the Constitution with which Mr. Brohi's book is concerned. It would be very wrong to regard this book, an application of immense labour and learning, as of no practical relevance, simply because of what has happened since its publication.

The Constitution of the Islamic Republic of Pakistan came into force on March 23, 1956. On October 7, 1958, the then President of Pakistan, Major-General Iskander Mirza, following the resignation of six members of the Coalition Central Government, abrogated the Constitution, dismissed the Central and Provincial Governments, dissolved the National Parliament and Provincial Assemblies, abolished political parties and imposed martial law on the whole of Pakistan, naming the Commander-in-Chief, General Mohammed Ayub Khan (who succeeded General Mirza on October 28, 1958) as Chief Martial Law Administrator.

On the one hand it would appear that Major-General Mirza's Act necessarily implies a clear break in the legal continuity of Government in Pakistan. The position of President was itself the creation of the Constitution and with the Constitution upset General Mirza had to base his authority on some more fundamental source. He described his action as a "peaceful revolution". "The Constitution is sacred," he said, "but more sacred is the country's welfare and the happiness of the people." He declared that it was his intention to collect a number of patriotic persons to examine Pakistan's problems in the political field and to devise a Constitution which at an appropriate time would be submitted to a referendum.

On the other hand there were in the events in October 1958 many indications that, although the ultimate source of law-giving

authority might have changed, continuity of the laws in and under the Constitution would be maintained. Thus on October 10, 1958 a Proclamation was published which declared that Pakistan should "be governed as nearly as may be in accordance with the late Constitution". The Courts were confirmed in their existing powers and jurisdictions, including the right of the Supreme Court and High Courts to issue writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. Furthermore it was laid down that, apart from the Constitution itself, existing laws and subordinate legislation should with some exceptions "so far as applicable and with such necessary adaptations as the President may see fit to make, continue in force until altered, repealed or amended by competent authority." But it should be added that the Proclamation specifically forbade the issuing of writs against the Chief Administrator of Martial Law or his Deputy or any person exercising powers or jurisdiction under them; and no Court or person was to be allowed to call in question the Proclamation itself, any Order made under the Proclamation (as by the Governor of a Province) or any Martial Law Order or Regulation or any finding, judgment or order of a special Military Court or summary Military Court (which had been set up on October 9 with wide jurisdiction and the power to impose heavy penalties, including the death sentence). In spite of these important limitations on the powers of the ordinary Courts it should be noted that the Courts were empowered by the Proclamation, in dealing with cases where a writ was sought against those protected by the Proclamation from such writs, to send to the authority so protected its opinion on a question of law raised. This presumably might require reference to the spirit if not the precise provisions of the old Constitution.

It is therefore clear that a treatise on the Constitution of Pakistan is not without practical importance even since the abrogation of that Constitution. But in fact Mr. Brohi's book has a much wider claim to attention. In his preface he explains that he has rejected the possibility of writing a commentary article by article on the constitution (after the pattern of the well-known Commentary on the Constitution of India of Mr. Durga Das Basu) in favour of a systematic treatment of the principles of Constitutional Law, a decision which has in the event much enhanced the permanent value of his work. What he has in fact given is a series of essays of varying length on almost every conceivable aspect of constitutional theory and practice, with many references to constitutions other than that of Pakistan and liberal citations from cases and from the writings of jurists. With such an ambitious approach it is inevitable that there should be some inequality in the standard of treatment. Sometimes – as for example in the section entitled "How to determine the *Ratio Decidendi* of a Case" – Mr. Brohi provides

little more than a careful but somewhat uncritical summary of the views of a number of other authors. It should, however, in fairness be said that such a treatment, even where it amounts to little more than an extended bibliography, has, in Mr. Brohi's words, value for the "uninitiated" student for whom his book has "primarily" been written. But in many other Sections, as for example, in those which deal with "Individual and the State" (Fundamental Rights and Constitutional Liberties)" – which cover some 230 pages of the text – there is an extremely valuable and detailed discussion of the legal character and practical problems raised by fundamental rights not only in the Pakistan constitution but also in the Indian constitution and in that of the United States, accompanied by an acute comparison of the differing approach of countries, such as the United Kingdom, in which fundamental rights are a political rather than a legal conception.

There are in Mr. Brohi's book no fewer than 245 Sections. It is here only possible by more or less arbitrarily selected titles to illustrate its extraordinary range and interest. Thus, there are Sections dealing with the Nature and Purpose of Written Constitutions, the Doctrine of "Judicial Review", the Theory of the Separation of Powers, Delegation versus Representation in relation to the Members of the Legislature, Types of Executive, Privileges of the Members of Assemblies, Delegated Legislation, Retrospectivity of Laws, Legislative Competence as to subject-matter (in a Federal State), "Right" as a Term in Jurisprudence, the Right to Property, the Nature of Writ Jurisdiction, the Theory of the Interpretation of Statutes, the Judges and the Problem of the Interpretation of the Constitution, the Concept of the Rule of Law and the Act of State, the Method of Securing Appointment of Supreme Court Judges, Theoretical Foundations of Social Order in Islam, and Sources of Muslim Law.

An example may be given to illustrate the value and, to some extent, the limitations of Mr. Brohi's methods. According to Article 5 of the Constitution of Pakistan "all citizens are equal before law and are entitled to equal protection of law". Article 14 of the Indian Constitution is similar, although in India the right to equality is guaranteed to citizens and non-citizens alike; the limitation to "citizens" in the Pakistan Constitution is described by Mr. Brohi as "incomprehensible". Mr. Brohi first considers whether there is special significance in the inclusion of the two phrases "equal before the law" and "equal protection of the law". He suggests at one point that these ideas may be in conflict: "for in a society which is riddled with inequalities of all kinds to insist upon rigid adherence to 'equal protection of the law' might, in effect, mean perpetuation of just the sort of inequality which the framers of our constitution set out to eradicate." Yet he also appears to suggest, and cites from an

Indian decision [*In Re Ramakrishna* AIR (1955) Madras 100] to this effect, that "equality before the law" contains within it the idea of "equal protection of the laws". There follows a reference to Article 40 of the Eire Constitution ("all citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to difference of capacity, physical and moral, and of social function") which Mr. Brohi describes as "relevant for the purpose of jurisprudence." But the relevance is not explained and the reader's attention is suddenly switched to an interesting discussion of the interpretation in American Courts of the "due process" clause of the 5th Amendment, as a substantive rather than procedural protection, and to the "equal protection of the laws" clause of the 14th Amendment. The conclusion reached is that there is no clear-cut distinction between the scope of the "due process" and "equal protection of the laws" clauses, and that their content has been largely determined less on grounds of logical interpretation than under the pressure of economic, political and social ideas of the time. The Indian Courts are therefore criticized for too much reliance on American decisions in interpreting Article 14 of the Indian Constitution. This comment is followed by a very long citation of three pages from a dissenting judgment of Bose J. of the Indian Supreme Court, the gist of which is that in interpreting Article 14 of the Indian Constitution, the judges must "regard the facts of each case concretely much as a jury would do; and yet, not quite as a jury, for we are considering here a matter of law and not just one of fact. . . Law (as used in Article 14 does not mean the 'legal precepts, which are actually recognized and applied in the tribunals at a given time and place' but 'the more general body of doctrine and tradition from which those precepts are chiefly drawn and by which we criticize them'." [*State of W. Bengal v. Anwar Ali*, AIR (1952) S.C. 75]. Two interesting and contrasting cases from the Supreme Court of Pakistan are then discussed at some length; in the first of these [*Jibendra Kishore and others v. The Province of East Pakistan* PLD (1957) S.C.9] a diminishing scale of compensation for outgoing landlords fixed according to the size of their income from rent received was held not to be contrary to Article 5 of the Pakistan Constitution, the scheme constituting a "necessary and not unreasonable classification", in accord with American decisions on the 14th Amendment; in the second case [*Waris Meah v. The State* PLD (1957) S.C. 157] an Act was struck down as discriminatory because it set up three tribunals to deal with offences under the Act and provided the Executive with no guidance as to the principles on which offenders were to be brought before one or other of the tribunals, each having its distinct powers and procedure. Mr. Brohi then reverts, rather confusingly, to American and Indian cases, presumably to

show that although "ordinarily, abstract principles are certainly helpful and their formulation has to be attempted by judges and lawyers – in the matter of applying Article 5, abstract principles are really not of much pragmatic value." The cases, the reasoning in which he cites at length, do not entirely bear out this conclusion and indeed Mr. Brohi in his treatment of *Charanjit Lal Chowdhury v. Union of India*, AIR (1951) S.C. 41, which raised the question whether a law applying to one person should be treated as repugnant to Article 14 of the Indian Constitution, disagrees with the majority decision and answers *prima facie* yes, and he would cast the burden of proof on the government to show that the apparent discrimination was reasonable in the circumstances. This is, it is submitted, a principle, and, although pragmatically reached, might be regarded as "abstract" as far as future cases are concerned. Moreover, he admits that there is a general principle (to which, he would argue, *Charanjit Lal's* case provides an exception, reversing the burden of proof) that there is a presumption in favour of legislation impugned under an "equal protection of the laws" clause. He distinguishes cases arising, in Pakistan, under Article 5 or, in India, Article 14 of their Constitutions from cases where, under some other Article, discrimination is prohibited when made *only* on one or more of a number of specified grounds, such as religion, race, caste, place of birth or sex (See Pakistan Constitution, Article 14 and Indian Constitution, Article 15). If such discrimination can be proved, there is no question of a presumption; the legislation is bad *per se*. Finally, we may mention in this most informative if rather diffuse treatment of equality a tantalizingly brief reference to the question whether in Pakistan "equal protection of the law" under Article 5 of the Constitution could be invoked on the ground that a civil litigant or accused person had not the means to obtain legal advice or representation; Mr. Brohi is doubtful whether Article 5 is available.

But while, over so wide a field, there is bound to be room for difference of opinion and criticism of Mr. Brohi's methods of treating so many and varied topics, there can hardly be disagreement on the wide scholarship, liberal spirit and stimulating quality of Mr. Brohi's work. It is an encouraging indication of, and inspiration to, constitutional studies in Pakistan. It is also an invaluable source-book for the comparative lawyer and will undoubtedly throughout the world, in the author's words, "serve to promote the general purposes for which constitutional governments are founded."

NORMAN S. MARSH

Journal of the Indian Law Institute, Volume I, No. 1 (October 1958) and No. 2 (January 1959), published by the Indian Law Institute, New Delhi, India. Annual Subscription Rs. 16.

This new periodical is of great interest not only to Indian and other Asian lawyers but also to all those anxious to follow the legal developments in a changing society like India.

India today is endeavouring to solve a difficult problem which concerns the very basis of society as well as the nature and scope of its legal structure: *viz.*, the problem of how to reconcile the idea of a Welfare State – or in any case the strong trend in a modern State to encroach more and more upon fields traditionally reserved to individuals – with the protection and promotion of all those basic rights and freedoms which we associate with the concept of the Rule of Law. On the one hand, real freedom must be safeguarded to all without distinction – this can exist only under the Rule of Law which implies the existence of procedures and an effective machinery providing protection against arbitrary interference. On the other hand, there are many societies, some old and many new, where State planning may be required to raise a very low standard of living and where insistence on the traditional individual rights and freedoms would be idle.

This problem is closely linked with, if not similar to, the old question of static law versus dynamic law or, *i.e.*, whether law should be regarded as a conservative force or whether law should be regarded as a dynamic force. The ever-increasing importance of the State and with it the development of administrative law deserves a careful study; and it may be necessary to look for new methods and approaches, as the traditional ones might not be altogether sufficient.

In this connection, then, India today offers an interesting example of a country where the Constitution guarantees human rights and fundamental freedoms and provides machinery for the protection of those rights and freedoms. Yet India proclaims to be a Welfare State to all intents and purposes.

The first issue of the *Journal* of the Indian Law Institute focuses particular attention on this problem confronting India, *viz.*, the complicated and difficult problem of Public Law, with special reference to administrative law. The editorial in the first issue of the *Journal* points out that the predominance of Public Law does not mean the predominance of government over the individual, but that “it indicates the reaffirmed determination of law to keep government so regulated as to preserve the liberty of the individual”. The essence of a Welfare State, according to the editorial, is that it “attempts by legislation to minimize the evils of economic disparity that now exist between the various sections of the community”; and the Rule of Law implies “a negation of uncontrolled discretion in public

authority when dealing with the rights of private individuals". The solution of the conflict between administrative discretion and individual freedom in a Welfare State is sought to a great extent in "balanced checks". The editorial properly stresses the importance of public opinion in the scheme of "balanced checks": "The processes which precede the decisions of public authority are to be so organized that they have the consent of the public which is affected by such decisions."

The editorial also draws attention to the increasing influence of law journals in the common law world. In contradistinction to the situation in a number of countries belonging to the so-called Continental School, the "doctrine", or writings of jurists, has had little influence on English law. It is only recently that judges in appropriate cases have looked further to see if the subject had been discussed previously or the authorities collected and analysed in a good legal journal.

The first issue of the *Journal* of the Indian Law Institute contains a series of articles which are mostly the texts of contributions to a Seminar held by the Institute in 1957. The following papers should be mentioned as of much more than topical or local interest: *Ramaswamy*, "Rule of Law and a Planned Society"; *Mukharji*, "Administrative Law" (some basic problems of administrative law and procedure in India); *Setalvad*, "Judicial Review of Administrative Proceedings" (an able summary of this problem in India); *Chatterjee*, "Control of Legislative Powers"; *P. Trikamdas*, (a Member of the International Commission of Jurists), "Fundamental Rights and Administrative Proceedings". There is also a chronicle, "Cases and Comments".

The second issue of the *Journal* contains a summary of the Delhi Congress and includes the text of the *Delhi Declaration* and of the *Conclusions* adopted by the Committees and Congress. This article emphasizes the success of the meeting and the importance of its results to the world legal community. In addition, this issue contains articles on comparative law, viz., *Chatterjee*, "The Soviet Legal System" and *Matsuda* "Japanese Legal Training and Research Institute". Two other contributions, one from *Jain* on "Administrative Discretion and Fundamental Rights in India" and the other from *Ebb* on "Constitutional Framework for Administrative Law" are of particular interest, especially to lawyers belonging to the Commonwealth. Finally, this issue contains also a résumé of a number of cases on administrative and constitutional law.

The India Law Institute is to be complimented on its excellent *Journal*. This publication should contribute greatly to the evolution of legal thinking in India while providing lawyers abroad with a special vantage point from which to study this evolution.

JEAN-FLAVIEN LALIVE

The Burma Law Institute Journal, Vol. I, No. 1 (Autumn 1958), published by the Burma Law Institute, Rangoon.

This first issue of *The Burma Law Institute Journal* has not only the distinction of being the initial number of a legal periodical published by the newly founded Burma Law Institute but also of introducing in Burma this type of journal for the first time. Published as it is at a time of great social and political changes which affect almost every segment of life of the community, the challenge it faces, according to the Constitution of the Institute, "to arouse and awaken the taking of active interest in the law as a living organism . . ." is a difficult one. The fulfilment, through law, of the aspirations of the individual in the social, educational, cultural and economic spheres, without impinging on or eliminating his individual freedoms, is part of an accelerated process of critical change facing most societies but particularly the lawyer and jurist in those societies. A legal organ such as this *Journal* can play a significant role in maintaining and strengthening those freedoms and individual rights at a time when spokesmen favouring radical economic and social changes may perhaps lose sight of the individual, his basic rights and dignity as a human being; at the same time this *Journal* can make its most valuable contribution by exploring and examining the legal ways in which those same essential economic and social changes may be introduced, and thus contribute to the uplifting of the individual without the loss of his fundamental rights.

The Burma Law Institute is a relatively recent creation and the appearance of its *Journal* is testimony of the Institute's sound and yet dynamic approach. Under the direction of its able and distinguished President, The Hon. U Chan Tun Aung, the present Foreign Minister and Minister of Judicial Affairs of the Union of Burma, and its energetic Executive Secretary, U Hla Aung, the Burma Law Institute has made significant progress towards the achievement of its aims and objects. Aside from its general aim of arousing an interest in law as a living force, the Institute has stimulated the study of its growth in the municipal and international spheres by encouraging private research, especially in Criminal Law and Procedure, on a comparative basis and has co-operated with academic and professional institutions holding similar aims. Although still in a pioneering stage the influence of the Institute in Burma, and to some extent outside, is developing rapidly through the active interest and participation of all the officers and members of its Executive Council, most of whom this reviewer had the pleasure of meeting during a recent visit to Burma, and deserves the continued support of the Burmese legal community.

One of the difficulties faced by journals of this type, however, is to publish material of immediate and practical use to local lawyers, while at the same time stimulating the interest of lawyers abroad through a general and international approach. In this, the *Burma Law*

Institute Journal has succeeded. The leading articles relate to Burmese public law ("Union Citizenship and Alien Laws from International Aspects", by U Chan Tun Aung); formerly Chief Justice of the High Court and now the Foreign Minister and Minister of Judicial Affairs, private international law ("Sino-Burmese Marriages and Conflict of Laws", by U Hla Aung); family law on a comparative basis ("The Legal Status of Women in Islam," by C. A. Soorma); public international law ("Recognition of States and Governments in International Law", by Myint Soe). Notes and Comments (among them, "The Burma Extradition Act," by U Nyun Tin) are included as well as a summary of recent decisions and book reviews. The appendices include a reprint of the Union Citizenship Act and the Constitution of the Burma Law Institute.

One of the short notes is devoted to legal education in Burma and the steps that have been taken and are being taken to strengthen the training of lawyers in Burma. The concern with this problem is to be commended and the Institute is to be encouraged to continue to delve deeper into its various aspects, for as the Visiting Professor Knowlton said in an introductory message to the *Journal*, the Institute can be a great help "in assuring the alert, informed and articulate Bar which is so essential to a democratic society". The role of the lawyer in today's complex modern society is a vital one; the true assessment of that role is an area of investigation which must be pursued on a broad level and is worthy of all the effort we can expend.

The appearance of *The Burma Law Institute Journal* is welcome and we wish it great success. At the same time the Burma Law Institute should be encouraged in the great tasks it has set for itself, not the least of which is to assist the Bar of Burma to be the well-informed, vigilant and independent force.

JEAN-FLAVIEN LALIVE

The Press in Authoritarian Countries. Published by the International Press Institute, Zurich, Switzerland, 1959, 201 pp.

The International Press Institute is an organization of newspaper editors representing some 500 newspapers in 38 countries. It is concerned primarily with defence of the freedom of the press and has issued several reports in the past but this is the first time that the Institute, or any other organization for that matter, has undertaken the complex task of giving an account of the position of the press under authoritarian regimes existing since the Second

World War. The job is well done and the Institute has a right to be proud of its achievement.

This is not a legal treatise and it is written primarily from the point of view of a newspaperman and journalist. Its value to the lawyer would have been enhanced by a systematic treatment of the press laws of the countries concerned, but this should not deter the lawyer from reading this useful survey, if only to understand more fully the environment in which the press must operate under authoritarian rule. Without freedom of the press and information and without a public opinion which is aware of its own interest in strengthening the Rule of Law, there can be no guarantee that the Rule of Law will be preserved.

The survey is divided into two parts, the first dealing with the countries under a Communist system, the second covering Spain, Portugal, Latin America, Egypt and the Far East.

In the Communist dictatorships, press policy derives from the totalitarian ideology of communism, to which information media are and must be subjected with the purpose of guiding opinion in a direction conforming to that ideology. The forty-year old Soviet archetype serves as the model for all other countries with the same regimes. In accordance with Soviet doctrine on information, the first mission of the press is not to inform but to propagate Communist ideas and popularise the measure of the Soviet government. The press has always remained, in the words of Lenin, "not only an educative propagandist and collective agitator, but a collective organ in the service of Communism". The press thus served as the medium of Communist "education" of the masses and performs a ceaseless campaign of agitation, be it for the rapid realization of Five Year Plans, for an increase of production, or for the vilification of enemies of the regime. In order to carry out its functions of agitation and propaganda, the circulation of each newspaper, its format, size, distribution and the line to be followed towards the section of the public at which it is aimed, are all controlled.

Newspapers appear by order of the competent authorities of the Communist Party and suddenly cease publication in the same circumstances. The choice of the editorial staff is very closely controlled. Editors are nominated or approved by the competent committees of the Communist Party. Their work is determined in advance according to a monthly plan. Editors are also guided by the directives of the Communist Party's special press organs within its Propaganda and Agitation Department and by themes outlined in the "Manual of the Agitator" which the Party publishes every ten days, and by the speeches of leaders. General instructions are constantly issued by the Central Committee and by its Praesidium and are chiefly concerned with three spheres: the general political

line of the Party, official information from home and abroad and material origination in the editorial office itself.

The Soviet press is also subjected to direct legal censorship. Before appearing, newspapers must be examined by the officials of a government censorship office. *Glavlit*, the Russian abbreviation of 'Chief Administration for Literary Affairs and Publishing', decides whether or not to grant the visa required before a newspaper goes to press. In the period that followed the death of Stalin, the importance of *Glavlit* as an organ of censorship diminished to the same extent as the responsibility of editors of newspapers increased. There is, however, one sphere in which *Glavlit* continues to function with uncontested authority and that is in supervising export of Soviet publication.

The survey deals in some detail with the mechanics of press control in some of the so-called People's Democracies: Rumania, Czechoslovakia, Eastern Germany, Hungary, Poland and Yugoslavia. It emphasises their similarity to those of the USSR. Only in Poland are there bright spots here and there in an otherwise despondent picture and even in this country recent moves towards the reassertion of complete and total controls for "Reason of State" are bringing to an end the hopeful movement towards liberalisation.

In Communist China, the press assumes an even more vital role as an instrument of mass persuasion than in other Communist Countries because of the country's immense population. Here again, through a series of rigorous controls and standing rules the press has been turned into an elaborate, diversified, highly specialised and efficient machine of Communist indoctrination.

The survey notes that, as far as the non-Communist-dictatorships are concerned, all have authoritarian information policies which are dictated solely by their own peculiar political circumstances rather than by any ideology, with the exception of Spain, which possesses a well-established doctrine of information. In these countries the press control seems largely designed to prevent unpleasant facts and comments from being published. It is to be noted that that in itself is bad enough.

The Survey mentions some encouraging points in the otherwise gloomy picture. Firstly, there is evidence of a spirit of revolt among journalists in all the countries examined. The extent of this resistance varies from country to country according to circumstance, but it can be detected even in the USSR where the control of information media is the most rigid. During the period under review, the survey points out that there had been evidence in many authoritarian countries of the aspirations of journalists to a greater freedom of expression and a greater degree of truthfulness in views. This is true even when 'liberalisation' was inspired from above. A large number of these journalists both in Communist and other countries have

been prepared to run grave risks in defying government authority for the sake of their aspirations. Some of them have paid dearly for their courage, in some cases at the cost of their lives.

Secondly, there is also evidence that the public in dictatorships has demanded a truthful and free press whenever it has had the opportunity to do so. This was evident in Warsaw during the 'thaw' and when the banning of 'Po Prostu' caused disturbances. It was also evident during the Hungarian rising, when the sale of the new, liberated newspapers "assumed the same importance as that of bread in the midst of the fighting in the streets. The same thing was to be seen again in the days that preceded the fall of Jimenez in Venezuela, and in Lisbon when the censorship was relaxed during the electoral campaigns". "In the countries where information is controlled and the newspapers are in bondage," the Survey comments, "freedom of the press is seen by contrast – at its true value. Only then is it fully realised how essential this freedom is for the human being."

N. A. NOOR MUHAMMAD

Contempt of Court. A report prepared by "Justice", British Section of the International Commission of Jurists. [London: Stevens & Sons Limited. 1959. v and 42 pp. 5s net]

Legal Penalties: The Need for Revaluation. A report prepared by "Justice", published in *The Criminal Law Review* [London: Sweet & Maxwell. June 1959. pp. 393-410]

"Justice", the very active British Section of the International Commission of Jurists, has initiated a series of inquiries concerning specific matters in which peculiarities or anomalies of English law are to be found today.

Two committees of "Justice" have recently published their reports on the law relating to contempt of court and the law on legal penalties. Both of them are excellent and inspiring critical documents and it is to be hoped that they will serve as a basis for long-awaited amendments to the law.

The survey on the *Contempt of Court* was undertaken by a committee of lawyers under the chairmanship of Lord Shawcross, Chairman of "Justice" and a Member of the International Commission of Jurists. The object was to determine how far complaints in the Press and by lawyers against the present exercise of this jurisdiction were justified, and what remedial action, if any, needed to be taken.

The report calls attention to the "chaotic" nature of the substantive law of criminal contempt, which proves "a serious handicap

to free discussion", and to the procedural defects contained within the present law. The chief defect is the absence of any right of appeal in criminal contempt and the summary manner in which a person may be imprisoned by a judge without trial by jury.

The report suggests that the most urgent need is for a right of appeal against any conviction or sentence for contempt by the High Court. This right would enable a substantive body of law on criminal contempt to be built up. Decisions of the Court of Criminal Appeal and perhaps even of the House of Lords would then establish a fair balance between the needs of the administration of justice and other elements of public interest without any further reform by legislation. The report recommends that the criticism of a judge should not amount to contempt of court unless prejudice, corruption or other improper motive is alleged against him. In general, it should be a defence to any charge of contempt, where published matter was alleged to have prejudiced judicial proceedings, that the accused neither knew nor had reason to suspect it contained contemptuous matter.

Procedural reforms are also advocated; they include: that no prosecution for criminal contempt outside the court should be initiated except by or with the consent of the Attorney General; any application for attachment or committal for civil contempt should be heard in public; every person charged with contempt should be entitled to give oral evidence in his defence; the power of the Court of Appeal, the High Court and quarter sessions to punish summarily for contempt committed in the face of the court should be limited in a way similar to that of county courts (maximum sentence of imprisonment, one month); the Court of Appeal and any judge of the High Court should be empowered to certify contempt in the face of the court for trial by another judge of the High Court. It is interesting to note that this report is likely to result in legislative action. Lord Shawcross and others will present a draft Bill in the next session of the House of Lords on this matter.

The report on *Legal Penalties* was prepared by a committee of "Justice" under the chairmanship of Sir David Scott Cairns, Q.C. It points out a number of anomalies due to historical accident. For instance, if a woman is abducted for financial gain, the maximum penalty is fourteen years imprisonment, but if a girl of less than eighteen is abducted with intent on her virtue, the maximum would be two years. Other examples are given which show that there is a strong case for establishing an official committee of inquiry into the matter, with a view to simplifying and rationalizing the criminal law.

The two reports prepared so far by "Justice" attracted wide attention, and very favourable comments, not only in legal circles but in the press.

A further inquiry is being held by another committee of "Justice" into the law governing criminal investigation. The committee is headed by Mr. F. H. Lawton, Q.C.

"Justice" is to be commended for its initiative in bringing out these reports which are of great interest and concern to lawyers, authorities and the general public. It is hoped that other National Sections of the International Commission of Jurists will follow this example and take up some important aspects of their law, with a view to suggesting reforms and improvements, especially when, as in the cases examined above, some essential institutions and procedures of the Rule of Law are involved or at stake.

JEAN-FLAVIEN LALIVE

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

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

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 5 are out of print.

Number 6 (December 1956): Contains information on the Poznan Trials, Hungarian developments, the Middle East, the "Rule of Law" and "Socialist Legality" in the USSR

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

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, Philippines, 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

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

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 additional printing cost. It has therefore been decided that as from the next issue of the Journal (to be published in the early Winter 1959-1960) readers will have to pay a small subscription fee. Particulars will be published in due course. On the other hand, the Bulletin and Newsletter will continue to be distributed free of charge.