

# **JOURNAL**

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*Editor: SEÁN MACBRIDE*

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## INTRODUCTION

### *THE MEANING OF HUMAN RIGHTS YEAR*

The United Nations has decreed that 1968, the twentieth anniversary of the adoption of the Universal Declaration of Human Rights, should be observed throughout the world as the International Year for Human Rights. As part of its contribution, the International Commission of Jurists is devoting two issues of the *Journal* (Vol. VIII, No. 2, and Vol. IX, No. 1) to a series of special studies written by eminent specialists from different regions of the world dealing with various aspects of the Universal Declaration of Human Rights.

The Universal Declaration is, and remains, the most important instrument and landmark in the history of mankind. It is the Charter of liberty of the oppressed and downtrodden. It defines the limits which the all-mighty state machine should not transgress in its dealings with those whom it rules. And, from the lawyer's point of view, most important of all, it proclaims that the rights of human beings 'should be protected by the Rule of Law'.

The Universal Declaration is no abstract statement of general principles; it is specific and detailed. Many of its provisions have now been embodied in national constitutions and have been used for purposes of judicial interpretation in different jurisdictions. It has received repeated confirmation in numerous international conventions. The unanimous decision of the General Assembly to mark its twentieth anniversary by the International Year for Human Rights is in itself a positive act of confirmation of its provisions. Indeed, there is a growing view among international lawyers that some of its provisions, which are justiciable, now form part of customary international law; this conforms with what the often forgotten Hague Convention of 1907 describes as:

... the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience.

The Universal Declaration does now represent in written form the basis for the law of nations, the laws of humanity and the dictates of the public conscience as accepted in the twentieth century.

As is fitting, the United Nations does not regard 1968 as being merely an occasion for paying empty lip service in grandiloquent speeches to the Universal Declaration or to the achievements of the United Nations in the field of human rights. If the International Year for Human Rights is to have any real meaning, it must be a stocktaking of the extent to which the principles enunciated by the Universal Declaration are applied in practice at the national, regional and international level. In this view all the International Non-Governmental Organizations involved in the field of human rights, including of course the International Commission of Jurists, concur fully. Action in 1968, and a programme for action in the immediate future must emerge; new targets must be shaped and new frontiers must be breached.

It is, of course, in the field of *implementation* that the efforts must be concentrated. First priority must be given to the provision of domestic judicial machinery to ensure the effective protection of all the rights enunciated in the Universal Declaration; such judicial protection to be effective must be exercised by an independent and objective judiciary not subject to political pressures.

At the international regional level, the only valid system which exists so far is that provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms. The International Commission of Jurists has repeatedly urged the adoption of analogous Conventions in other regions—Latin America, Africa, Asia and Eastern Europe. Interest is not lacking, and even drafts exist, but progress has been slow; one of the 1968 targets should be the formulation and adoption of such regional systems for the protection of human rights.

At the universal level the progress in regard to implementation machinery has been also extremely slow and disjointed. The International Convention on the Elimination of Racial Discrimination and the International Covenants on Human Rights do contain some form of implementation machinery. This implementation machinery is far from satisfactory but it does represent a step forward. However, none of these instruments is in force; they are still awaiting ratification by a sufficient number of States to enable them to come into operation.

The great defect of the present efforts of the United Nations to provide implementation machinery is that it is piecemeal, disjointed and is political rather than judicial. Effective implementation machinery should conform to judicial norms, it should be objective and automatic in its operation; it should not be *ad hoc* nor dependent on the political expediency of the moment. Has the time not come to envisage the establishment of a Universal Court of

Human Rights analogous to the European Court of Human Rights with jurisdiction to pronounce on violations of human rights? Even if its judgments were initially to be only declaratory, they would be of considerable moral value and would help to create judicial norms in the field of human rights. Its findings would certainly carry far more weight than those of transient and often ill-equipped part-time U.N. Committees or Sub-Committees, selected on a political basis.

One of the obvious immediate tasks upon which all efforts should be concentrated is the ratification of all United Nations conventions and covenants in the human rights field. In many cases governments which have supported, and even signed, international conventions have failed to ratify them. Sometimes this is due to bureaucratic inertia; sometimes to political feet-dragging by governments or parliaments. Whatever the reason, a special effort should be made in 1968 to secure the ratification of these international conventions. Some of these have been under discussion for close on twenty years; some of them have been adopted unanimously by the General Assembly. A list of 24 of these conventions and the ratifications outstanding will be found in *Bulletin* No. 32 (December 1967) of the International Commission of Jurists.

One of the factors that influenced the adoption of the Universal Declaration was the determination of world leaders in 1948 to ensure that the world should never again witness the genocide, the destruction of human rights and the brutality that engulfed humanity in the neo-barbarism that accompanied World War II. Yet, twenty years later, humanity is again witnessing in many areas acts of brutality which disgrace the present era. Such acts create a momentary horror which shocks the human conscience but are only too easily relegated to the 'lost property' compartment of the public conscience. Brutality is nearly always contagious. In a conflict, it engenders counter-brutality. The fact that cruelty is tolerated and even easily forgotten tends to encourage others to resort to it. Cruelty is a contagious disease that leads to a degradation of human standards. This is a serious problem which has grave ethical implications that require the urgent attention of Church leaders, statesmen, sociologists, philosophers and lawyers alike. Would not the International Year for Human Rights be a suitable occasion to launch a campaign to arouse world opinion against brutality? Article 5 of the Universal Declaration must be given reality.

Most countries have laws making acts of cruelty and brutality criminal offences. Should not such acts also be made offences under international law? After all, international law does operate successfully in such relatively less important fields as extradition,

communications, crime detection, commerce, shipping and consular relations. Has the time not come for the United Nations to create international jurisdiction to deal with crimes against humanity? For a start, violations of the United Nations and the Red Cross Conventions could be made indictable offences before an International Tribunal to punish crimes against humanity. Such a Tribunal could, in addition, be given general power to pass judgment on crimes that violate '...the law of nations, derived from the usages established among civilised peoples, from the laws of humanity and from the dictates of the public conscience'.

At the end of World War II a bold new concept of international jurisdiction was adopted under the Charter of the International Military Tribunal that dealt with crimes against humanity. Accepting the principle upon which this new jurisdiction was founded, Professor Lauterpacht (in the 7th edition of Oppenheim) rightly says that:

... it affirmed the existence of fundamental human Rights superior to the law of the State and protected by international criminal sanctions, even if violated in pursuance of the law of the State.

This jurisdiction suffered from one major defect: it was a trial of the vanquished by the victors. If this was a defect, is there any good reason for not creating now a permanent judicial tribunal to deal with all crimes against humanity? Such a permanent judicial tribunal would not suffer from the inherent defect of being set up on an *ad hoc* basis to deal *ex post facto* with a particular situation. The decisions of such a tribunal might remain temporarily unenforceable in some regions. But behind every act of cruelty there is an individual who perpetrates or inspires the act of cruelty. That individual could at least be identified and branded as an outlaw. Such a sanction would have a restraining influence and would reduce the trend towards the brutalization of mankind.

In protecting human rights, it is not sufficient to enunciate the rights involved; it is essential to provide a judicial remedy accessible to those affected. In curbing cruelty and crimes against humanity it is not sufficient to deplore them; it is essential to pass judgment and if necessary outlaw the individuals responsible.

It is true that the creation of a Universal Court of Human Rights and of a criminal jurisdiction to deal with Crimes against Humanity would involve an acceptance of some degree of supranational jurisdiction; the extent of such acceptance could be regulated by optional clauses. In the world in which we live, the old outworn concepts of 'absolute leave and licence' to rulers to act as they wish without regard to the rights of the human beings over



whom they rule cannot subsist. This concept of 'absolute leave and licence' is in fact what governments glibly encompass when they euphemistically refer to 'infringements of national sovereignty'. Every convention, treaty or even trade agreement involves a limitation on absolute national sovereignty. In this connection it is noteworthy that some of the very sovereignty-conscious States of Europe have agreed to limit their absolute sovereignty in the domain of human rights by adhering to the European Convention for the Protection of Human Rights and Fundamental Freedoms. An even greater limitation of national sovereignty has been accepted by the States that compose the European Economic Community, which many other European States now are seeking to join.

The reasons for the need of international judicial machinery in the field of human rights are many; the most important is to ensure objectivity and independence on the part of the tribunal which decides the issues. We all know only too well that often the political authorities—particularly in periods of stress—are not above using patronage, pressures and even coercion against judges to secure their subservience.

International jurisdictions of the kind suggested must be 'automatic'—that is, must be free to act and be capable of acting on receipt of a complaint without the intervention of a government. This is one of the defects of the European Convention in regard to those States which have not subscribed to Articles 25 (the right of individual petition) and 46 (the compulsory jurisdiction of the Court) of the Convention. In any international jurisdiction which is created, it is essential that the individual aggrieved should have the direct right of petition or complaint to the instances created. It is important to ensure that a complaint will not be stifled by a government or be made dependent upon the prevailing political alignments. Some of those governments which still cling to the old doctrine of 'absolute leave and licence' for themselves argue that the individual can never have rights under international law. This is quite erroneous; this concept was abandoned after World War I, when the Upper Silesian Treaties specifically gave individuals the right of petition. The European Convention as well as the International Convention on the Elimination of Racial Discrimination and two International Covenants on Human Rights all recognize the right of individual petition under international law.

The composition of any international court or tribunal set up must be above suspicion of bias. Its members should as far as is possible be selected on a non-political basis; they should not be merely functionaries of their governments but should be jurists of high standing who command respect.

Independently of any international judicial implementation machinery, there is at the moment a vitally important proposal for the establishment of a United Nations High Commissioner for Human Rights with a status somewhat analogous to the High Commissioner for Refugees.

This proposal, if adopted, will provide the United Nations with a modest but useful instrument for the fulfilment of its mandate, under article 13 (1) of the Charter, to assist in the realization of human rights and fundamental freedoms for all. It does not go so far as to provide machinery for the implementation of the Universal Declaration of Human Rights. The High Commissioner is not intended to form part of the machinery for the implementation of existing or future international instruments relating to human rights, and his powers and functions will not be such as to clash with any existing or future machinery for their implementation, but will rather be complementary to such machinery.

The High Commissioner's power to give advice and assistance to United Nations organs which request it, will be of considerable value to bodies such as the Commission on Human Rights, which is not organized in such a way as to enable it to undertake detailed examinations of particular problems and at the present time has no independent authority available to which it could entrust such a task. Further, the High Commissioner, being independent of government influence, would be in a position to act completely impartially in any assistance he might give to United Nations organs.

One aspect of the proposal which is of considerable importance is the power given to the High Commissioner to render assistance and services to governments when requested to do so. Governments, particularly of newly independent states, are frequently faced with complex problems affecting human rights in regard to which they require advice and assistance. At the moment there is no United Nations body to which they can turn. The result has been that non-governmental organizations, such as the International Commission of Jurists, have received requests from governments for assistance. In 1965, the International Commission of Jurists, at the request of the government of British Guiana, set up a Commission of Inquiry into certain racial problems which had to be solved prior to the granting of independence; further requests have been received since from governments for assistance, but non-governmental organizations are not the ideal bodies to carry out this sort of mission; they have not the necessary resources to undertake this work; nor are they always politically acceptable. This is a function which would be much better performed by a High Commissioner appointed by the General Assembly, with all

the moral authority that he would have as representative of the General Assembly. There is a considerable field in which, for lack of an appropriate United Nations authority, the non-governmental organizations are the only bodies to take an active interest. The appointment of an independent and objective High Commissioner would provide a United Nations authority able to perform some of the functions now being discharged by non-governmental organizations. Non-governmental organizations are often overwhelmed by demands on their services; they are just unable or ill-equipped to cope with all the situations in which their assistance is sought.

It is really those governments which level criticism at non-governmental organizations generally, or which accuse them of bias, which should be foremost in supporting the proposal for the creation of the post of a strictly impartial High Commissioner for Human Rights. Paradoxically it is these governments which, so far, have opposed the proposal.

The High Commissioner, through his report to the General Assembly, could play an important part in encouraging and securing the ratification of international conventions relating to human rights. At the same time, the High Commissioner's powers and functions are so defined and limited that his office will in no way encroach upon national sovereignty. He cannot intervene in the internal affairs of any state. He cannot undertake an investigation against the will of the state concerned; he can only act in relation to the internal affairs of a state, if he is requested to render assistance by the government of that state. He cannot issue any binding orders or directions.

Modest though it is, the proposal for the institution of a High Commissioner for Human Rights is, in the view of the International Commission of Jurists, worthy of the support of those anxious to promote the cause of human rights. It would make a useful contribution to the protection of human rights acceptable to the large majority of the member states of the United Nations, since it in no way can be said to encroach upon their national sovereignty and, while providing them with an institution to which they may turn for assistance if they desire it, refrains from any unsolicited interference in their domestic affairs.

As the six principal Non-Governmental Organisations concerned with human rights issues pointed out in expressing their support:

The functions proposed for the High Commissioner fall short of those which the undersigned international organisations would wish to have assigned to such an independent Office. They do, however, appear to represent the maximum likely to be acceptable to a number of governments in the present circumstances.

It would indeed be a great pity if this proposal were not adopted at least in 1968; it has now been under active consideration for three years.

In the preceding part of this article I have set out very briefly some of the tasks which it is hoped may be undertaken by the United Nations Inter-Governmental Conference on Human Rights which is to meet in Teheran next April. It is not intended to minimize the most valuable work which has been performed by the United Nations in the field of human rights; it is intended rather to emphasize the need for a more dynamic and better-planned approach in the years to come.

In this article I have not dwelt on the splendid work which UNESCO, the ILO and the High Commissioner for Refugees have done for human rights in their respective fields. It is invaluable, and it is hoped that the International Year for Human Rights will encourage them in their task and spur them to fresh endeavours. From a long term point of view, UNESCO can render a tremendous service to the cause of human rights in the educational and cultural fields; their work, by inspiring the rising generation, can create the climate necessary for reducing brutality and for ensuring respect for the inherent dignity of human beings.

While there is every reason to feel despondent at the slow progress which is being made in the protection of human rights and at the increase in brutality, this is no time for apathy or cynicism. On the contrary, lawyers, helped by world public opinion, have a special contribution to make in promoting the protection of human rights under the Rule of Law.

The advent of higher standards of literacy and the availability of mass media of communication have given a new dimension to the important role of world public opinion. No dictator or authoritarian regime can now remain immune from the impact of world public opinion. There is no centre of power, be it in a democratic state or in a totalitarian regime, which now can ignore world public opinion for long. Indeed, it can be said that a shift is taking place in the centre of power—a shift that makes governments more subject to world public opinion than ever before. The importance of this new factor is not yet fully appreciated—even by governments. In this new situation lawyers have an important role to play in shaping this new instrument of power—world public opinion to achieve the more effective protection of human rights.

On behalf of the International Commission of Jurists, I would like to thank the eminent lawyers who have so ably and generously contributed to this first Special Human Rights issue of the *Journal*.

By so doing, they have contributed to the shaping of world opinion and have rendered public service to the cause of human liberty.

With their help, the International Commission of Jurists hopes to make its contribution to the International Year for Human Rights in the sense so well expressed by U Thant, Secretary-General of the United Nations:

It is hoped that it will promote encouragement and support by making known the separate contributions of all to the common purpose of bringing hope and satisfaction to those still suffering from violations of human rights and fundamental freedoms and all those ardently wishing to establish on a more solid basis mankind's claims to self-respect and dignity.

SEÁN MACBRIDE S.C.  
Secretary-General of the  
International Commission of Jurists

# **TWENTY YEARS AFTER THE UNIVERSAL DECLARATION**

## **Freedom and Equality**

by

**RENÉ CASSIN \***

**I.** Article 1 of the Universal Declaration of Human Rights states that ' all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood '.

Neither this text nor any resembling it appeared in the original outline for an international declaration which was, indeed, most ably prepared by the Secretariat of the United Nations in 1946-47. However, as soon as the drafting committee, appointed by the United Nations Commission on Human Rights, met in June 1947, it commended its Rapporteur, who, following the principles of the French Revolution of 1789 and in strong reaction to Hitler's totalitarian oppression, had not begun by enumerating individual freedoms, nor even by stating the most fundamental rights, as the right to life, but had placed first a categorical affirmation of a higher value which makes life itself worthwhile: that all human beings from their birth are endowed with an inherent dignity and a common heritage of liberty, equality of rights and full membership in the brotherhood of man.

In the Third Committee of the General Assembly, the text, put forward by the Commission on Human Rights, was sharply criticized in connection with the philosophical assumption that human beings ' are endowed by nature with reason and conscience '. At the same time, certain Latin American delegates also objected that the first sentence of the proposed text did not ' define clearly the rights to equality and individual liberty, rights which were expressed in other

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\* Member of the Institute of France; Honorary Professor of the Paris Law Faculty; former National Commissioner for Justice and Education; Honorary President of the Conseil d'Etat; since 1946, Member and former Chairman, U.N. Commission on Human Rights, in which capacity he was the principle draftsman of the Universal Declaration; since 1959, Judge of the European Court of Human Rights, of which he is now the Presiding Judge.

articles'. They therefore requested a roll-call vote on whether to transfer to the *Preamble* the entire contents of the article submitted by the Human Rights Commission. The proposal met with opposition from an overwhelming majority, and the only result was that the words 'by nature' were removed from the Commission's text. A conclusion that should be drawn from this vote is that the first two lines of Article 1 were intended to be the essential element in the Universal Declaration, and should be seen in the same light as Article 22 on the rights of man as a member of society: while the other articles comprise the more important specific, though by no means exhaustive applications of the principles which have thus been highlighted.

The authors of the Declaration also wanted to stress the need for a balance between human rights and duties (Article 29), by stating in the very first article the general duty of all men, as members of one family, to act towards one another in a spirit of brotherhood.

Article 1 of the Declaration was, moreover, not directly referred to in the twin multi-purpose covenants on Human Rights adopted by the United Nations General Assembly on 16 December 1966; for the aim of these two covenants was to create specific and legally binding rules applying the 'key principles' placed at the head of the Declaration.

II. Having noted the significance of Article 1, we shall first examine the general trends in the development which has since taken place towards setting man free to enjoy equality in dignity and in rights; we shall then seek the best paths leading to this goal, which is so rewarding and still so far from us.

Since 1948, several important phenomena have tended to hasten this development, particularly in comparison with the period immediately preceding the Declaration.

In the first place, there has been the gradual realization throughout the world of the importance of Human Rights, so long considered to be a narrow field of work and the almost exclusive reserve of the most advanced nations. Although the Universal Declaration did not create the movement of which it is itself a product, a movement of protest against the scientific barbarity of Hitler's regime and of aspiration towards a better destiny for mankind, it gave this movement a sense of direction and a means of steering itself, which it did not have before, towards individual freedoms and social rights. Far from remaining a mere annex to the United Nations Charter, it immediately became a common source of inspiration for all the international organizations, even for those already in existence, as the International Labour Organization, and particularly for those set up afterwards. All the States which have since become independent or joined the United

Nations Organization have felt themselves bound to subscribe to it. Organizations at all levels whether civic or professional, national or reaching across frontiers, together with the most miserable victims of poverty, ignorance and oppression, have all found in the principles of Article 1 a promise of emancipation and progress. The attitude of legal scholars and constitutional lawyers who have been studying afresh the concepts of liberty and equality, the attitude of the political and social theorists and that of the churches, who have emerged from centuries of isolation in response to man's demand for freedom, including freedom of conscience, are characteristic of the new ferment in people's minds.

The second phenomenon of our time lies in the remarkable progress made in technical conditions, as a result of the rapidity and importance of scientific discovery, tending towards the liberation of man. We have only to think of the discoveries which have lengthened human life and of the astronomic progress made in the use of energy, from the oldest known sources to the atom. The ease and speed of travel and communications have almost put an end to the age-long isolation of small scattered groups of people; and even this cannot compare with the audio-visual methods of news-broadcasting, which now include the use of artificial satellites.

Finally, it is impossible to over-estimate the influence of the changes in the political face of the world, brought about in the name of the right of peoples to self-determination, implied, if not expressed, in the Universal Declaration. The great wave of decolonization which began with India, a state of the first rank, was not merely the signal for a widespread movement towards the emancipation of peoples, but it also enabled the newly independent states to become members of the United Nations as equals before the law with older or more powerful states.

III. Such are the principal factors common to mankind as a whole, which have worked in favour of the general evolution of Human Rights towards a greater liberty and equality. Their influence has made itself felt both in the internal legislation and legal practice of every nation and at the international level, by the adoption first of single-purpose conventions and later of the two multi-purpose covenants which the United Nations Commission on Human Rights had been in the process of drafting since 1947.

The United Nations Yearbook on Human Rights has, since 1947, regularly published reports and even the principal official documents relevant to specific countries. It can thus be seen, in the case of the democratic countries for example, that, except during the dark period of MacCarthyism, co-inciding as it did with the Cold War and the war in Korea, there have been considerable victories for the cause



of liberty in the United States since the Second World War. The Supreme Court has adopted an increasingly liberal practice in safeguarding the freedoms listed in the First Amendment to the United States Constitution (those, *inter alia*, of religion, thought, expression, literary or artistic creation, education and political opinions). Where this proved inadequate, in the case of equal rights for coloured people, the federal legislature intervened in 1964 with the Civil Rights Act. In the economic and social field, ever greater importance is being given to legal and civil equality, which had been badly neglected since the abolition of slavery.

A similar study could be made of the socialist countries of which the USSR is the prototype. As a result of the United Nations Report on Forced Labour and since the death of Stalin, the labour camps have for the most part been abolished. The consolidation of the regime and the general though insufficient rise in the standard of living have led to the relaxation of certain restrictions. A socialist doctrine of human rights has been evolved and institutions have been set up to put an end to abuses: measures have even been taken recently in the economic field to encourage initiative on the part of those engaged in agricultural or industrial production and to take into account the wishes of consumers. The foundations of the regime have not, however, been changed and formidable barriers still hamper freedom of expression in the political, social and literary spheres. The process of liberalization has for the moment come to a standstill. Nor have the riots and revolts which took place in the Eastern European Republics between 1953 and 1956 been forgotten, nor the renewed repression following them, though this has since been considerably relaxed.

IV. Having confined ourselves to a small number of examples of national rights, we shall not describe in any greater detail the temporary or permanent steps taken by the United Nations or the many specialized institutions dealing with liberty and equality.

It should however be recalled that during the last twenty years two major categories of universal conventions have been adopted under the auspices of these institutions, and independently of the ILO labour conventions and the 1949 humanitarian conventions of the Red Cross.

The first in chronological order were single-purpose conventions safeguarding either a freedom or a particular right: the campaign against genocide — 9 December 1948; against statelessness — 1951 and 1954; against slavery and its concealed forms — 1956; against forced labour — 1957; for the elimination of discrimination based on sex (on equal pay — 1951; in the political rights of women — 1953; on nationality of married women — 1957; on consent to marriage — 1962); for the elimination of discrimination in the matter of employ-

ment and profession — (ILO 1958); in education (UNESCO 1960); and the campaign against all forms of racial discrimination (Convention of 21 December 1965).

Such conventions have, by establishing international standards, undoubtedly removed from the exclusive jurisdiction of individual states problems which had hitherto been in the province of purely national law. They have, moreover, in most cases introduced international preventive measures (such as replies to questionnaires or periodic reports) and, more rarely, corrective measures (ILO procedures; the UNESCO Protocol of 1962; Committee of Experts of the Convention against Discrimination of 1965). This last universal single-purpose convention, for the first time, opened the door to the right of individual petition.

The second category of universal conventions consists of two multi-purpose covenants in application of the Universal Declaration, one concerning civil and political rights and the other economic, social and cultural rights. They were adopted on the same day, 16 December 1966, by the United Nations General Assembly, the result of more than eighteen years' hard work. These covenants complete the triptych of which the Universal Declaration formed the first panel, in the first place, by means of their legally binding substantive provisions, and in the second place, by the preventive measures and corrective procedures normally available to the State parties. Certain procedures are made available to individuals through an optional protocol annexed to the covenant on civil and political rights. It will be an event of world significance when these Conventions come into force and a sign of a revolution in legal thinking, giving to the individual irrevocably a place among the subjects of international law.

V. This revolution was, moreover, begun at the regional level, by the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, signed at Rome on 4 November 1950, which was followed by a number of protocols extending the original list of rights and freedoms guaranteed. The democratic States, members of the Council of Europe, which have ratified and implemented the convention, were not merely the first to transform the principles of the Universal Declaration into international legal obligations; they also set up entirely new institutions to ensure their implementation: the European Commission of Human Rights which, since 1953, has heard three applications from States <sup>1</sup> and more than 3,100 from individuals, the Committee of Ministers, and, at the head, the European Court of Human Rights, which has been functioning since 1959, so far only on a

<sup>1</sup> *Editor's Note:* since the writing of this article, an application has been brought by several members of the Council of Europe against another member state.

comparatively small scale, though its work is clearly on the increase. This stands as a unique example of a regional organization which is effectively in force for the protection of Human Rights.

**VI.** However, it would be unrealistic to speak of this powerful movement exalting the dignity of man and ensuring, by means of legislation, that all human beings without discrimination have access to equal rights and fundamental freedoms, and at the same time to ignore the existence of certain elements, present in various parts of the world, which have curbed and opposed this development, or at least certain aspects of it. The spectacle of so many wars, of violence and unjust poverty which still mar the face of the earth can only prove that, in his journey down the ages, man has not progressed nearly as far in the realm of morals, politics and social organization as he has in the world of science.

In the first place, therefore, it must be stressed that 'where there is civil or foreign war, or even where the Geneva Red Cross Conventions of 1949 are not respected, there can be no liberty or dignity for man in such countries'. These freedoms are moreover, gradually being threatened, curtailed or jeopardized in other parts of the world.

Such is the opinion which, as Rapporteur of the drafting committee of the Declaration, I sought, in June 1947, to have included in the first draft Preamble (paragraph 2), which would have read as follows: 'Considering that there can be no peace unless the rights and freedoms of man are respected and, conversely, such rights and freedoms cannot be fully respected so long as war and the threat of war are not abolished'.

The idea which lay behind this text was unfortunately lost from sight during the preparatory work, and it was only towards the end of the discussions of the Third Committee of the General Assembly that, on the proposal of Mr. Bogomolov, the Soviet delegate, a vital paragraph, although much less forceful, was added to the Preamble: 'Whereas it is essential to promote the development of friendly relations between nations.'

The events in the recent past, the wars now being waged, the dangers threatening humanity, and the waste of vast resources on arms committed by most states, even the most needy, do not absolve us, but rather compel us to cast our minds back to the principal obstacle to the free realization of Human Rights.

It should be added that although the Nazi dragon was defeated in its powerful struggle to destroy freedom and equality, the poison which it left behind is no less deadly today, and is capable of infecting the world, if countries even slightly relax their resistance to its evil influence. Racial discrimination is one of its most dangerous carriers, since it not only denies freedom and equality to members of another

group, but, on what appear to be the most plausible grounds, it develops into genocide under all its forms. Neo-nazism organized openly on a world-wide basis is always a potential danger. Its activities should, therefore, be carefully tracked down, watched, opposed, and, at the first sign of danger, suppressed.

**VII.** The second factor which reduces the effect of all international, political and legal action to establish the principles of freedom and equality, is undoubtedly the starvation and malnutrition present in a great many countries with rising birth-rates. There are more than three thousand million human beings on earth today. Without advancing the theory of a strict correlation between the standard of living and the consumption of food on the one hand and respect for fundamental rights and freedoms on the other, it is impossible not to be aware of the startling relationship between them.

The food problem is closely connected with that of productivity; the gap between the developing countries and the developed countries is known to be widening at an alarming rate. The inhabitants of the richer countries and their governments would be making a grave mistake to imagine that the disastrous consequences of that disparity will only affect the population of the partially developed countries. Their economy, their principles and their own security will be in jeopardy, if the conditions of misery, tied to a defective and out-dated political organization, are not treated and remedied in a relatively short space of time.

**VIII.** This brings us to the third general factor causing delay in the acceptance and effective observation of the fundamental principles of the Universal Declaration. In the non-aligned countries, most of which have benefited from recent decolonization or from an attempt to abolish feudal and archaic institutions, the governments have usually directed the thoughts of their co-citizens towards the concept of emancipation from foreign influences. Their participation in the building of their country has therefore been stimulated primarily by antagonism towards the outside world.

Where the internal structure of a country (whether administrative, economic or social) needs to be re-organized or established, and age-old customs must be changed, there exists almost invariably an atmosphere of tension which requires, legitimately in the view of the government, a sacrifice of many of the most important individual rights, such as that of personal security, freedom from arrest and arbitrary detention, and freedom of expression and political opinion; and any opposition can easily be mistaken for subversion.

However, hasty generalizations, based entirely on the date of a State's independence or on the provisions of its constitution or its

laws as recorded in the United Nations Yearbook of Human Rights, must be avoided. The real degree of freedom, security and equality enjoyed by the people depends to a large extent on a State's effective cohesion (the balance of power between the provinces and the absence of tribal quarrels and threats of secession), its social composition (the homogeneity of the population, the difference in the races, its pressure groups and the division of individual and collective property), the degree of progress attained by its economy (a free or tied economy, an agricultural, industrial or mixed economy), its political system (democracy, dictatorship of a socialist nature, or a military anti-communist dictatorship, or a regime based on racial superiority).

Between extremist regimes such as those in Cuba, Algeria and Guinea and, at the other end of the spectrum, those in South Africa, Indonesia and Greece, there is a wide range of countries, under parliamentary or non-parliamentary democratic rule, progressive monarchies or moderate military governments, which pursue a policy of development refusing to sacrifice fundamental freedoms or to permit flagrant inequalities such as slavery, the caste-system or serfdom.

IX. Another disturbing factor should be considered: it is the serious inequality in size and strength among the various Member States of the United Nations. In the present period of decolonization, the right of peoples to self-determination is very widely applied. A recent vote has approved the granting of independence to the inhabitants of Mauritius. The multiplication of small countries, all entitled to vote at the United Nations General Assembly on an equal footing with the great powers, means that they have a greater influence than is commensurate with the responsibilities that they are in a position to assume, and is likely to lead to a development of a kind of international law that is a bastion for the weak. On the other hand, the burden of heavy state responsibilities falling upon inadequate organization, and the shortage of means and manpower capable of meeting the requirements of specialized skills renders the real independence of such states precarious and may constitute a threat to the freedoms of their citizens. Technical co-operation on the international level, however extensive, cannot compensate for such inadequacies: what must be an indispensable minimum is the organization of such States into vigorous regional groups, not necessarily possessing a common boundary and without prejudice to membership of political blocs. In fact, major structural reforms of world organization in general are inevitable.

X. Can it be said that the preceding examination of the world's balance-sheet leads to the conclusion that the guiding principles at the head of the Declaration have gained ground? Can it be said that the common man possesses a little more completely than in the past,

those two great gifts of freedom and equality, claimed as his birth-right not only by certain Mediterranean and Atlantic countries, but now, by the representatives of the whole world?

The answer is an undoubted affirmative, even though, at first glance, the hostile forces on the debit side appear to offset the credit balance. The pessimist in us points to the many examples of oppression and injustice in the world today, so many that it is difficult to imagine a worse state of affairs; and he may cite the numerous petitions to public opinion in each country, to the United Nations authorities and to other international or regional institutions, alleging the violation of the various fundamental freedoms or some outrage to human dignity.

All that cannot be denied. Yet, since the end of the Second World War, far-reaching changes have taken place in three particular spheres. In the first place, while there are still vast areas of the earth's surface where millions of men and women are resigned to their fate, and neither dare to breathe a complaint nor even imagine the existence of a remedy, their frontiers are receding rapidly. More and more widely, people have begun to be aware of their potential emancipation. In other vast areas, formerly under foreign domination, where independence has enhanced the dignity of the new citizens, their feeling of now being the equal and entitled to the respect of other people can be seen as a great step forward.

This is what reassures the optimist: the cries of victims can no longer be stifled with the same ease as before by oppressive governments and by those who exploit their fellow-beings. The growth of the press, world-wide coverage by radio and television and courageous 'on-the-spot' interviewing by ubiquitous news-reporters have ensured that those who have a grievance have been heard. Certainly, 'to be heard' does not necessarily mean 'to be listened to and heeded'. Nevertheless, the elementary condition of any system of justice, namely the ability to compel the powerful to accept some opposition and even public control is now fulfilled much more often than before.

The third change lies in the gradual organization and development of administrative, judicial, parliamentary and other remedies, allowing individuals or non-governmental bodies (leagues and groups) or officials (such as the *ministère public*, procurator general and ombudsman) to bring an action or application before a national or international authority. Most of the Conventions and Agreements referred to above urge the State parties to establish national bodies to whom petitions may be brought, and provide for their own international protection and control.

In conclusion, although the violations of human rights have not been sufficiently reduced, either in number or in seriousness, the attitude of hopeless resignation, the blanket of silence and the absence

of remedies are all gradually disappearing; this is an encouraging development, which must be preserved at all costs.

**XI.** The principles of freedom and equality are placed at the head of the Declaration, in the context of non-discrimination and brotherhood; a question that might be asked is which of the two principles has made the greater progress.

Such a comparison would be of little value in itself; and it would be better to examine a problem of greater importance from the point of view of both doctrine and practice: certain sociologists and philosophers have noted, with regret, that since the coming to independence of many states, the movement towards freedom in general and specific freedoms has, as a result of the Universal Declaration, been slower than the movement towards equality. The problem is to discover if this is so, and to what extent.

It should first be considered what freedom offers to an individual: it provides a shelter from outside coercion and at the same time the practical means to achieve his chosen aims. The freedom of the individual with its corresponding responsibility, within every social group and ultimately in the State itself, lies at the heart of democracy. However, these inherent human freedoms, which are the criteria of man's independence and a condition for the development of his personality, do not stand alone. The Declaration also recognizes and provides for a number of collective freedoms giving each man the means to defend his ideas and interests in Society. Political freedoms are often to be found in this category. The name, 'independence', is applied to that freedom which is enjoyed collectively by the citizens of a State, free from foreign domination. By stating that 'all human beings are born free', Article 1 of the Universal Declaration not only recognizes that they are not mere objects, as slaves for instance, but also that through their very existence they are entitled to make use of all the rights and freedoms contained in the Declaration.

The other arm of democracy is equality, the elementary form of justice, ever-present in the writings of Rousseau and Tocqueville. Article 1 of the Declaration states that 'all human beings are born equal in dignity and rights' — in the plural. The exact meaning of this reference is clarified by Article 2 and Article 7. Article 2 provides that there should be no distinction (discrimination) of any kind in the exercise of fundamental rights and freedoms, whether it be on the basis of rank, opinion or personal status (by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status) or the political status, jurisdictional or international, of the country of which the beneficiary is a national. Article 7 lays down that 'all are equal before the law and are entitled without discrimination to equal protection of the law'.

It is clear from these provisions that the Universal Declaration intends all human beings to be born and to live with equal rights. It is part of that liberal concept, which makes equality one of the mainstays of freedom: it raises to the level of those who were previously more privileged millions of people who had formerly been classified as inferior on account of their being women, coloured, serfs, proletarians and non-conformists, for example. Furthermore, the equal rights of all citizens to take part in the political and social life of the country and to have access, according to their merit, to public service, favours the existence of a state of freedom. Conversely, freedom is one of the means of ensuring equality; thus, by exercising the right to form trade unions, employees can put themselves in a position to negotiate with their employers on equal terms.

Indeed, equality in the law is itself an obstacle to arbitrary distinctions that individuals or authorities have, by virtue of freedom, been able to create. The courts are concerned with the principle of equality, not only as it affects individuals among themselves but also the equality of individuals as objects of legislation, and in respect of public offices and services. Nevertheless, these limitations on equality before the law are not really an obstacle to initiative or a check upon freedom.

**XII.** The most important conclusion that emerges from a comparison of the Declaration with the 18th century declarations and 19th century constitutions is that individual freedoms are not considered by the Universal Declaration to be *the* fundamental human rights to the exclusion of all others. In the Universal Declaration, these individual freedoms which are inherent in man's nature, are accompanied on an equal footing by economic and cultural rights which man has by virtue of his membership in society. These rights are provided for in general by Article 22, and are dealt with in particular by its following articles. These rights (such as the right to work, to an adequate standard of living, to social security, to leisure and to education) have sometimes been called 'artificial rights' since, according to Article 22 itself, their realization usually implies a transfer to the beneficiary from another individual or from the community, depending on the organization and resources of each country and on the national effort and international co-operation.

It should not be thought that these 'rights over society' belong to an inferior category because they depend on varying conditions and are too vague to be legally definable. The 'rights to freedom', such as the right to defend oneself before the law or freely to express one's opinions in the press, sometimes also depend on the presence of certain conditions, such as an adequate administration of the State; and the rights to property and to individual freedom are not always capable of being the subject of a legal action. It can easily be seen that



in a number of countries, for instance in France, the economic, social and cultural rights can, as soon as they have been defined, be the subject of a judicial claim from those who consider themselves to have been illegally injured, or in default of this, of a demand for compensation (right to social security in case of illness, to family allowances, to a minimum salary, to a minimum pension, or to compensation for redundancy).

Undoubtedly, the more fundamental rights are extended the more it becomes difficult to satisfy each one of them. Their realization depends on the political system in force: liberal systems are able to give priority to the safeguarding of individual freedoms, and socialist societies give preference to the fulfilment of economic and social rights, or some of them. To take an example, the considerable increase in the number of students in higher education necessitates their undergoing examinations of especial difficulty in order to enter or to remain in a faculty; in this sense, then, their freedom to study is no longer absolute; but it is undeniable that the spread of education among the citizens and future citizens is a powerful contribution towards realizing their freedom of opinion and their right to vote.

'Freedom', then, which results from man's being able to exercise fundamental rights and freedoms, is not, in principle, prejudiced by their extension in the Universal Declaration. It must, moreover, not be considered purely in relation to the State, but in terms of each of the many social groups, national or otherwise, of which each person is a member.

**XIII.** In the search for an explanation of the unquestionable retrogression in the realization of certain freedoms, and particularly in the spirit of freedom, (although the increasing momentum toward national independence is an exception), it is necessary to examine the deeper general causes.

The combination of the freedom to own property and of contract, whose power was greatest in the middle of the 19th century, and the serious *de facto* inequality between the individual seeking a livelihood and his employer, led to so much exploitation of the worker that almost everywhere varying forms of legislation had to be introduced to compensate for the effective absence of freedom among the weakest members, even in countries where trade union freedom had been recognized. Under the rule of these two freedoms, moreover, monopolies were set up which in a number of important fields suppressed free competition, the cornerstone of free societies. As a result serious measures were taken to put an end to this abuse; these ranged in the capitalist countries from prohibition of trusts and cartels to nationalization, and in socialist countries to the total suppression of private ownership of the means of production.

Under the influence of marxist theories, such measures became so serious that they aroused opposition, with the consequence that further measures were taken in order to consolidate the regimes that had limited the freedom; and other freedoms, theoretically on a temporary basis, were abolished or severely reduced, the first of these being freedom of expression, of political opposition, and of intercourse with foreign countries; and in many cases also the safeguards to individual freedom disappeared.

**XIV.** Even the least authoritarian democracies have found it necessary to impose more and more detailed and vexatious controls on their citizens. The reason for this lies in the present-day phenomenon of, on the one hand, the population explosion, and on the other, scientific progress making the world smaller and more crowded. In the words of Valéry, 'man's ends achieved have begun'.<sup>1</sup> Within national society the isolation and the independence everywhere of individuals, especially of producers of goods, has lessened to the same extent as the isolation and separation of former national societies. Interdependence, solidarity and unity of all strata of the human race are becoming daily stronger in all aspects of life. An ever tighter tangle of regulations and conventions is encircling human beings and communities. As man has become more powerful and has harnessed to a greater extent the forces of nature, he has become prisoner to the institutions and the technical machinery in the heart of which he lives.

This phenomenon which results from the population increase and man's ability to invent and to produce, is, in its strongest forms, irreversible. This is why the claims put forward by States, the most ancient no less than the newest and the most powerful, to absolute sovereignty seem entirely out of date and can only engender catastrophes which will eclipse the two world wars. A balance should therefore be found between the rights of the world community, the still extensive functions of States and the rights and freedoms of the individual as a subject of international law, freedoms of which only a small number should retain their absolute nature, such as freedom of conscience and the right to live in dignity, and the others more limited will be more strongly protected.

**XV.** Given the obstacles and the dangers which are always a threat to the freedom, the security and equality of treatment of human beings, in spite of present-day progress, the problem arises of finding the best ways of reaching these ideals of the Declaration.

Three parallel ways should, it is suggested, be followed simultaneously.

The first and the widest, is for States to follow, individually and in

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<sup>1</sup> 'L'ère du monde fini a commencé'.

the United Nations and other international institutions, a general policy of peace, constructive co-operation and solidarity. Everything that can be done to rid the world of the fear of tyranny, to prevent famine, and the exploitation of the poorest people, to arrest the arms race, to eliminate incitement to racialism, to adapt judicial institutions to the modern world and to find peaceful means of settling disputes, will at the same time contribute to the protection of human rights.

The second way is for public opinion and States to direct their policy towards the creation and putting into effect of national or international institutions, whose principle purpose would be to prevent, correct and even sanction violations of human rights. By its mere presence, the European system for protecting human rights has encouraged States to bring into their legislation effective guarantees for the rights of individuals and to remove from it anything that is inconsistent with the European Convention of 1950.

At the world level, the scarcity of machinery for international protection (outside the International Labour Organization) gave way after a few years to an almost anarchical abundance: in November 1962, the UNESCO protocol, establishing a Commission to detect violations of the Convention of 1960 against discrimination in education; December 1965, the United Nations *Convention for the Elimination of all forms of Racial Discrimination*, establishing an international committee of experts with wide powers; December 1966, the adoption of the *International Covenant on Civil and Political Rights*, setting up a Human Rights Committee to which under an optional protocol individuals may bring applications; March 1967, for the first time since its establishment, the Commission on Human Rights was invited by the United Nations' Assembly to recommend measures against violations of human rights, and appointed a Committee of Jurists to enquire into a concrete situation, that of the policy of *apartheid* in South Africa. Finally, in Autumn 1967, the General Assembly of the United Nations included in its agenda the creation of the office of a High Commissioner for Human Rights.

It is to be feared that the almost simultaneous initiation of too many devices and procedures will cause duplication of work and encourage inertia on the part of governments reluctant to ratify the 1965 Convention and the 1966 Covenants, which take the grievances of individuals out of their exclusive jurisdiction.

It is moreover of the highest importance that public opinion and States should bring about the signature, ratification and effective implementation of these instruments with the minimum of delay and reservations. Since it is a long and arduous task, it is essential that it should be begun now.

Only after this, will it be possible to take effective action to establish

an organ of the United Nations (a *Ministère Publique*, Attorney-General, or an international Ministry of Justice) having the power to set in motion a procedure for detecting, and if necessary sanctioning violations of the Covenants and breaches of law committed by States not bound by these Covenants.

XVI. The third way, in appearance the least demanding, is for each country to establish within the framework of the Universal Declaration and the Covenants implementing it a system in which each man is able freely to develop his personality.

This is the opinion of those who are anxious to prevent the disappearance of a sense of responsibility and a spirit of initiative which might result from a minimum of protection being given to all. There is, for example, the case of old age pensioners: social security should be organized so that a minimum level of existence is guaranteed to every old person. For that purpose, compulsory saving combined with contributions from employers and the community constitute the normal method of providing the necessary funds. However, it is right that the amount of the retirement pension should be augmented by the beneficiary's own efforts: he may have subscribed for longer than the minimum period, or he may, on his own initiative, have taken out a complementary insurance policy.

Similarly, scholarship grants for higher education and even the right to follow advanced studies at a given level cannot, even in the most democratic society, be accorded without a selective system, ensuring that the most able benefit from the resources allocated to education by the community.

In conclusion, equality should always be sought by raising to the higher level rather than by reducing to the lower. Experience shows that skilled workers are less vulnerable to unemployment than others; that agrarian laws enacted without measures for safeguarding productivity rarely succeed. Recently, one of the greatest sociologists of our time published the fact that, in the space of half a century, the gap between the salaries of senior officials and workers' wages had narrowed considerably, not on account of a reduction in the former but of an increase in the latter, made possible by higher productivity bringing greater wealth.

There are countries, industrial and liberal, where freedom originated and has for long been practised, but where a certain retrogression has taken place. This must be counteracted by safeguarding and strengthening the freedoms as a whole. Relevant examples are the measures which have been or are to be taken in regard to ownership of rural or urban land; others are the restrictions on liberty in the professions, in industry, agriculture and commerce. The economic planning which is gaining ground in many countries can, if voluntarily

respected by the producers and traders concerned, prevent a country's economy from becoming authoritarian or from being transformed by nationalization which should not otherwise have been necessary. Freedom which is disciplined is able to gain respect much more than a freedom which is used to destroy itself.

**XVII.** A most powerful factor which can set man free has not yet been mentioned; it is education. The Universal Declaration not only places education in the forefront of the means for promoting understanding and respect for Human Rights, it also states clearly in Article 26, paragraph 2, that 'education should be directed to the full development of the human personality'. The building of character is an essential part of education; it is not on the curriculum but runs parallel to it. Education, self-mastery, the spirit of liberty and initiative given to the new generations and an awareness of the distinction between the discipline indispensable to social life and slavish conformity, these are all part of education and ensure that there will always be a source of independent vitality within the members of society.

Education, moreover, is not only given in schools and colleges; the role of the universities is essential, though at present they are far from doing as much as could be desired. The family and vocational training institutions also have a primary role which they must not abandon. Nor is education in the wider sense confined to children and adolescents, it extends to adults as well, not only in the form of retraining which is becoming more and more necessary, but also through the influence of culture and a sensible use of leisure. The Preamble to the UNESCO Convention recalls that, 'the great and terrible war which has now ended was made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation in their place through ignorance and prejudice of the doctrine of the inequality of men and races'. Article 2(b) provides that UNESCO 'should suggest methods of education for preparing the children of the whole world for the responsibilities of free man'.

If the world, whose progress towards unity is increasingly determined by technology, is to remain a human world, there is nothing more essential than the realization of Article 1 of the Universal Declaration. Conscious of his dignity, man must defend his freedoms without forgetting that, as Gandhi so wisely said, these freedoms must be used to further the fulfilment of his duties and, it must be added, to treat his fellowmen as equals and brothers.

# THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

## A common standard of achievement ? The status of the Universal Declaration in international law

by  
LOUIS B. SOHN \*

When the *Universal Declaration of Human Rights* was adopted by the General Assembly in 1948, the Assembly in the preamble to the Declaration took two separate steps: it proclaimed the Declaration 'as a common standard of achievement for all peoples and all nations'; and it stated that 'every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'. What is the meaning of these provisions? Are they mere exhortation? Or do they imply an obligation to secure effective observance of the rights and freedoms listed in the Declaration? To find an answer to this question, it is necessary to explore the legislative history of the Declaration and to consider its application in practice.

### Legislative History

The San Francisco Conference, at which the United Nations was established, did not have time to prepare and insert in the Charter of the United Nations an 'international bill of rights'; but it was clearly understood that one of the first duties of the new United Nations would be to frame such a bill.<sup>1</sup> In accordance with this understanding, one of the first tasks given by the Economic and Social Council of the United Nations to its Commission on Human

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<sup>1</sup> United Nations Information Organizations, Documents of the United Nations Conference on International Organization (London-New York, 1945), Vol. VI, pp. 296, 423, 456, 705. In his closing speech to the Conference, President Truman expressed the hopes of all, when he stated that under the Charter 'we

Rights was to prepare an international bill of rights. This led immediately to a division of opinion between those who wanted the bill of rights to take the form of a 'Declaration' and those who felt that it should take the form of a 'Convention' or 'Covenant'. As a compromise, it was agreed that two documents should be prepared, a Declaration 'wider in content and more general in expression' and a Convention (or Covenant) on those matters which 'might lend themselves to formulation as binding obligations.'<sup>2</sup> In voting for the Draft Declaration in the Commission on Human Rights, the French representative emphasized that the Declaration constituted something new: '... the individual becomes a subject of international law in respect of his life and liberty; principles are affirmed, side by side with those already laid down by a majority of national laws, which no national or international authority had hitherto been able to proclaim, let alone enforce.'<sup>3</sup>

In commenting on the Draft Declaration, the Netherlands Government expressed the view that the Declaration would have 'only a moral importance', while the Covenant would be 'a legally binding instrument' which would have to be ratified or accepted in a formal way.<sup>4</sup> The Government of the United States considered that the Declaration should fulfil two functions:

1. To serve as basic standards to guide the United Nations in achieving, within the meaning of the Charter, international co-operation in promoting and encouraging respect for and observance of human rights and fundamental freedoms for all;
2. To serve as a guide and inspiration to individuals and groups throughout the world in their efforts to promote respect for and observance of human rights.

It added that the nature and purpose of the Declaration could best be explained by a statement of President Lincoln who, in discussing the affirmation of human equality in the Declaration of Independence, had said that the draftsmen of that instrument 'did not mean to assert the obvious untruth that all were then actually enjoying that equality, or yet that they were about to confer it immediately upon them. In fact, they had no power to confer such a boon. They meant simply to declare the *right*, so that the *enforcement* of it might follow as fast as circumstances should

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have good reason to expect the framing of an international bill of rights, acceptable to all the nations involved. That bill of rights will be as much a part of international life as our own *Bill of Rights* is a part of our Constitution.' *Idem*, Vol. I, p. 717.

<sup>2</sup> U.N. Doc. E/CN.4/21 (1 July 1947), pp. 3,6.

<sup>3</sup> Economic and Social Council, Official Records, Sixth Session, Supp. 1 (E/600), p. 20.

<sup>4</sup> U.N. Doc. E/CN.4/82/Rev.1 (22 April 1948), p. 3.

permit. They meant to set up a standard maxim for free society which should be familiar to all,—constantly looked to, constantly laboured for, and even, though never perfectly attained, constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people, of all colours, everywhere. ' <sup>5</sup>

The Mexican Government expressed the view that the 'usefulness and importance of the Declaration are not lessened by the fact that it includes no provisions for legal sanctions. The Declaration has a real and effective value in itself; first, because it states precisely the human rights and fundamental freedoms which States Members undertook in signing the Charter of the United Nations to promote and develop, and second, because it solemnly proclaims before the whole world a standard of justice and freedom to serve as guide and encouragement to States in their own practice, and enjoying the approval of international public opinion'. It also noted that 'although this Declaration imposes no precise legal obligations on Members, these in signing the Charter undertook to fulfil in good faith the principles stated therein; and these principles include the promotion and respect of human rights'. <sup>6</sup> More cautiously, the United Kingdom expressed the view that the Declaration constituted 'a statement of ideals, a goal towards which mankind should strive, and in no way a document creating binding legal provisions, such as the Covenant'. <sup>7</sup> On the other hand, the Swedish Government was willing to go much further than the others; it felt that it would be most gratifying if the principles laid down in the Declaration 'were raised to the international level and fitted into the system of international law'. <sup>8</sup> The Government of New Zealand took a more middle of the road position, in considering that the object of the Declaration should be to 'state the philosophical basis of human rights and fundamental freedoms, define the essence of each, and state, in a form comprehensible to the peoples of the world, the objectives of the United Nations in the field of human rights and fundamental freedoms'; and that the Declaration 'cannot in itself impose any legal obligation on States or call for any measures of implementation, although it may, with reference to the rights and freedoms not dealt with in detail in the Covenant, provide a guide to the interpretation of the relevant provisions of the United Nations Charter'. <sup>9</sup>

During the discussion in the Commission on Human Rights, Professor Cassin (France) noted that there were two conflicting

<sup>5</sup> *Idem*, pp. 18-20.

<sup>6</sup> U.N. Doc. E/CN.4/82/Add.1 (16 April 1948), p. 3.

<sup>7</sup> U.N. Doc. E/CN.4/82/Add.9 (10 May 1948), p. 2.

<sup>8</sup> U.N. Doc. E/CN.4/82/Add.11 (19 May 1948), p.1.

<sup>9</sup> U.N. Doc. E/CN.4/82/Add.12 (3 June 1948), p. 4.



views about the legal force of the Declaration. Some saw the Declaration purely as a document interpreting the Charter, and therefore vested with the same mandatory force as the Charter itself. Others saw it as a purely formal document, giving expression to a hope of a rather limited moral influence, and of no legal value until its principles had been embodied in one or several covenants. The French Government believed that the Declaration, which would in a sense be an explanation of human rights in existence before the Charter, rights which it was incumbent upon the Members of the United Nations to protect in accordance with the Charter, should to a certain extent bear an assertive character. Even in the absence of any Covenant, therefore, the principal organs of the United Nations would, in the opinion of the French delegation, be entitled to take cognizance of the fact if any State violated human rights.<sup>10</sup> Mr. Malik (Lebanon) declared that the Declaration should be given greater weight and importance than ordinary General Assembly resolutions; the Declaration was not a simple resolution of the General Assembly, but a continuation of the Charter and must have the dignity of the Charter.<sup>11</sup>

Similarly, various views on the subject were voiced in the final debate in the General Assembly. Mrs. Roosevelt (U.S.A.) stated that the Declaration was not a treaty or international agreement and did not impose legal obligations; it was rather a statement of basic principles of inalienable human rights, setting up a common standard of achievement for all peoples and all nations. Although it was not legally binding, the Declaration would, nevertheless, have considerable weight. Its adoption would commit Member States, in the words of the preamble, 'to strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction'. Mr. Castberg (Norway) considered that, though the Declaration was designed to set moral standards rather than to impose legal obligations, it would be of practical value, since it would undoubtedly serve as a basis for the discussion in the United Nations of any questions of human rights.

Mr. Santa Cruz (Chile) remarked that the Declaration merely stated, explicitly, rights granted by the Charter, and consequently a violation by any State of the rights enumerated in the Declaration would mean violation of the principles of the Charter. Similarly, Mr. Azkhoul (Lebanon) expressed the view that the Declaration was

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<sup>10</sup> U.N. Doc. E/CN.4/SR.48 (4 June 1948), pp. 6-9.

<sup>11</sup> U.N. Doc. E/CN.4/SR.50 (4 June 1948), pp. 3-5.

not mere pious talk, for no State could violate its principles without also violating the terms of the Charter. In actual fact, the resolution for its adoption was more than a recommendation because there already existed a place in the Charter for a declaration of human rights. Human rights were mentioned too many times throughout the Charter for that not to be so. The implicit agreement concerning human rights, which was reflected in the Charter, was stated clearly in the Declaration. Mr. Cassin (France) considered that the Declaration was fulfilling the promise made at San Francisco. It was intended to guide Governments in the determination of their policy and their national legislation. Such a declaration would not have any coercive legal force but it would, nonetheless, have a very real value because, on the one hand, it could be considered as an authoritative interpretation of the Charter of the United Nations and as the common standard towards which the legislations of all the Member States of the United Nations should aspire and, on the other hand, although it had no coercive power, it could not be considered as weakening in any way the pledges made by States subscribing to the Charter of the United Nations. However, Mr. Mayhew (United Kingdom) denied that the Declaration could be considered to have legal authority, as an interpretation of the relevant provisions of the Charter. No General Assembly resolution could establish legal obligations. The moral authority of the document that would be adopted by the Assembly, however, would serve as a guide to Governments in their efforts to guarantee human rights by legislation and through their administrative and legal practice.

Mr. Dehousse (Belgium) made a distinction between the principles which would be inserted in the Declaration: 'Some of the principles will only repeat rules which already appear in the customary law of nations and are, in consequence, recognized in unwritten international law. The act of inscribing them in an international declaration cannot deprive these rules of the binding character they already possess.

'Other principles which will be included in the Declaration do not belong to international customary law, and the fact of their inclusion in an international declaration will certainly not make them obligatory. Their inclusion, however, will oblige Member States to give those principles very serious consideration; and that may lead them to consider the question of adapting their constitutions and laws to the declaration they have approved.

'Naturally no Member State will be under an obligation to adapt its constitution and laws in that way. No Member State, even if it has voted for the Declaration will be legally bound to write the principles of the Declaration into its legislation. But it will be under

the obligation to take them into consideration. In other words, the recommendation resulting from the work of the Committee will create the beginning of an obligation for the Member States of the United Nations.' He added that the Declaration would have incontestable legal force. It would not, in the strict sense of the word, be binding; but it would place an obligation on Member States to consider the action which should be taken on that recommendation of the General Assembly.<sup>12</sup>

Introducing the Declaration to the plenary session of the General Assembly, Mr. Charles Malik (Lebanon), the Chairman of the Third Committee which prepared the draft, recalled that the Members of the United Nations had already solemnly pledged themselves, under the Charter, to promote respect for human rights and fundamental freedoms, but that it was the first time that human rights and fundamental freedoms had been set forth in detail. Hence every Government knew, at present, to what extent exactly it had pledged itself, and every citizen could protest to his Government if the latter did not fulfil its obligations. The Declaration would therefore provide a useful means of criticism and would help to bring about changes in present legal practice. Mrs. Roosevelt (U.S.A.) stressed that the Declaration was first and foremost a declaration of the basic principles to serve as a common standard for all nations. It might well become the *Magna Carta* of all mankind. Mrs. Roosevelt thought that its proclamation by the General Assembly would be of importance comparable to the 1789 *Declaration of the Rights of Man*, the proclamation of the rights of man in the *Declaration of Independence* of the United States of America, and similar declarations made in other countries.

Mr. Cassin (France) emphasized again his view that the Declaration had a wide moral scope. Furthermore, while it was less powerful and binding than a convention, it had no less legal value, for it was contained in a resolution of the Assembly which was empowered to make recommendations; it was a development of the Charter which had brought human rights within the scope of positive international law. That being so, it could not be said that the Declaration was a purely theoretical instrument. It was only a potential instrument; but that fact in no way detracted from the binding force of the provisions of the Charter. Similarly, Mr. Ugon (Uruguay) pointed out that the Declaration was a natural complement of the Charter, and thus, its enforcement and respect for its provisions would become one of the obligations of Member States. Count Carton de Wiart (Belgium) noted that in certain

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<sup>12</sup> General Assembly, Official Records, Third Session, Part I, Third Committee, pp. 32, 35, 51, 61, 64, 199-200.

circles, it had been said that the Declaration of Human Rights was a purely academic document. That statement was erroneous, for the Declaration not only had an unprecedented moral value, it had also the beginnings of a legal value. The man in the street who appealed to the Declaration could support his protests with the authority of the unanimous decision of the peoples and Governments of the United Nations. When the General Assembly approved the Declaration unanimously, by 48 votes with 8 abstentions (the Soviet bloc, Saudi Arabia and the Union of South Africa), the President of the General Assembly (Mr. Evatt, Australia) stated that the adoption of the Declaration by a big majority without direct opposition was a remarkable achievement, a step forward in a great evolutionary process. He added that this document was backed by the authority of the body of opinion of the United Nations as a whole, and millions of people, men, women and children all over the world, would turn to it for help, guidance and inspiration.<sup>13</sup>

It is difficult to draw any firm conclusions from this drafting history. There seems to be an agreement that the Declaration is a statement of general principles, spelling out in considerable detail the meaning of the phrase 'human rights and fundamental freedoms' in the Charter of the United Nations. As the Declaration was adopted unanimously, without a dissenting vote, it can be considered as an authoritative interpretation of the Charter of the highest order. While the Declaration is not directly binding on United Nations Members, it strengthens their obligations under the Charter by making them more precise. Members can no longer contend that they do not know what human rights they promised in the Charter to promote. They agreed in the Declaration on 'a common standard of achievement', they approved a list of basic rights and freedoms, and they accepted the obligation 'to secure their universal and effective recognition and observance' by 'progressive measures, national and international'.

### Practice of the United Nations

The Declaration has been applied constantly in the practice of the United Nations, and even States which had originally expressed doubts about the legal force of the Declaration have not hesitated to invoke it and to accuse other States of having violated their obligations under the Declaration. The United States, for instance, invoked it in the so-called *Russian Wives Case* even before the

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<sup>13</sup> General Assembly, Official Records, Third Session, Part I, Plenary Meetings, pp. 860, 862, 866, 880, 887, 933-34.

ink on the Declaration was dry,<sup>14</sup> and the General Assembly adopted a resolution on the subject, declaring that Soviet measures preventing Russian wives leaving the Soviet Union with their foreign husbands were 'not in conformity with the Charter', and it cited Articles 13 and 16 of the Declaration in support of this conclusion.<sup>15</sup>

The Declaration was invoked by the General Assembly in several resolutions relating to the treatment of people of Indian and Pakistani origin in South Africa,<sup>16</sup> the administration of South Africa,<sup>17</sup> and the policies of *apartheid* in South Africa.<sup>18</sup> The Security Council requested South Africa 'to cease forthwith its continued imposition of discriminatory and repressive measures which are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights'.<sup>19</sup> In a more general fashion, the General Assembly condemned 'all manifestations and practices of racial, religious and national hatred in the political, economic, social, educational and cultural spheres of the life of society as violations of

<sup>14</sup> General Assembly, Official Records, Third Session, Part I, Sixth Committee, pp. 735-39.

<sup>15</sup> General Assembly, Resolution 285 (III), 25 April 1949; General Assembly, Official Records, Third Session, Part II, Resolutions (A/900), pp. 34-35.

<sup>16</sup> General Assembly, Resolution 265 (III), 14 May 1949; General Assembly, Official Records, Third Session, Part II, Resolutions (A/900), p. 6. General Assembly, Resolution 395 (V), 2 December 1950; General Assembly, Official Records, Fifth Session, Supp. 20 (A/1775), p. 24. General Assembly, Resolution 511 (VI), 12 January 1952; General Assembly, Official Records, Sixth Session, Supp. 20 (A/2119), p. 11. General Assembly, Resolution 615 (VII), 5 December 1952; General Assembly, Official Records, Seventh Session, Supp. 20 (A/2361), p. 8. General Assembly, Resolution 719 (VIII), 11 November 1953; General Assembly, Official Records, Eighth Session, Supp. 17 (A/2630), pp. 5-6; General Assembly, Resolution 1179 (XII), 26 November 1957; General Assembly, Official Records, Twelfth Session, Supp. 18 (A/3805), p. 8. General Assembly, Resolution 1302 (XIII), 10 December 1958; General Assembly, Official Records, Thirteenth Session, Supp. 18 (A/4090), p. 9. General Assembly, Resolution 1597 (XV), 13 April 1961; General Assembly, Official Records, Fifteenth Session, Supp. 16A (A/4684/Add.1), p. 5. General Assembly, Resolution 1662 (XVI), 28 November 1961; General Assembly, Official Records, Sixteenth Session, Supp. 17 (A/5100), p. 10. After 1961, the General Assembly combined this question with that of *apartheid*.

<sup>17</sup> See, for instance, General Assembly, Resolution 1142B (XII), 25 October 1957; General Assembly, Official Records, Twelfth Session, Supp. 18 (A/3805), p. 25.

<sup>18</sup> See, for instance, General Assembly, Resolution 721 (VIII), 8 December 1953; General Assembly, Official Records, Eighth Session, Supp. 17 (A/2630), pp. 6-7.

<sup>19</sup> Security Council, Resolution 182 (1963), 4 December 1963; Resolutions and Decisions of the Security Council, 1963 (S/INF/18/Rev.1), pp. 8-10.

the Charter of the United Nations and the Universal Declaration of Human Rights'.<sup>20</sup>

All these resolutions indicate the growing reliance by the United Nations on the proposition that the Declaration established binding obligations, a violation of which by a State may be severely condemned by the General Assembly. This seems to be also the implication of two provisions included in the two later Declarations adopted by the General Assembly in 1960 and 1963. Thus in 1960 the General Assembly unanimously proclaimed in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* that:

All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity.<sup>21</sup>

A similar provision was included in the *Declaration on the Elimination of All Forms of Racial Discrimination*.<sup>22</sup> These two supplementary Declarations have been vigorously implemented by the General Assembly and the Security Council, especially in the Rhodesian Case.<sup>23</sup>

## Conclusions

The doubts which might have been raised in 1948 about the effect of the Universal Declaration of Human Rights have been dispelled by the constant and consistent practice of the United Nations, which has imbued the Declaration with a status almost equal to that of the Charter itself. On the one hand, the Declaration derives its strength from being an authoritative interpretation of the Charter. On the other hand, the Declaration strengthens the

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<sup>20</sup> General Assembly, Resolution 1510 (XV), 12 December 1960; General Assembly, Official Records, Fifteenth Session, Supp. 16 (A/4684), pp. 21-22. See also General Assembly, Resolutions 1779 (XVII), 1780 (XVII) and 1781 (XVII), 7 December 1962; General Assembly, Official Records, Seventeenth Session, Supp. 17 (A/5217), pp. 32-33.

<sup>21</sup> General Assembly, Resolution 1514 (XV), 14 December 1960; General Assembly, Official Records, Fifteenth Session, Supp. 16 (A/4684), pp. 66-67. This Declaration was approved by 89 votes, with 9 abstentions (Australia, Belgium, Dominican Republic, France, Portugal, Spain, Union of South Africa, United Kingdom, and United States).

<sup>22</sup> General Assembly, Resolution 1904 (XVIII), 20 November 1963; General Assembly, Official Records, Eighteenth Session, Supp. 15 (A/5515), pp. 35-37. This Declaration was adopted unanimously, South Africa not participating in the vote.

<sup>23</sup> See, for instance, the resolution of the Security Council of 16 December 1966, U.N. Doc. S/RES/232 (16 December 1966).

obligations of the Charter by giving a more precise meaning to the general phrases of the Charter. Step by step, the United Nations has proceeded to enforce more vigorously the obligations of Member States to observe human rights and fundamental freedoms, and almost all Members have accepted this gradual extension of United Nations powers in this area. Many traditional rules of international law may have been changed through these developments; but those who are traditionally inclined can trace the new obligations to the consent of the Member States, given by their acceptance of the Charter, their unanimous votes for the three Declarations, and their explicit or tacit approval of the decisions of the United Nations which rely on the binding character of the Declarations.<sup>24</sup> In a relatively short period, the Universal Declaration of Human Rights has thus become a part of the constitutional law of the world community; and, together with the Charter of the United Nations, it has achieved the character of a world law superior to all other international instruments and to domestic laws.

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<sup>24</sup> The rules of international law relating to sources of international law are flexible enough to allow—as suggested by Dr. Bin Cheng in connection with space law—‘instant’ creation of new rules of law by unanimous, or nearly unanimous, consent. If almost all the States in the world, including all the major powers, should agree that rules embodied in certain declarations adopted by the General Assembly are binding upon them, by that very fact these rules create obligations for all States including the few dissenters. In the human rights area this method has actually been applied in a variety of ways, and the fact that the Universal Declaration and the subsequent Declarations have resulted in specific obligations, limited only by the rather general character of the phrases used, has by now been widely accepted.

# ASYLUM — ARTICLE 14 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

by

PRINCE SADRUDDIN AGA KHAN \*

## Introduction

While the age-old problem of refugees has unfortunately not abated in the present century, it is an encouraging development that the position of the asylum seeker has become a matter of concern to the international community. It is therefore quite natural that when the *Universal Declaration of Human Rights* was drafted, an article was included which stated specifically that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'.

In our modern times society has found it necessary to give clear definitions so as to include in the structure of laws and regulations the provisions that are essential to the working of a well-organized community. Thus, the refugee has been described as a person who is outside his former home country because of fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, and who cannot or will not avail himself of the protection of his country of origin.

Before this definition existed there were, of course, refugees. History relates how particular groups fled in times of disturbances because their lives or their property were in danger, or they were not allowed to live according to their creed. They found asylum in other countries, very often receiving help from people who thought like them or belonged to the same religion. Such active generosity was sometimes viewed with considerable suspicion by the State from which the refugees had fled and denounced as an unfriendly act. Even in more recent times, help to refugees was the subject of much controversy. There has, however, been a definite change of heart in this respect. More and more, the refugee problem has come to be regarded as a matter of concern to the international community as a whole, calling for action of a purely humanitarian and non-political nature, which

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\* United Nations' High Commissioner for Refugees.



needs the support and co-operation of all States irrespective of their attitude towards the political or other causes that are at the root of the problem. The High Commissioner's functions are now almost universally accepted in this light. Not infrequently the countries of origin of refugee groups publicly express their appreciation for the activities undertaken by the international community to help—to refer to a phraseology often used—‘their compatriots who left the country’. Undoubtedly, they are moved by the consideration that the relief and resettlement operations are positive elements that may reduce tensions in the area. They know that the material assistance projects will help the displaced populations to settle peacefully in their country of asylum and that, as a result, the causes of unrest and agitation will tend to be reduced.

This state of mind is the result of a gradual development in the thinking of nations about refugee problems, in the fields of both protection and assistance.

### International Protection of Refugees

As from the close of the first World War, a series of international instruments relating to refugees<sup>1</sup> were adopted and a succession of intergovernmental organs were created to provide refugees with international protection.<sup>2</sup> The various agreements at first provided for the issue of certificates of identity to refugees to use as travel documents. Later the agreements became wider in scope and concerned also the legal status of refugees in their countries of asylum.

One must remember that refugees are not ordinary aliens and that the rules and regulations for foreigners do not by far meet the very special situation in which refugees find themselves. Therefore, it was necessary to take a number of measures that would give refugees the

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<sup>1</sup> *Arrangement (of 5 July 1922) for the Issue of Certificates of Identity to Russian Refugees* (L.o.N. Treaty Series, Vol. 13, No. 355); *Arrangement (of 31 May 1924) for the Issue of Certificates of Identity to Armenian Refugees* (L.o.N. Doc. CL. 72 (a) 1924); *Arrangement (of 12 May 1926) relating to the Issue of Identity Certificates to Russian and Armenian Refugees* supplementing and amending earlier arrangements (L.o.N. Treaty Series, Vol. 89, No. 2004); *Arrangement (of 30 June 1928) relating to the Legal Status of Russian and Armenian Refugees*, (paragraph 7) (League of Nations Treaty Series, Vol. 89, No. 2005); *Convention relating to the International Status of Refugees* of 28 October 1933, (Article 3) (*Ibid.*, Vol. 159, No. 3663); *Provisional Arrangement concerning the Status of Refugees coming from Germany* of 4 July 1936, (Article 4) (*Ibid.*, Vol. 171, No. 3952); *Convention concerning the Status of Refugees coming from Germany* of 10 February 1938, (Article 5) (*Ibid.*, Vol. 192, No. 4461); *Convention relating to the Status of Refugees* of 28 July 1951 (United Nations Treaty Series, Vol. 189, p. 137).

<sup>2</sup> As to the nature of this international protection and its relation to human rights, see pp. 32 and 33 below.

basic rights to which as human beings they are entitled, such as the right to work, access to courts, the right to own property, the right to a legal identity, and a series of rights in the social field. These various rights are now defined in detail in the international *Convention relating to the Status of Refugees*, adopted in Geneva in 1951, to which fifty-one States are now parties.

Nevertheless, the most essential requirement in all refugee work is that a person will be granted asylum. This means that he will not, upon entering a country, be returned to his country of origin or to the country from which he fled, or at a later stage be expelled from his country of asylum to a country where he fears persecution.

It is proposed in this article to examine in greater detail the basic principles of asylum and in particular how they have been dealt with in various instruments adopted in the field of Human Rights:

### **The Traditional View of Asylum**

According to the traditional view, the so-called 'right of asylum' is the sovereign right of a State to grant asylum in its territory to persons fleeing from persecution. Being the exercise of a sovereign right, the granting of asylum cannot therefore be considered an unlawful act by other States. This traditional view is reflected in the history of the elaboration of Article 14 of the Universal Declaration and its present wording. The earlier version, drafted by the United Nations Human Rights Commission in 1947, stated that 'Everyone has the right to seek and *be granted* in other countries asylum from persecution'. In 1948, when the text was examined by the General Assembly, the words '*be granted*' were replaced by the word '*enjoy*'. According to the Declaration, therefore, everyone has the right *to seek* and *to enjoy* but not the right *to be granted* asylum.

### **Developments since the Universal Declaration of Human Rights**

#### *(a) Preparation, within the framework of the United Nations, of a Draft Declaration on Territorial Asylum*

One year before the Universal Declaration of Human Rights was formally adopted by the General Assembly, meeting in Paris in 1948, a decision was taken by the United Nations Human Rights Commission 'to examine at an early opportunity the question of the inclusion of the right of asylum of refugees from persecution in the International Bill of Human Rights or in a Special Convention for the purpose'.<sup>3</sup> For a number of reasons it was, however, found more appropriate to

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<sup>3</sup> Document E/600, para. 48.

draft a special Declaration, at first called ' Declaration on the Right of Asylum ', later changed to ' Declaration on Territorial Asylum ', which passed through a number of Committees, without, however, reaching the final stage of adoption. At present, a text has been prepared by a Working Group of 20 members set up by the Sixth Committee,<sup>4</sup> and it is hoped that it will be formally adopted by the General Assembly during its Twenty-Second Session in the autumn of 1967. It is significant of the present thinking that the Declaration specifically states that the granting of asylum is a peaceful and humanitarian act and, as such, cannot be regarded as an unfriendly act by other States. Article 1 of the Draft Declaration re-states the traditional view that asylum granted by a State in the exercise of its sovereignty shall be respected by all other States. Article 2 declares that the situation of persons entitled to invoke Article 14 of the *Universal Declaration of Human Rights* is without prejudice to the sovereignty of States..., of concern to the international community. Moreover, the Article makes it clear that where a State has difficulties in granting or in continuing to grant asylum, other States, in a spirit of international solidarity, individually or through the United Nations, will consider measures that can lighten the burden. From the point of view of the individual seeking asylum, the basic article of the Draft Declaration is Article 3. This Article states in clear terms that no person entitled to invoke Article 14 of the *Universal Declaration of Human Rights* shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution (paragraph 1). Exception to this principle may only be made for over-riding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons (paragraph 2). Should a State decide that such an exception would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

The present wording of the Draft Declaration is not very different from that already adopted by the Human Rights Commission in 1960. Its terms could already serve as a model for provisions relating to asylum in regional instruments, notably in Asia and Africa. The *Principles concerning Treatment of Refugees* adopted by the Asian-African Legal Consultative Committee meeting in Bangkok in 1966, and the *Draft Convention relating to the Status of Refugees in Africa* adopted in

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<sup>4</sup> Australia, Belgium, Bulgaria, Ceylon, Colombia, France, Hungary, Iraq, Japan, Mali, Mexico, Nigeria, Norway, Philippines, Sudan, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, United States, Venezuela.

Addis Ababa in 1966 by a Committee of Legal Experts of the Organisation of African Unity, each contain an Article on Asylum similar to Article 3 of the Draft Declaration.

(b) *Right of asylum in national legislation*

Over the years a number of States have taken the initiative to introduce provisions relating to the granting of asylum either in their Constitution or in their Aliens Legislation. In many cases these provisions confer upon the individual a subjective right to asylum under national law.<sup>5</sup>

(c) 'Non-Refoulement'

A further important development has been the widespread acceptance of the principle of *non-refoulement*.

In the *Convention relating to the Status of Refugees* of 28 July 1951, Article 33, provides that:

1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provisions may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The importance of this Article is all the more significant in that no less than fifty-one States are parties to the Convention, and that in many cases its provisions have direct force under national law.

The international community has on various occasions stressed the basic character of the 1951 Convention, and hence of the principle of *non-refoulement* which it embodies. Thus, in Resolution 1959 (XVIII) of 12 December 1963, the United Nations General Assembly invited States Members of the United Nations and members of Specialized Agencies to continue to lend their support to the alleviation of refugee problems . . . by improving the legal status of refugees residing in their territory, particularly in new refugee situations, *inter alia*, by acceding as appropriate to the 1951 *Convention relating to the Status of Refugees* and by treating new refugee problems in accordance with the principles and the spirit of the Convention. The basic character of the Convention has also been recognized, on the regional level, in resolu-

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<sup>5</sup> See P. Weis: *Territorial Asylum*, *Indian Journal of International Law*, April 1966, p. 173 to p. 180; P. Mertens: *Le droit d'asile en Belgique à l'heure de la révision constitutionnelle*. *Revue Belge de Droit International*, 1966-1-p. 218 to p. 247.

tions of the Assembly of Heads of State and Government of the Organization of African Unity.<sup>6</sup>

The particular significance of the principle of *non-refoulement* was also expressly recognized in the Final Act of the Conference which adopted the *Convention on the Status of Stateless Persons* of 28 September 1954.<sup>7</sup> While this Convention regulates the legal status of stateless persons by provisions similar to those of the Refugee Convention of 1951, it contains no provision corresponding to Article 33. The omission of such a provision was explained in the following manner by the Conference:

*The Conference,*

*Being of the opinion* that Article 33 of the Convention relating to the Status of Refugees of 1951 is an expression of the generally accepted principle that no State should expel or return a person in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion,

*Has not found it necessary* to include in the Convention relating to the Status of Stateless Persons an article equivalent to Article 33 of the Convention relating to the Status of Refugees of 1951.

The principle of *non-refoulement* has moreover found expression in the Articles on Asylum adopted by the Asian-African Legal Consultative Committee and the Article on Asylum contained in the *Draft Convention relating to the Status of Refugees in Africa*.<sup>8</sup> It has been expressed in the most comprehensive terms in Article 3 of the *Draft Declaration on Territorial Asylum*, to which we have already referred.

### Conclusion—Human Rights and the Refugee

While to the refugee the right of asylum is of vital significance, there are also other provisions in the *Universal Declaration of Human Rights* that apply to his particular situation.

At the beginning of the century, many persons who had had to leave their home countries and had thereby lost the protection of their Government found themselves in the extremely difficult situation of being unable to claim the basic rights essential to their day-to-day existence. Today, the basic rights of the refugees are defined in international instruments and national law, and legal protection is extended to refugees on behalf of the international community. In

<sup>6</sup> Resolution 26 of 24 October 1965; *Resolution on the Convention on the Status of Refugees in Africa* adopted by the Assembly of Heads of State and Government at its Third Ordinary Session in Addis Ababa from 5-9 November 1966.

<sup>7</sup> United Nations *Treaty Series*, Vol. 360, p. 130.

<sup>8</sup> See above.

accordance with the Statute of this Office,<sup>9</sup> the High Commissioner is called upon to provide protection for refugees falling within his competence. An important aspect of this activity, specifically mentioned in the Statute, is promoting the conclusion and ratification of international conventions for the protection of refugees. The principal international convention of this type is the *Convention relating to the Status of Refugees* of 28 July 1951, which provides for the granting of basic rights to refugees in their country of asylum, and lays down minimum standards for their treatment as regards a variety of matters affecting their day-to-day existence. The Preamble to the Convention refers in its very first paragraph to the *Universal Declaration of Human Rights*, and the Convention may be regarded as an effort by the international community to develop and protect the fundamental human rights of refugees. The Convention, however, contains a date-line limiting its application to events occurring before 1951 and gives States the option of limiting its application geographically. In order to remedy this situation and to make the Convention applicable in new refugee situations, the *Protocol relating to the Status of Refugees* of 31 January 1967 was prepared and transmitted by the Secretary-General of the United Nations to states to enable them to accede<sup>10</sup> and has recently come into force. The provision of international protection by the United Nations High Commissioner for Refugees, especially by promoting the adoption of such international instruments and seeking to ensure that refugees are treated in accordance with the minimum standards which they incorporate, is also a practical example of work in the field of human rights. Indeed, the creation of the High Commissioner's Office first originated in a resolution of the Human Rights Commission of the United Nations.

Outside the purely legal field, the High Commissioner has the task of carrying out programmes of material assistance. These programmes are aimed at providing refugees with the initial help necessary to make them self-supporting and to enable them to establish themselves in their country of asylum. Such help is therefore a necessary prerequisite to the enjoyment of human rights by refugees.

There can thus be no doubt that the humanitarian work of the international community for refugees is contributing in a very practical way towards the implementation of many of the basic principles embodied in the *Universal Declaration of Human Rights*. For all our efforts are bent on giving the individual who has left his own country as a refugee the possibility of leading a life of dignity and enjoying all the fundamental rights to which he is entitled as a human being.

<sup>9</sup> Annex to General Assembly Resolution 428 (V) of 14 December 1950.

<sup>10</sup> Pursuant to General Assembly Resolution 2198 (XXI) of 16 December 1966. For the history of the Protocol see Document A/AC.96/INF. 40 and A/AC.96/346.

# THE BACKGROUND TO ARTICLE 17 OF THE UNIVERSAL DECLARATION

by

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It would not be easy for the present generation to imagine the tremendous difficulties of all kinds (philosophical, political, moral and linguistic) that had to be overcome in the course of formulating a list of rights that ought to be considered fundamental to human life, in an Assembly attended by men of diametrically opposed cultural backgrounds, at a time—a few years after the end of the second World War—when there were sharp divisions in the world. I had the privilege of sharing the rare experience of acting as my country's delegate to the third session of the General Assembly of the United Nations.

The world organization had not yet grown to its present vast proportions from its San Francisco origins. There were only fifty-eight member countries at the time, but they ranged from the most conventional proponents of economic *laissez-faire* to the communist bloc; they represented the most sophisticated of Western cultures and the most ancient of Eastern civilizations; there were nations that had travelled far along the road to democracy and others that were still at the difficult early stages.

Everything was a matter for argument: whether it was the meaning and scope of parental authority or of a man's authority over his wife, the definition of 'arbitrary imprisonment', the right to take part in the government of one's country, or the very concept of equality between individuals.

Such problems also arose in the course of determining the fundamental right of an individual to acquire the property necessary for his existence, which involved the definition of its scope, the establishment of safeguards and the attempt to find a formula which, without being too wide, could be accepted by all the cultural streams, political ideologies and economic systems represented at the Assembly.

The following summary is an attempt to describe in outline the process that led to the adoption of Article 17 of the Universal Declaration.

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When the draft of the 'International Declaration of Human Rights' was submitted to Committee III of the Third General Assembly of the United Nations (Paris, September 1948), it had already passed through a long process.

The Commission on Human Rights, which was responsible for preparing the document, presented it to the Economic and Social Council at its meeting in Geneva (2-17 December 1947).

In that first draft the right to property was dealt with in Article 14 in these terms:

*Article 14.* 1. Everyone has the right to own property in conformity with the laws of the State in which such property is located.

2. No one shall be arbitrarily deprived of his property.

The text contained three central ideas:

(a) that the ownership of private property was considered fundamental to human life;

(b) that the scope of the right to property should be governed by the *lex loci*; and

(c) that the right to property should be given adequate legal protection against arbitrary deprivation.

At the Commission's meetings a clear distinction, which was also to be made later at the Paris meeting, was drawn between 'arbitrariness' and 'illegality'. There may be deprivation of property unchallengeable in law, but which is clearly arbitrary when the law is not in accord with certain standards of equity and justice.

This first draft did not make it clear whether each man was entitled to a certain minimum of property; nor did it state whether ownership should be individual or whether it could be collective. Furthermore, while arbitrary deprivation of his property was prohibited, insofar as the scope of this right was concerned, man, the subject of it, was totally dependent on the legal provisions of the place where the property was situated.

At its meeting at Lake Success (24 May-18 June 1948), the Commission revised the text of this Article 14, which became Article 15 of the draft.

In the new version, Article 15 read thus:

*Article 15.* 1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.<sup>1</sup>

<sup>1</sup> *Spanish text:* (1) Toda persona tiene el derecho de poseer bienes, individualmente o en asociación con otros.

(2) Nadie será privado arbitrariamente de su propiedad.

*French text:* (1) Toute personne a le droit de posséder des biens, aussi bien seule qu'en collectivité.

(2) Nul ne peut être arbitrairement privé de sa propriété.



This formula was reached after the rejection of a proposal by the Soviet delegation that Article 15 should be drafted as follows:

*Article 15.* 1. Everyone has the right, alone as well as in association with others to own property (in accordance with the laws of the country where the property is located).

2. No one shall be arbitrarily deprived of his property, that is, contrary to the laws.

A comparison of the Soviet Union's rejected amendment with the text that was adopted, gives an indication of what was in the minds of the drafters.

(a) The concession to the communist system went no further than to admit that the right to property could be both *individual* and *collective*. In other words, the possession of private property by individuals—a condition considered indispensable if a human being is to live in dignity—would be fulfilled, whether the right of property was exercised individually or in association with others. On the other hand, it did not state that an individual was entitled to a minimum of property for his own use.

(b) The rejection of the amendment to Paragraph I of the article, which read: *in accordance with the laws of the country where the property is located*, reveals the Commission's intention to set the Declaration above national laws, so that the latter could be challenged when they were inconsistent with the purposes of the Declaration concerning the right to property.

(c) The rejection of the amendment to Paragraph 2 of the Article, which added the words *that is, contrary to the laws* after the word *arbitrarily*, confirms that the Commission's view was that a law may be arbitrary, and that deprivation of property by virtue of such a law would damage the meaning and purposes of the Declaration.

It should also be noted that at this Lake Success meeting the Commission, both in Article 15 and in the rest of the draft, abandoned the word 'man' in favour of the word 'person', which was the one to be finally adopted in the Declaration, without fully clarifying whether 'person' is always used in the restricted sense of 'human person' or whether, in some articles, it may and should have the wider meaning of 'legal person'.

In 1948, the same year as the Lake Success meeting, during which the third session of the General Assembly of the United Nations was to be held, the American nations, at the Inter-American Conference of Bogotá, approved an *American Declaration of Fundamental Human Rights and Duties*.

Article XXIII of the document dealt with the right to property:

*Article XXIII.* Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.<sup>1</sup>

<sup>1</sup> *Spanish text:* Toda persona tiene el derecho de poseer personalmente bienes para las necesidades esenciales de una vida decente, que contribuyan a asegurar la dignidad de la persona humana y del hogar.

*French text:* Toute personne a le droit de posséder personnellement des biens pour les besoins essentiels d'une vie décente, qui contribuent à assurer la dignité de la personne humaine et du foyer.

There was a major difference between this formula and the one prepared by the Commission on Human Rights both in the drafting and in the basic meaning.

It was immediately apparent that the accent was on 'individual' property, and there was no reference to property being 'collective' or 'in association with others'. Furthermore, it was not a defence or general support for the right to property, so much as a declaration of every person's right to own individually a certain minimum of property necessary to meet the requirements of 'decent living'. There was an attempt to qualify the subjectivity of this last idea in the final clause of the Article.

The Bogotá text must be mentioned because its contents, different as they are from the formula adopted by the Commission on Human Rights, were to have an influence on the Paris debates.

In fact, when the third General Assembly took place at the Palais de Chaillot in September 1948, and the draft Universal Declaration was returned to Committee III, two amendments were proposed by the delegations of Cuba and Chile respectively, which were directly inspired by the formula in the American Declaration.

*Article 15.* Every person has the right to own (in Spanish, '*poseer*' = to possess) such property, alone as well as in association with others, as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

Every person has the right to legal protection against arbitrary confiscation of his property.

This text is an unhappy compromise between the American Declaration and the Commission's draft:

1. The first paragraph contained, as an addition to the text of the American Declaration, the explanation that the ownership of such property as 'meets the essential needs of decent living' might be individual or collective. It would not appear to reconcile in any way the system of collective ownership with the ownership of property for the essential needs of life. Even the Soviet Union was obliged to accept that the essential minimum of property should be owned individually. The text (in Spanish) also refers to 'possession' of property and not to 'ownership', a technical distinction of major importance in Latin American systems.

2. The second paragraph, by establishing the right to legal protection against arbitrary confiscation lost the very useful and necessary distinction between *arbitrary* and *illegal* which had been established by the Commission on Human Rights.

Chile's amendment, for its part, was conceived in these terms:

*Article 15.* Everyone has the right to own such property as meets the essential needs of decent living, that helps to maintain the dignity of the individual and of the home, and shall not be arbitrarily deprived of it.

This formula was a repetition of Article XXIII of the American Declaration, with the addition that no one might be arbitrarily deprived

of the essential minimum of property, and with the implication that only the minimum was protected against arbitrary deprivation. During the debates in Committee III, there was fairly general dissatisfaction with all the proposed amendments.

The Soviet Union and the other countries under its influence insisted that both the recognition of the right to property and its protection would be subject to national legislation, which merely amounted to ratifying by means of an international instrument the relevant provisions of national law. The concept of 'arbitrariness' as a restriction on 'legality' was raised in opposition to this view; and in the end it was clearly established that not every restriction on the right to own property would be in accordance with the spirit and the letter of the Declaration simply because it had been ordained by national legislation, since the legislation might itself be 'arbitrary'.

The Cuban amendment was rejected by a large majority (23 votes against, 3 in favour, and 13 abstentions on the first part, and 19 votes against, 10 in favour and 8 abstentions on the second part), which caused the Chilean amendment to be withdrawn.

The Committee considered that the amendment did not constitute full recognition of the right to property, but merely of the right to a minimum of property; and that only the minimum was guaranteed thereby.

A proposal by the delegate of Haïti, prepared during the deliberations, might have improved the final text of the Declaration had it been suitably worded. Taking up a criticism that the Commission's draft was excessively individualistic in tone, the delegate of Australia had pointed out that a Declaration of Human Rights should not omit anything that would emphasize its individualist philosophy. The delegate of Haïti, in partial modification of this opinion, said that a reference should be included in Article 15 to the effect that the right to property should be exercised 'within the limits of public interest'.

This important qualification subsequently reappeared in a new formula for Article 15 submitted by the delegate of Belgium in a compromise proposal, the text of which was as follows:

*Article 15.* Within the limits of public interest, everyone is entitled to own property alone as well as in association with others.

There was clearly a substantial difference between the two formulas: while the Haïtian proposal meant that the exercise of the right to property should not conflict with the public interest, the Belgian compromise proposal meant that only the entitlement to own property was subject to the requirements of public interest.

The Belgian compromise proposal also assumed the adoption of an amendment to the French text proposed by Uruguay to the effect that the article should refer to the 'right to own property' and not to the

'right to possess property', which was the only amendment to the original draft that was ultimately approved. The important legal distinction between the terms 'possession' and 'ownership' accounts for this amendment, which was supported by France and adopted in the final text of the Declaration on the motion of the delegate from Greece.

The Belgian compromise formula was rejected by the Committee on account of two main considerations:

- (a) Some members of the Committee felt that the reference to limitations imposed on grounds of public interest was unnecessary by virtue of the provisions of Article 27 of the draft Declaration;
- (b) Other delegates thought that the reference to the public interest should relate to the exercise of the right to property and not merely to the entitlement to own property.

Perhaps the Declaration would have gained in precision and lost some of its excessive individualism if, as was nicely pointed out by the delegate from Lebanon, the amendment proposed by the delegate of Haiti had been expressed negatively, that is, by stating that the right to property *could not be exercised against* the public interest.

The final version of the Article on the right to property, which was incorporated in the Declaration as Article 17, was approved in the following terms, the scope of which is clearly explained in the light of the drafting process that it went through:

*Article 17.* 1. Everyone has the right to own property, alone as well as in association with others.

- 2. No one shall be arbitrarily deprived of his property.<sup>1</sup>

At least three additional points should be included in the text, if it is to come close to perfection.

- 1. The recognition of the right of each individual to a minimum of personal property, sufficient to guarantee the dignity of life.
- 2. The clear statement of the principle that the right to property must not be exercised against the public interest, thus showing the 'social function' that property should have.
- 3. The qualification that the deprivation of property—other than that necessary for decent living—is not 'arbitrary' when it is based on considerations of public interest and is accompanied by fair compensation.

But it is nevertheless undeniable that, in 1948, the adoption of the formula analysed above constituted remarkable progress. The task of perfecting it and of creating better juridical and political instruments to ensure its effective implementation will fall to later generations.

<sup>1</sup> *Spanish text:* 1. Toda persona tiene derecho a la propiedad, individualmente o en asociación con otras.

2. Nadie será privado arbitrariamente de su propiedad.

*French text:* 1. Toute personne, aussi bien seule qu'en collectivité, a droit à la propriété.

2. Nul ne peut être arbitrairement privé de sa propriété.

# FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

by

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Human rights are fundamental rights which all men ought to have solely by virtue of their humanity, and which, therefore, every society must accord its members if it is to be a truly human society. Among these rights are rights to freedom of thought, of conscience and of religion. These rights have received varying formulations in the numerous declarations of rights, like the American *Bill of Rights* or the French *Declaration of the Rights of Man and of the Citizen*, which have accompanied the struggle for liberty in the modern period. During this period there have been continuous efforts to acquire international recognition and enforcement of these rights. The protection of religious minorities, for example, was a feature of numerous European Peace Treaties from Westphalia in 1648 to Versailles. Against that historical background, two recent events are likely to prove of lasting significance. One is the adoption in 1948 of the *Universal Declaration of Human Rights*, which the General Assembly asserted as 'a common standard of achievement for all peoples and nations.' Article 18 of the Declaration (which has received a legal formulation in the *International Covenant on Civil and Political Rights*) reads:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The second is the progress toward the adoption of the *Convention on the Elimination of All Forms of Religious Intolerance*, with its promise of international co-operation in measures aimed at realizing the Declaration's standards for religious liberty. It was initiated by the General Assembly on December 7, 1962, together with the parallel *Convention on the Elimination of All Forms of Racial Discrimination*; and the Human Rights Commission, at its most recent session in February-March 1967 in Geneva, agreed on a text

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comprising a preamble and twelve substantive articles. These it transmitted for the review and approval by the Assembly.

This essay has four purposes. First, I examine the concept of a right to freedom of thought, conscience and religion. This examination involves both an exposition of the distinction between positive and negative freedom and the clarification of the meaning of a human right—its scope and limitation. Secondly, I sketch briefly the development of that concept in the history of Western Europe. Thirdly, I describe a few of the insights and some of the understanding which have emerged out of interpretation of religious liberty in the two decades of United Nations experience with Article 18. Finally, I present the highlights of the *Convention on the Elimination of All Forms of Religious Intolerance*, which, I believe, is now the spearhead for efforts at strengthening religious freedom in the international community.

### **Freedom of Thought, Conscience and Religion; Positive and Negative Aspects.**

A reliable index of the moral force of the right to freedom of thought, conscience and religion is the verbal obeisance given to this right even by States which violate it systematically. Further, despite inevitable disputes over borderline issues, there has been a growing convergence both on the importance and on the specific meaning of the right.

Within that consensus it has been recognized that every expression of freedom admits both of a positive and a negative interpretation—colloquially a ‘freedom to’ and a ‘freedom from’. The concept of positive freedom derives fundamentally from the idea that to be free is to be able to pursue one’s ends, aims or purposes. From this perspective, freedom of thought, conscience and religion is concerned with the conditions in a social community which allow for the development of creative thought and inquiry, of religious searching and institutional practice, of sensitive conscience and its expression. The range of these conditions comprises the legal and political framework, but it must also include, as Aristotle and Marx taught, the economic and social conditions which crucially affect religious or intellectual development, and even those subtle ingredients of the cultural atmosphere and public life which distort or inhibit, foster or strengthen religious and intellectual activity.

The negative concept of freedom derives fundamentally from the idea that to be free is to be immune from intrusion or coercion. With specific reference to freedom of thought, conscience and religion, its central concern is the defence of private conscience and

religious belief and practice from encroachment by the major coercive institutions of society, especially by the State.

Although there is a polemical literature concerning the relationship, equivalence, or independence of these two kinds of freedom, in practice, all activity toward the elimination of religious intolerance and discrimination has involved *both* positive and negative aspects: an improvement in the conditions of religious expression within societies and an enhancement of the legal safeguards of the individual against the exercise of coercive power.

### **Meaning of the Right to Freedom of Thought, Conscience and Religion**

The Universal Declaration ascribes to the perennial human idea of freedom of thought, conscience and religion the status of a human *right*. Every assertion of a right, according to the British legal philosopher, H.L.A. Hart, locates the burden of proof, that is, it identifies the social practice which is *prima facie* justified when a choice is required among contending claims, interests and priorities. To recognize freedom of thought, conscience and religion as a human right does not make that freedom absolute; but it serves to set severe restrictions and rigorous criteria upon the kinds of considerations which may be invoked to justify interference with the exercise of that right. Since human rights represent minimal moral standards for human society, they can be impinged upon only by relevant considerations of conflicting rights or moral urgency. The practical issues for adjudication then emerge in the delineation of the permissible limitations upon freedom of thought, conscience and religion.

It follows that the assertion of the right to freedom of thought, conscience and religion does not deny that there are relevant grounds for inhibiting the exercise of that freedom. A professor in a discipline whose personal point of view may be heterodox must show familiarity with standards prevalent in the discipline; a teacher at a religious Seminary may be required to have some commitment to the doctrines of his religion; and it is not considered discriminatory to realize that in every social order the person who expresses dissent must risk some unpopularity.

The inevitability of limitations as well as the restriction on what constitutes permissible ones, were recognized in Article 18 of the *International Covenant on Civil and Political Rights*. That article confines the limitation of the freedom to manifest religion or belief solely to those considerations which invoke either 'fundamental rights and freedoms of others' or 'public safety, order, health or morals'.

This recognition, that there are practical limitations on any exercise of a right, even such a sacred right as freedom of thought, conscience and religion, raises the threat of the undermining of the right through the imposition of limitations. The ultimate safeguard against that threat can only be the judgment and concern of men.

Freedom of thought, conscience and religion always involves freedom to *manifest* thought, conscience and religion. The measure of freedom in society is a measure of the degree and variety of its manifestations. Some have even suggested that freedom of thought or of conscience *per se* cannot be invaded since, short of certain fantastic 'science fiction' incursions into the domain of private introspection, interference with this freedom is impossible. Along these lines Metternich used to point out that he would willingly concede the freedom to 'think' if only all expression of heterodox thinking were denied. Yet the denial of freedom of thought may go beyond even the prohibiting of expression. Coercion may be directed not only against the expression of opinions; it may even exclude the right to silence and require the positive assertion of dogma or the explicit denial of heresy. The history of intolerance, both religious and secular, therefore, shows the logic of those formulations, like the Universal Declaration, in which not only freedom of expression is recognized but of thought and conscience as well.

### The European Experience

To a marked degree, the commitment of the United Nations to the defence of the right to freedom of thought, conscience and religion reflects inevitably the funded wisdom derived by the Western nations, particularly the European nations and their major historic religions, from their checkered history of religious intolerance and persecution and the striving for liberty. Although freedom is a universal ideal rooted in sentiments and habits to be found everywhere in the world, it is not simply 'European arrogance or provincialism', as the political historian John Plamenatz has shown, which claims that the prevailing formulations and idiom of the concepts of religious liberty 'slowly emerge in the West in the course of the sixteenth and seventeenth centuries'.

At the start of that emergence, the idea of religious freedom had little to do with the right of an individual to freedom of thought, conscience or religion; it referred exclusively to the rights of the Church against the temporal authority. As for the Church itself, however, since there was only one true Church—a view held in common by Catholics, Lutherans, Anglicans and Calvinists—and the true Church teaches the doctrines necessary to salvation, the right of



the individual to reject that truth seemed perverse. Accordingly, the justification for coercive action in defence of the single religious doctrine seemed reasonable. In contrast, for many historical non-Western religions which developed without a conception of their exclusive religious truth, the issue of religious toleration was not posed so sharply.

The continuing existence through the sixteenth century of several Christian churches, each claiming to be the single, true Church, sharpened the practical necessity for religious tolerance. The major arguments for toleration in the sixteenth century were political, that is, they were not arguments for the desirability of diversity, the fallibility of belief, or the right of the individual, but they were arguments against religious persecution, since such persecution was politically harmful, unwise, inefficient, or unsuccessful. If there are several religious groups of considerable size within one State, tolerance becomes expedient for political integration and even for avoiding civil war. If several powerful sovereign States are committed to differing exclusive religious beliefs, then unless warfare is to be interminable, some strategy of co-existence among these religions is required. This logic of tolerance as a strategic necessity was strongly etched by the fatigue and horror of continual religious warfare and persecution. It is ironic that the relevance of that logic for an age of ideology as well as for an age of faith has generally not been conceded.

Sentiment for religious toleration in the sixteenth century was not only inspired by political motives but by a concern for 'the purity and sincerity of religious belief'. For, if belief is coerced, then, from the point of view of the true believer, the quality of the belief is impaired. This affords an instructive instance of the generalization that coercion in affairs of belief, conscience or religion is self-defeating. Coercion can achieve verbal consent, but often at such a high price in apathy, resentment and mistrust that it frustrates the achievement of the genuine community of belief which was its purpose.

The classic statement of the right to freedom of thought, conscience and religion, as distinct from the necessity for tolerance and the futility or evil of persecution, was formulated by natural rights theorists, like John Locke. In their view, the fundamental nature of the individual from which the legitimate authority of society derived set an absolute boundary against any effort to interfere with a person's thought or belief.

Since that formative period of the concepts of religious liberty in the seventeenth century, differing justifications of the right to freedom of thought, conscience or belief have advanced. Some, like Mill, have stressed the fallibility of human thought and belief;

others, like Dewey, have argued the social benefits derivable from plurality of belief and freedom of inquiry; and others have calculated the comparative risks for social value of a policy of freedom, as opposed to the risks of repression. One conclusion from the number and variety of such justifications is that no single theological, secular or philosophical foundation is presupposed in the belief in the right to freedom of thought, conscience and religion. Defenders of the ideal and institutions of freedom do not and need not share metaphysical, theological or psychological beliefs; rather, they share a commitment to the value of freedom in the life of the community and an appreciation of the fruits of freedom for society and the individual. Dramatic evidence of this conclusion is the recent *Declaration of Religious Freedom* by the Vatican Council. This formulation develops from the Roman Catholic tradition, yet it is compatible both with theological and secular positions.

### **The Vatican Council**

In that document, the 'Vatican Synod declares that the human person has a right to religious freedom'. This right 'has its foundation in the very dignity of the human person'. It is important to note that this right does not and need not conflict with any claim of the Church to doctrinal truth or to the obligation to seek religious truth. It rests rather on the recognition that the dignity of man requires that the 'usages of freedom' in society cannot be limited by the existence of that truth. It further asserts that the obligation to seek religious truth presupposes immunity from coercion.

For the Church, the Declaration provides important guidelines for Christian dialogue and ecumenicism, for its policies on education, on attitudes to non-Christian religions and on many other issues. Its relevance in the international domain, however, must lie as an instructive example of the way in which religious or atheistic institutions can affirm within their own specific heritage those principles which support freedom of thought, conscience and religion. In Judaism, in Islam, in Marxism, and in other religious or secular movements, there have been formulated claims of ultimate truth and of the special status that truth entails both for the believer and the non-believer, on the one hand, and arguments for the freedom of thought, conscience and religion of all men, on the other.

Although the statements of the Vatican Council are a pioneering effort to mediate between the demands of institutional and doctrinal continuity and the claims of religious liberty, they are also an effort of the Church to catch up with the recognition of a right previously

asserted in secular, Protestant, Jewish and other religious traditions. It is well known that the *Universal Declaration of Human Rights* has been a significant influence on the Vatican Council; and it is accordingly noteworthy that the Vatican Council has, in turn, inspired significant support for the United Nations' activity on behalf of religious freedom, in particular, toward the adoption of the *Convention for the Elimination of All Forms of Religious Intolerance*.

### The United Nations' Experience

In comparison with the United Nations' extensive involvement with problems of racial discrimination, its experience with issues of religious liberty has been extremely limited. There has been considerable effort to clarify concepts and general problems in the formulation of Article 18 of both the *Universal Declaration* and the *Covenant on Civil and Political Rights*, in *The Study of Discrimination in the Matter of Religious Rights and Practices* undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and especially in the formulation of the *Draft Convention on the Elimination of All Forms of Religious Intolerance*. The complexities of the issues involved in the elaboration of standards for religious liberty in a world community of diverse beliefs and institutions emerge through even a cursory review of the United Nations' experience in this domain.

It is obvious, for example, that no single blueprint for Church-State relationships for Member States can be drawn up. The *Draft Convention on Religious Intolerance*, for example, recognizes this in Article I:

Neither the establishment of a religion nor the recognition of a religion or belief by a State nor the separation of Church from State shall by itself be considered religious intolerance or discrimination on the ground of religion or belief; . . .

Member States include those in which there is complete separation of Church and State, those in which several religions are recognized by the State, and those with a single Established Church or State religion. While it has often been argued that a particular juridical relationship logically determines a potential pattern of infringement of the rights of minority religions or beliefs, it seems difficult to confirm this argument in practice. The United Kingdom, in which there is an Established Church, is generally conceded to rank high in religious freedom. On the other hand, only recently and haltingly has the Spanish government allowed public worship for any religious domination other than the Established Church. Again, significant evidence has been marshalled that in the USSR,

in which there is complete separation of Church and State, there has been discrimination against religious believers in general, and also discrimination against some minority religious groups. Such patterns of discrimination contrast sharply with a sister Communist country like Poland, where the thrust of religious freedom hinges upon issues like the financing of the schools of the majority religion, and where there is no allegation of discrimination against minority religions. This contrasts with yet another separationist State, the United States, in which the boundaries of religious freedom probed by court cases seem to be confined to protecting the rights of atheists.

The moral of these examples is easily drawn: the determinants of the religious freedom of a society include not only the juridical framework and the laws of the State but also the *mores* of the society, including the value placed upon this freedom by the major religions and ideologies within the society.

That the determination of standards of religious liberty requires understanding of the role religion plays within a society was a central thesis of the *Study of Discrimination in the Matter of Religious Rights and Practices*, produced by Special Rapporteur Arcot Krishnaswami for the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This thesis also received impressive documentation at the United Nations' Regional Seminars on Human Rights held in Afghanistan and in Senegal, which showed how standards for freedom of thought, conscience and religion are related to issues of nationalism and ideology, especially in developing countries. Three examples are illustrative of many. One is the conflict between many traditional religions and the process of modernization in developing countries. Examples range from the religious status of polygamy, which may itself deny other human rights, to that of religious fasts and taboos which interfere with productivity. Second, there is the special role of the established religion in the development of cultural nationalism and national identity, as for example, the relationship of Islam to Arab nationalism. The problem of safeguarding dissent is complicated, if the religious minorities are excluded from the search for nascent national identity. Third, in many developing countries, as in the Republic of Viet-Nam, political leadership is connected with religious leadership. Drawing the line between the immunity granted to religious expression and the accountability required of political advocacy affords a strenuous challenge to judicial and political wisdom.

Sharp awareness of the diversity of patterns of religious liberty within the international community, however, does not minimize the need for explicit international standards. Precisely because of the complexities of varying national and religious *mores*, the elaboration

of standards for the interpretation of the right to freedom of thought, conscience and religion is of paramount importance. These standards might prove of little value in affecting the behavior of a society bent on total suppression of dissenting thought or belief. The force of these standards has relevance, however, for those States in which both the principle and the practicality of freedom of thought, conscience and religion is granted, but violations and abuses, to a greater or less degree are manifest. In these cases the standard and sanction of the United Nations serve as guide and goad: as an instrument for confronting deficient practice with professed moral principle or the abusive practices in one area with the more adequate practices in another. In the continuous vacillation and conflict within Member States, they can serve to support those who desire their society to live up to the standards proposed by the international community.

### The Draft Convention

The *Draft Convention on the Elimination of All Forms of Religious Intolerance* adopted by the Human Rights Commission in March 1967, is the most significant initiative of the United Nations to give substance to the assertion of Article 18 of the *Universal Declaration of Human Rights*. Its rationale and scope resembles in many ways the *Convention on the Elimination of All Forms of Racial Discrimination*.

There are two important senses of 'religious intolerance' as used in the *Draft Convention*. It refers, on the one hand, to discrimination against individuals, in the civic, political or social life, on the grounds of their religion and, on the other hand—and here lies its distinctive contribution—to discrimination against the institutions and practices of particular religions. The two senses are distinct and each kind of discrimination has taken place independently of the other. In the first sense, it resembles the concept of the *ILO Convention in Respect of Employment and Occupation* adopted in 1958 and the *UNESCO Convention Against Discrimination in Education* adopted in 1960, in rejecting discrimination on religious (and other improper) grounds. The reach of the *Draft Convention*, however, extends beyond the proscription of *discrimination*, to the prohibition of invasions of the freedom of religious belief and its manifestations as such.

After defining, in Article I, 'religion or belief' to include 'theistic, non-theistic and atheistic beliefs', Article III of the *Draft Convention* defines a person's religious freedom so as to include the 'freedom to adhere to any religion or belief and to change his religion or belief in accordance with the dictates of his

conscience...' This holds up a critical standard for those States Parties which allow adherence to belief but not withdrawal, or which discriminate against a person who would change his religion or belief. The Article includes in the definition, freedom to manifest religion or belief in public and in private, as well as 'freedom to express opinions on questions concerning a religion or belief'.

Article III obligates States Parties to ensure to everyone within their jurisdiction eight specific kinds of religious freedom. Many States which grant the first of these, 'freedom of worship', obstruct the second—freedom to teach and disseminate religion or belief and to train personnel intending to devote themselves to their practices or observances. This list of specific conditions in Article III, (such as the right to publish religious texts in a sacred language or to, 'import the objects, foods and other articles and facilities customarily used in its observances') affords an operational criterion for evaluating the state of religious freedom in a given country—as for example freedom of the Jewish religion in the Soviet Union.

Article III also includes as an element of freedom of religion, the right to express 'in public life the implications of religion or belief'. Since freedom of religion is indivisibly connected with other civic freedoms, the import of this provision is admittedly far-reaching. Similarly, a person's 'freedom to organize and maintain... national and international associations in connection with his religion or belief... and to communicate with... co-religionists and believers', sets up a standard which clashes with many aspects of any 'closed' society.

Noteworthy in the Convention is the initiative required of States in Article VI. States Parties are to 'undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information with a view to combating prejudices...' Further, Article IX states that 'incitement to hatred, likely to result in acts of violence against any religion or belief or its adherents, shall be considered as offences punishable by law'. The specific reference in this Article to 'acts of violence' contrasts significantly with the parallel Article 4 of the Convention on Racial Discrimination, which requires States Parties to 'declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts...' Article IX manifestly gives greater weight than does the latter to the competing right to freedom of speech. One justification for the difference in approach in the two Conventions lies in the distinctive nature of religious beliefs. It is characteristic of many religions that the affirmation of their religious truth implies their religious superiority. Consequently, had the incitement article in the Convention on

Religious Intolerance been couched in the same terms as the one in the Convention on Racial Discrimination, a significant number of fundamental religious affirmations which have no discriminatory intent would have been condemned.

The assertion of the right to religious freedom requires inevitably, as I have pointed out, the formulation of its permissible limitations. Article XII of the Convention permits a State Party to prescribe 'by law such limitations as are necessary to protect public safety, order, health, or morals, or the individual rights and freedoms of others, or the general welfare in a democratic society'. The precedents provided by the interpretation of these limitations in the adjudication of cases involving human rights in democratic societies are not so broad as to reduce to triviality either the specific demands formulated in the Convention or its general moral force.

### Implementation

Obviously, the ratification of the Convention and its incorporation into domestic law—and its observance as such—is the most effective form of implementation. However, since States cannot always be relied upon to comply with their international undertakings, measures to call them to account when they fail to do so, are needed. Thus, it is to be hoped that the General Assembly will approve for this Convention implementation measures that are at least as strong as those in the Convention on Racial Discrimination, which not only requires governments to submit reports, but also provides for a mandatory right of State-to-State complaint to an international conciliation body and to the International Court of Justice, and an optional right of petition to the former.

In addition to these measures which are linked to the Convention, other UN programs of a promotional and educational nature, are required. Thus, States might volunteer to host Regional Seminars, and UN fellowships might be awarded on problems in the field. Such programs can be undertaken even before the Convention comes into force, which may be a long time.

### Conclusion

I have examined the concept of the right to freedom of thought, conscience and religion, reviewed its history in the Western tradition, sketched some of the lessons of United Nations' experience with that right, and presented salient features of the proposed *Convention on the Elimination of All Forms of Religious Intolerance*. It is perhaps appropriate to conclude by referring to a number of issues which fall

directly within the scope of Article 18, but which have not yet received the attention they merit.

While Article 18 specifies three freedoms — thought, conscience and religion—it is religious liberty which has been the main object of interest and concern. Liberty of conscience is, of course, directly connected to religious liberty. Yet, its achievement requires the resolution of novel problems. One such problem is the right of the conscientious objector to refuse to bear arms. There has been little effort by the United Nations at assertion of standards in this area. The range of practices prevalent in States include those in which exemption from service is granted, those in which alternate forms of service are required, and those in which the conscientious objector is subjected to legal sanctions.

Finally, the development of social conditions which will make for the growth of freedom of thought raises unprecedented problems for an age of scientific and technological achievement. For example, new technologies of communication by satellite with the prospects they offer for propaganda across international boundaries dramatically suggest the international concern over the right to freedom of thought. This international problem is itself reflective of similar problems emerging in every country concerning the potential of the new technology, both electronic and biological, for 'thought-control'. It suggests, even for the societies whose free institutions are mature, new problems in the control of concentrations of power. Another emerging issue may be the status of the University and the problems concerning academic freedom. Related to this is the necessity for freedom of inquiry in an age of classified research.

Even while we are involved with seeking to exorcize the age-old curse of religious intolerance and persecution of thought, we must be concerned with the agenda of new and untried dilemmas. The resolution both of the old and of the new problems of freedom ultimately rests upon the value which each political community will assign to the pursuit of freedom.



# A FREE PRESS

by

LORD SHAWCROSS, Q.C. \*

The right to personal liberty as enjoyed in a mature democracy has of course many aspects. Looked at from one or another of these, it may indeed seem to be in conflict with itself. This is especially so in the case of freedom of expression, of which the liberty of the press is an example, and which is still as much debated as when Milton wrote the 'Areopagitica'. That in a free society the press should be free is something to which we in Britain are at least willing to pay lip service, although in a number of countries claiming to be free, it is by no means any longer axiomatic. But how free? Absolute freedom means absolute anarchy, and one freedom is tolerable only to the extent that it does not unreasonably curtail another.

It is in this kind of context that the matter falls to be discussed. To define an elephant in words is, we know, a difficult task, although most people have no difficulty in recognising an elephant when they see one. It is rather the same with freedom of the press. Attempts have been made over the years, indeed over the centuries, in many constitutional instruments, in a large number of legislative enactments and in innumerable judicial decisions to define what is meant by freedom of the press. But none of the definitions is perfect, for press freedom is not an absolute capable of exact definition. As with the elephant, so with the press; one can usually recognise a country which possesses a free press when one sees it. But sometimes a country's laws are an uncertain guide to whether freedom actually exists or not. There are countries which have enshrined the doctrine in language of the most noble kind, but in which actual practice does not accord the freedoms professed. All countries pretending to be democratic say that they believe in freedom of the press; it is very apparent that some believe in it more effectively than others.

The difficulty of definition is of course that the freedom of the press is in effect only one facet of individual and personal freedom. Freedom of the press is not therefore a special privilege of

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newspapers, although in some countries elaborate laws expressly dealing with the press do attempt to guarantee the freedom and to regulate its exercise. It derives, as the British Commonwealth Press Union said in a declaration at its West Indies Conference in 1965, from the fundamental right of every person to have full and free access to the facts in all matters that directly or indirectly concern him, and from his special right to express and publish his opinion thereon and to hear and read the opinions of others. As press freedom is simply one aspect, although a most important one, of the free man's right to receive and impart information, it follows that it is unaffected by national boundaries; and here, recent legislation in Canada and in New Zealand which appears to discriminate against publications by persons not nationals of those countries, may seem to depart from the full recognition of freedom which would be expected in those countries. The right to give or to receive information is a fundamental right of all in the free world. It is indeed inherent in the freedom of each individual that his country's press should be free, for the press is often in a real sense the individual's mouthpiece and his ears.

Not unnaturally, therefore, the matter has been the subject of much international discussion. In 1947, the General Assembly of the United Nations adopted the following Resolution:

Freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the U.N. is consecrated:

Freedom of information implies the right to gather, transmit and publish news anywhere and everywhere without fetter.

As such, it is an essential factor in any serious effort to promote the peace and progress of the world.

In the following year, the *Universal Declaration of Human Rights* stated the right in general terms, and in what is now likely to become the most authoritative international enunciation of it, Article 19 of the *International Covenant on Civil and Political Rights*, which is now open for signature and has indeed already been signed by some States, the principles are set out with more particularity:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally in writing or in print in the form of art or through any other media of his choice.

The exercise of the rights provided for in the foregoing paragraph carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall be such only as are provided by law and are necessary (1) for respect for the rights or reputations of others; (2) for the protection of national security or of public order or of public health or morals.

This last paragraph is all very well. But who is to define what the law should contain or, still more difficult, what is 'necessary'?

for the permitted purposes? In practice, and at least until some international jurisdiction for the protection of human rights is well established, it must inevitably be for the Government, the Legislature and the Courts of the country in which the question arises. Wide variations occur in the way in which Governments deal with the matter.

The basic principles which all countries should observe, however, seem plain enough: the restrictions imposed must be laid down clearly by laws passed by the legislature and enforced in the ordinary courts. No advance *imprimatur* should be required; no censorship proposed; no arbitrary or executive action taken. If what is published contravenes the law, the offence should be dealt with in the ordinary courts of the country, and there should be no seizure, confiscation or prohibition of publication except in accordance with the order of a court. The principles themselves are clear enough. Unfortunately they are still very far from being universally applied, even by countries which regard themselves as free. In a number of countries, censorship has been exercised on political grounds, particular issues of newspapers have been confiscated, or their publication suppressed or taken over by Government organs.

On September 5th, 1964, the International Commission of Jurists published a general statement relating particularly to the position in Southern Rhodesia. It must be said, however, that Rhodesia has not been the only offender. Other African countries which have been given (although they have not always maintained) majority rule have pursued equally deplorable courses. So have Governments of other parts of the free world. In the Communist countries, of course, the principle of freedom of the press and of opinion as discussed in this article are not recognised at all.

It is perhaps desirable to comment at more length on the particular areas of legitimate restrictions. Political advantage in the Party sense is not one of them. Newspapers commonly advance varying political views and these reflect the opinions of the editors or proprietors concerned. It cannot be denied that the proprietor of a newspaper is entitled to use it in order to promote his own political or other views. However objectionable it may appear to those holding different views, to deny the right to a newspaper owner to use his paper as an organ of propaganda on his own account or on behalf of the political party he supports would be to deny the right of individual expression of opinion. That newspaper proprietors should use their papers for the purpose of influencing political opinion is objectionable only if there is danger of monopolisation of newspaper ownership in a particular country. Here, legislation may be justified to prevent or discourage take-overs of existing newspapers. It must be added, however, that such legislation will

rarely be effective. What, however, is clearly intolerable is the attempt by others, and normally it is by those in authority, to exert pressure to influence newspaper opinion, still more to suppress newspapers which have expressed views critical of or hostile to the governing administration. There have been not a few instances of this kind where, for barely disguised partisan reasons, action has been taken against newspapers because of opinions they have expressed. Where such action occurs it may be taken and should be stigmatised as the mark of a regime which disregards the basic human rights and is moving towards totalitarianism.

I turn next to the publication of so-called official or governmental secrets: information in the possession of Departments of State which they do not care to disclose or information about matters taking place within Departments. In many countries, as in Britain, there is legislation forbidding disclosure in particular cases. This is not a matter which we can expect to be left entirely to the discretion of the newspapers. Even assuming that all newspapers are loyal and seeking to promote the best interests of their country, the fact remains that not every newspaper editor can at every moment be fully informed in every case whether or not disclosure of some particular matter might be detrimental to the State. There must, therefore, be some degree of control by law.

But how is it to be decided whether a particular matter comes within the scope of a legitimate restriction on publication? Not merely by the *ipse dixit* of the Government Department concerned. It should be a matter for the Courts to decide. Accordingly, it should be an answer to a charge that some particular publication had infringed the law relating to so called official secrets, to show that the national interests or legitimate private interests confided to the State were not likely to be harmed by the publication in question, and that the information was passed and received and published in good faith and in the public interest.

The tendency of Governments is to shield themselves behind a curtain of secrecy in which the only window is controlled by a public relations official trained in the art of conveying a minimum of information with a maximum of self-righteousness. It is notable that in the United States the Congress is presently directing itself in exactly the opposite course. There has recently been passed by the Senate a Bill (S. 1160) with the significant title of 'The Bill to Clarify and Protect the Right of the Public to Information'. This is intended, as the title indicates, to increase the information available to the public about official actions. It is a step in the right direction.

The other branch of public law (I am distinguishing here from the laws of libel and so forth intended to protect the rights of

individuals) is that relating to blasphemy, obscenity and heresy, matters into which political considerations should not enter although they sometimes do: it is difficult to generalise about the way in which these subjects should be treated, since so much depends upon the tradition of each country concerned and their existing state of manners and of progress. The Covenant on Civil and Political Rights expressly recognises the right of a State to impose restrictions for the protection of public order and morals, and these are of course matters of very differing standards in different countries. So far as public order is concerned, States are obviously entitled to protect themselves against treason, sedition or attempts to alter the constitution, or the composition of the Government otherwise than by lawful means. But this right is often abused and exercised in a way which in fact eliminates criticism of the Government in power. Controversy perhaps most attaches to the question whether the restrictions which the law imposes should be enforced *ex post facto* by the imposition of penalties for publications which infringe the standards laid down or should be enforced in advance by some system of censorship. In general, censorship is to be deplored: it is not, as *ex post facto* proceedings are, a judicial process; it is often arbitrary and capricious in its administration and sometimes influenced by political considerations. On the other hand, it is argued with some force that the widespread publication of some matter injurious to public order or morals may have such dangerous effects that a mere penalty imposed after the event is an inadequate protection which cannot undo the harm already done. One can understand this view when applied, for instance, to matters concerning faith and morals as it is in some catholic countries. Much that is freely published nowadays in some of the so called advanced countries would have been considered, as indeed he said, an exercise in licence rather than liberty, when Milton wrote the 'Areopagitica'.

But censorship becomes extremely dangerous if it enables Governments, by administrative action, to stop the publication of matter which is critical of or inconvenient to them or which stifles legitimate and reasoned controversy whether in the political, the religious or the moral field. In the most progressive modern democracies where the rights to freedom of opinion and of expression reach their full fruition, there is no censorship. The only safe way in the end by which false doctrines can be combatted is through an educated and therefore discriminating public opinion.

Outside the sphere of Government action in matters affecting the community as a whole, there are, of course, the various laws which rightly protect the individual against the abuse of their freedom by newspapers. The obvious case is the law of libel. All civilised

systems have laws protecting the reputation of the individual, but the degrees of restraint which these impose on the press vary greatly between different countries. In all cases where an individual complains that his reputation has been injured, it should be a defence for a newspaper to prove that what it said was in fact true. More difficult is the case where the newspaper had at the time of publication reasonable grounds for believing and did believe that what it said was true, although in the event it turns out to have been mistaken or at least to be unable to establish the truth by legally admissible evidence. In such a case, should the individual injured by the publication be entitled to recover damages? Hitherto most systems of law have, I think, answered that question affirmatively, preferring to restrict the freedom of the press rather than to risk injury to the rights of individuals. But in England, a *Justice Working Party*, convinced that the press was unduly fettered in canvassing matters of public concern, recommended that the law should be altered so as to state clearly by statute that a defence of 'qualified privilege' would be available to newspapers in respect of the publication of matters of public concern or interest made in good faith and without malice and based upon evidence which might reasonably have been believed to be true, provided that the newspaper concerned has on request published a reasonable letter or statement by way of explanation or contradiction and has withdrawn and apologised for anything shown to be inaccurate.

Is public opinion prepared for such a change in the law? This is more doubtful. But it may be of interest to observe that in the United States the Supreme Court has held that a qualified privilege does exist in the case where defamatory statements have been made about persons in public positions. It is possible that the privilege may extend to cases where public matters are involved. Certainly the Supreme Court seems, as in the recent case of *The New York Times v. Sullivan*, to be broadening the law.

Contrary to this trend is the growing feeling that some restriction should be placed upon the press in protection of the so called right to privacy. This is an important but a difficult matter. The notion of a legal right to privacy is one which has been recognised both in the law of the United States, in the Universal Declaration of Human Rights and in the Covenant. But to recognise the right and to give sensible effect to it are two very different matters. In the U.S.A., the courts have jurisdiction to give a remedy in damages in the case of:

an unwarranted . . . publicising of one's private affairs with which the public has no legitimate concern or the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.

But what is an 'unwarranted' publicising? And in what private affairs has the public no 'legitimate interest'? And what, indeed, in these strange days, is 'ordinary sensibility'? The existence of these necessary qualifications shows how uncertain the administration of any such jurisdiction must become. Similarly, in the Universal Declaration of Human Rights it is provided that 'no one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour and reputation...' But what is and what is not 'arbitrary'?

English law has never gone so far as this, although it is not certain that in an extreme case the House of Lords might not hold that the principles of the Common Law—'broadening down from precedent to precedent'—did indeed provide some remedy. In two cases involving august personages, our courts in the 19th century indicated that a right of privacy might exist. When George III was ill, Lord Eldon (putting a hypothetical case) thought that if his physician had made notes of conversations and had then attempted to publish them, a court might have prevented him. This was in the days when the exposure of abdominal operation scars by top people was an unusual occurrence. Later, a publisher actually did attempt to publish copies of a number of etchings which Prince Albert and Queen Victoria had made of events in their family life and of which he had managed somehow to get hold. In 1848, the courts granted an injunction to prevent this, expressly saying that what was proposed was an intrusion into the rights of privacy. A similar situation might possibly have arisen in the recent case where there was a threat to publish school essays written by Prince Charles, but a simpler remedy existed. The English law, like God, is—as of course everybody knows—no respecter of persons. Still, it would be a bold and wealthy litigant who sought to persuade the House of Lords to accord to him in the very different circumstances of today the protection made available to the Royal Family over a hundred years ago.

In some countries, but not in Britain, attempts have been made to deal with the matter by statute. There are two problems. Of these the most troublesome is, of course, the difficulty of definition.

The other lies in the changing manners of society. The development of all sorts of means of mass communication undreamt of in the 19th century; television (not to mention Telstar), and the great increase in the circulation of popular newspapers has made us all accustomed to (and has caused some of us to seek) a much greater degree of publicity in regard to our personal affairs than would have been thought seemly less than half a century ago. Coupled with all this, is the fact that the increasing complexity of modern societies has led both to a vast increase in the number of

people engaged in one form or another of public life, political, social or industrial, and (because of the greater impact of their activities upon the lives of the ordinary people) to a greater interest on the part of the general public in how these people conduct themselves. The world is a much less private place than it used to be. And those who engage in public life, whether it be in politics, or in leading positions in industry or the professions, are a legitimate matter of interest to the public at large. 'Public men are public property.' This is the price to be paid.

It may be added that the vast majority of those concerned are only too willing to pay it. It was, I think, the late Miss Mae West, who coined the phrase that 'it is better to be looked over than to be overlooked', and most of those in public life would prefer to receive a little too much attention from the newspapers than to be ignored by them. Almost without exception, all newspapers have gossip columns, however disguised; and these are amongst the most widely read features of modern journalism.

But this is by no means to say that there is no right to privacy or that newspapers do not sometimes commit unpardonable intrusions upon it. Whilst the public has 'a right to know and to be informed' about much in the life of public men and women, they in their turn are entitled to privacy in their purely family and private affairs—so long as these are not a matter of public concern.

In Britain, some years ago, a very strong committee on the law of defamation, reported that:

There were great difficulties in formulating an extended definition of criminal or civil libel which, whilst effective to restrain improper invasion of privacy would not interfere with the due reporting of matters which are of public interest. It appears to us, however, that the difficulties which confront the Committee should not form an obstacle to action by the press itself or prevent it from dealing with the problem as one of internal discipline.

Experience during the years which have since passed has confirmed the correctness of this conclusion. The press has established a Council, presided over by a very distinguished retired Judge, to police itself in these matters and, in recent years, there has been a very marked improvement in the way the press has handled them.

But whilst the press, like the ordinary citizen exercising his individual rights, must abide by the maxim *sic utere tuo ut alienum non laedas*, in the fundamental matters concerning politics and belief, the press, like the citizen, must be free and unafraid. It is the interest as well as the duty of citizens everywhere to ensure recognition of this basic principle by all in authority.



# FREEDOM OF ASSEMBLY AND ASSOCIATION

by

DR. T. O. ELIAS \*

In this brief study of the twin freedoms of assembly and association, it is proposed to attempt a rapid review of the relevant provisions of the international conventions and of representative municipal constitutions as well as the treatment of the subject in a number of legal systems, before we draw our conclusions.

## I. International Conventions and the Two Freedoms

Our main concern is with Article 20 of the *Universal Declaration of Human Rights*, adopted by the General Assembly of the United Nations on December 10, 1948, which provides as follows:

- (1) Everyone has the right to freedom of peaceful assembly and association.
- (2) No one may be compelled to belong to an association.

But we would do well to look at three related Articles of the 1948 Declaration which complement these terse provisions of Article 20. The first is Article 23(4), which provides that everyone has the right to form and join trade unions for the protection of his interests; the second is Article 28, which, in order to set the political context in which alone the proper exercise of these two freedoms can take place, provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized; and the third is Article 29 which contains logical and inevitable limitations upon the enjoyment of these rights, *inter alia*, in an atmosphere of ordered freedom by providing thus:

- (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

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(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

When we come to consider the practical application of these provisions in selected municipal laws, we shall see how important it is to bear in mind that freedom of assembly and association entails certain correlative duties. In sum, we may refer to the note of warning sounded by the United Nations in the concluding Article 30, in these words:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.<sup>1</sup>

If we turn to the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, we find that Article 11 combines freedom of assembly and association in two clauses, whereas the two freedoms are in separate Articles 21 and 22 of the *International Covenant on Civil and Political Rights* adopted by the General Assembly on December 16, 1966.<sup>2</sup> Article 11 of the European Convention, however, omits clause 3 of Article 22 of this Covenant, which refers to the ILO Convention of 1948 on *Freedom of Association and Protection of the Right to Organise*.

In so far as freedom of assembly is concerned, Article 18 of the draft *Covenant on Human Rights* (1950) provides:

Everyone has the right to freedom of peaceful assembly. No restrictions shall be placed on the exercise of the right other than those prescribed by law and which are necessary to ensure national security, public order, the protection of health or morals or the protection of the rights and freedoms of others.

The *European Social Charter*<sup>3</sup> which came into force on February 26, 1965, provides in Article 5 for the right to organize,

<sup>1</sup> In its recent publication, *The Rule of Law and Human Rights*, the International Commission of Jurists has put forward these pertinent propositions:

*Page 6, Paragraph 7:* Everyone is entitled to freedom of assembly and peaceful association and particularly to become a member of a political party of his own choice. No political party must be put in a preponderant position in the state apparatus through legislative or administrative provisions. *Page 8, Paragraph 6:* Representative Government implies the right within the law and as a matter of accepted practice to form an opposition party or parties able and free to pronounce on the policies of the government, provided their policies and actions are not directed towards the destruction of representative government and the Rule of Law. *Page 10, Paragraph 3(d):* The legislature must not place restrictions on freedom of speech, freedom of assembly or freedom of association.

<sup>2</sup> For the text of this covenant, see *Journal of the International Commission of Jurists*, Volume VIII, No. 1.

<sup>3</sup> Signed by Member-States of the Council of Europe on October 18, 1961.

that is, for the freedom of employers and workers to form local, national or international organizations for the protection of their economic and social interests and to join such organizations. It is based on the *Freedom of Association and Protection of the Right to Organise Convention* which was adopted by the I.L.O. in 1948, although the I.L.O. Convention itself lays down special rights and their guarantees. The section, however, contains two exceptions: the right to organize in the case of the police and of the armed forces, which is left to legislation or regulation by each State. Article 6, which guarantees the right of collective bargaining, aims to promote (a) joint consultation between workers and employers, (b) machinery for voluntary negotiations between workers' and employers' associations resulting in collective agreements, and (c) machinery for conciliation and voluntary arbitration for the settlement of labour disputes.<sup>4</sup> It includes 'the right to strike', subject to obligations assumed under existing agreements. In an appendix, each state may regulate by law the exercise of the right to strike, provided that further restrictions are within the limits set by Article 31, which provides for such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals.<sup>5</sup> It is the first provision in international law in which the right to strike has been expressly guaranteed. Even the I.L.O. Convention does not go as far. It remains to be seen how it will be implemented in practice.

## II. National Constitutions and the Two Freedoms

We may now consider how freedoms of assembly and of association have been treated under representative municipal constitutions. It will be observed that practice varies as regards both the particular formulation of these rights and their positive contents. Thus, Article 8 of the Basic Law of Western Germany, 1949, guarantees the individual's freedom of assembly by stipulating that:

All Germans shall have the right without prior notification or permission to assemble peacefully and unarmed. For open air meetings, this right may be restricted by legislation or on a basis of law.

The Irish Republic, while similarly guaranteeing freedom of assembly so long as it is peaceful, spells out the conditions rather

<sup>4</sup> *Journal of International Commission of Jurists*, Winter 1966, Vol. VII, No. 2, at pp. 224-5, in an article entitled: *The European Social Charter* by Peter Papadatos at pp. 214-242.

<sup>5</sup> See A. H. Robertson's *Human Rights in Europe*, pp. 146-8.

more fully by providing in section 40(6)(1) of the 1937 Constitution as follows:

The State guarantees liberty for the exercise of the following rights, subject to public order and morality:

...  
(ii) The right of the citizens to assemble peaceably and without arms. Provisions may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.<sup>6</sup>

No breach of any law may be committed under the guise of exercising freedom of assembly.<sup>7</sup>

The position in the United States is well summed up in the leading case of *Cox v. State of New Hampshire*<sup>8</sup> in which it was held, *inter alia*:

Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order, without which liberty itself would be lost in the excess of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.

In *Thomas v. Collins*<sup>9</sup> it was held that the test in this, as in the case of freedom of expression, is that of the 'clear and present danger' which the assembly constitutes in any given situation. We shall deal more fully with this point in the next section.

An ideological interpretation would appear, however, to have been given to the concept in the Soviet Union. Thus, Article 125 of the Constitution of the U.S.S.R. provides:

In conformity with the interests of the working people, and in order to strengthen the socialist system, the citizens of the U.S.S.R. are guaranteed by law:

- (a) freedom of speech;
- (b) freedom of the press;
- (c) freedom of assembly, including the holding of mass meetings;
- (d) freedom of street processions and demonstrations.

These civil rights are ensured by placing at the disposal of the working people and their organizations printing presses, stocks of paper, public buildings, the streets, communications facilities and other material requisites for the exercise of these rights.

<sup>6</sup> S. 40(6)(2), *ibid*: Laws regulating the manner in which... the right of free assembly may be exercised shall contain no political, religious or class discrimination.

<sup>7</sup> *Dunne v. Fitzpatrick* (1958) I. R. 29.

<sup>8</sup> (1941) 312 U. S. 569.

<sup>9</sup> (1945) 332 U. S. 851.

One real difficulty about this approach is that it guarantees not a universal freedom of assembly, but the sectional rights of the 'working people' with a view to the strengthening of 'the socialist system'.

Article 21 of the Constitution of Japan is in the orthodox tradition, although it encompasses a number of other freedoms than those of assembly and association. It provides:

Freedom of assembly, association, speech, press and all other forms of expression are guaranteed. No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

The Constitution of the Federal Republic of Nigeria,<sup>10</sup> 1963, provides in its section 26 as follows:

- (1) Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to trade unions and other associations for the protection of his interests.
- (2) Nothing in this section shall invalidate any law that is reasonably justifiable in a democratic society:
  - (a) in the interest of defence, public safety, public order, public morality or public health;
  - (b) for the purpose of protecting the rights and freedoms of other persons; or
  - (c) imposing restrictions upon persons holding office under the state, members of the armed forces of the Federation or members of a police force.

The debt which this provision owes to the *Universal Declaration of Human Rights*, 1948, is obvious. It not only guarantees freedom of assembly and association for all within Nigeria, but also contains the kinds of limitations provided for in Articles 29 and 30 of the Declaration; more specifically, certain limited restrictions, which are to be found in all the democracies, are imposed on members of the civil service, the armed forces and the police with regard to freedom of association.

It may be added that almost all the African countries that have gained their independence since 1960 and that have embodied fundamental human rights in their constitutions have followed the Nigerian pattern in respect of the provision for freedom of assembly and association.

In most of French-speaking Africa,<sup>11</sup> the preambles to their constitutions contain a recital to the effect that human rights are incorporated as embodied in the French *Declaration of the Rights of*

<sup>10</sup> The Constitution of 1960 contained exactly the same provision.

<sup>11</sup> The notable exceptions are Algeria, the Cameroons, Guinea and Mali, whose constitutions make no reference to French law as a basis of their incorporation of human rights provisions.

*Man and of the Citizen* of 1789 and the *Universal Declaration of Human Rights* of 1948. Occasionally, a reference to the United Nations' Charter is added. In this indirect way have the freedoms of assembly and of association, embodied in the Universal Declaration, been made part and parcel of the national constitutions of most of Francophone Africa.

### III. Freedom of Assembly and Judicial Review

While it is useful to look at representative samples of constitutional provisions under municipal law, it is necessary to study the treatment of these provisions and of the organic laws made thereunder in order to appreciate the issues involved. This is because some countries like the United Kingdom have no written constitutions and, therefore, no constitutional provisions relating to these freedoms; but there are common law rules and statutes dealing with them, and their judicial review should throw a flood of light on the law and the practice.

A recent case from a country which constitutionally guarantees freedom of assembly and of association is *Nawabzada Nasrullah Khan v. The District Magistrate, Lahore, and the Government of Pakistan*.<sup>12</sup>

The West Pakistan National Democratic Front was an association formed in 1964 to achieve democratization of the constitution. A committee of the Front met on February 8 at an address, and adjourned to the following day to resume its work in the home of one of its members. During the meeting, two inspectors of police, acting on an order of the District Magistrate of Lahore, entered the house and began to record the proceedings. The order had been made by the Magistrate in exercise of the powers conferred on him by section 8 of the West Pakistan Maintenance of Public Order Ordinance 1960, which empowered him to depute one or more police officers or other persons to attend any public meeting for the purpose of causing a report to be made of the proceedings. By a unanimous decision of the Full Bench, it was held that section 8 of the ordinance was *ultra vires* the fundamental rights guaranteed by the Constitution, since 'the powers conferred on the District Magistrate in this behalf are likely to act as a deterrent to the public to assemble together and may even stifle the meeting altogether. In this manner they materially infringe upon the fundamental rights of assembly and association protected by the Constitution'. The Court further held that the particular meeting, in so far as admission to it

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<sup>12</sup> Pakistan Legal Decisions, 1965, W. P. Lahore, p. 642.

was limited to members of the central executive of the Front, was a private and not a public one.<sup>13</sup>

Freedom of assembly has featured in the United States Supreme Court decisions because, or in spite, of its constitutional guarantee. In the interesting case of *U.S. v. Cruikshank*,<sup>14</sup> it was observed:

The very idea of 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.

This right is not, however, limited to the organization and presentation of grievances; it extends to any assembly for any lawful discussion designed to secure that government is responsive to the will of the people and that desired changes may be achieved by peaceful means. In the leading case of *De Jonge v. Oregon*,<sup>15</sup> the Supreme Court took the view that:

The holding of meetings for peaceful political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals. The question, if the rights of free speech and assembly are to be proscribed, is not as to the auspices under which the meeting is held but as to its purpose. . . . . If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against public peace or order, they may be prosecuted for their conspiracy or their violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offences, seizes upon mere participation in a peaceful assembly and a lawful public discussion as the basis of a criminal charge.

The extent to which *Dennis v. U.S.*<sup>16</sup> held that mere knowledge on the part of a member that an assembly 'advocates', without any overt act, the overthrow of the government, would render him liable for an offence, has since been clarified by *Yates v. U.S.*,<sup>17</sup> which held that a mere doctrinal justification of a forcible overthrow of the government did not constitute the 'advocacy' envisaged in the *Dennis Case*; what was necessary was an advocacy of concrete action designed to achieve such a goal.

It was held in *Presser v. Illinois*<sup>18</sup> that the right 'to keep and bear arms' guaranteed by the Constitution (Second Amendment) does not include the right to parade the streets and other public places with arms or to assemble as military organizations. It was also held that a State would be entitled to forbid such activities by law.

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<sup>13</sup> See *Journal of the International Commission of Jurists*, Vol. VII, No. 2, Winter, 1966, pages 284-6.

<sup>14</sup> (1876) 92 U. S. 542.

<sup>15</sup> (1937) 299 U. S. 353.

<sup>16</sup> (1951) 341 U.S. 494.

<sup>17</sup> (1956) 354 U.S. 298.

<sup>18</sup> (1886) 116 U.S. 252, at p. 265.

Let us compare the English decision in *Beatty v. Gillbanks*,<sup>19</sup> where it was held that, if persons assembled for a lawful purpose (e.g. a group of the Salvation Army for a peaceful street procession), their assembly was not rendered unlawful merely because they had reason to believe that a rival organization would disturb their procession and cause a breach of the peace. This raised the delicate issue of the 'hostile audience'. In *O'Kelly v. Harvey*,<sup>20</sup> it was held by the Court of Appeal that where the authorities are unable to preserve the peace otherwise than by dispersing the meeting, a lawful assembly may be dispersed on the ground that others may likely cause a breach of the peace. And it has been further held in *Duncan v. Jones*<sup>21</sup> that those who refuse to disperse after the necessary order has been given by the appropriate authority may be prosecuted for obstruction of the police in the lawful execution of their duty. In the American case of *Feiner v. New York*,<sup>22</sup> it was held that the police may not only disperse a public meeting at which a speaker uses provocative language to excite his audience, but also arrest the speaker if he refuses to stop when asked to do so. It was, however, emphasized that the police should not interfere with a meeting unless there was a clear and present danger to public order. The police must not be used as a pretext to suppress views hostile to the authorities.

According to the English common law, there is freedom of assembly, that is, any number of persons may meet or assemble peacefully, provided that the object is also lawful. An assembly is said to be unlawful if three or more persons gather together with intent either to commit a crime or to execute a common purpose, whether lawful or unlawful, in a manner likely to cause reasonable persons in the neighbourhood to apprehend an imminent breach of the peace. It is an offence to participate in an unlawful assembly. Magistrates have power to disperse such assemblies, and they may for this purpose call private persons to their aid. An assembly which is lawful to begin with, might be rendered unlawful if it later embarks upon a course of conduct likely to result in a breach of the peace.<sup>23</sup> Meetings held for prize-fighting are unlawful. English law also distinguishes between *Rout*, which is a disturbance of the peace by persons who are assembled together to do an unlawful act and who take steps towards executing it, and a *Riot* or *Riotous Assembly*, which consists of three or more persons who assemble

<sup>19</sup> (1882) 9 Q.B.D. 308.

<sup>20</sup> (1883) 14 L.R. Ir. 105.

<sup>21</sup> (1936) 1 K.B. 218.

<sup>22</sup> (1951) 340 U.S. 315.

<sup>23</sup> *R. v. Graham & Burns* (1888) 16 Cox C.C. 420, at p. 434.



together, without lawful authority, with an intent mutually to assist one another, by force if necessary, against anyone opposing them in the execution of a common purpose, and who in fact execute or embark upon executing that purpose in such a manner as to alarm at least one person of reasonable firmness and courage—*Munday v. Metropolitan Police District Receiver*.<sup>24</sup> In this case, it does not matter whether the original purpose of the assembly was lawful or unlawful or whether the Riot Act 1714 has or has not been read.

Under the Public Meeting Act, 1908, it is an offence for anyone to act in a disorderly manner or incite other persons so to act at any lawful public meeting with the object of preventing the transaction of the business of the meeting. The freedom of assembly is further reinforced by the provision in section 3 of the 1936 Act to the effect that it is a misdemeanour to indulge in any offensive conduct such as using threatening, abusive or insulting words or behaviour at any lawful public meeting with intent to provoke a breach of the peace.

Under a number of statutes, however, freedom of assembly has been restricted in the interests of law and order. Thus, the Riot Act, 1714, provides for the dispersal of riotous assemblies consisting of twelve or more persons, and for the punishment of those apprehended after 'the reading of the Riot Act'. The Seditious Meetings Act, 1817, makes unlawful any assembly of more than fifty persons within one mile from Westminster Hall, for the purpose or on the pretext of considering or preparing a petition or an address during the sittings of Parliament and the superior courts. Exempted, however, are meetings held by persons attending to the business of Parliament or at the High Court. The Unlawful Drilling Act, 1819 (together with the Firearms Act 1920) forbids all meetings and assemblies for the purpose of training or drilling in the use of arms or of practising military exercises, unless under lawful authority. But a significant enactment in more recent times is the Public Order Act, 1936, which makes it an offence for any person in any public place or at any public meeting without the permission of the Chief Officer of Police, to wear uniform signifying his association with any political organization or with the promotion of any political object. The consent of the Attorney-General is necessary before a person may be prosecuted for this offence. Similarly prohibited are quasi-military organizations, the members or adherents of which are organized, trained or equipped so as to enable them to be employed in usurping the functions of the police or of the Government armed forces, or for the use or display of physical force in promoting any political objective. The 1936 Act also regulates public processions by empowering a chief officer of police to impose on the organizers

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<sup>24</sup> (1949) 1 All E.R. 337.

or the participants such conditions as appear to him to be necessary for the preservation of public order; such conditions may include those restricting the display of flags, banners, or emblems, if a breach of the peace is committed or threatened.

It is significant that the same year (1936) in which the (British) Public Order Act was enacted also saw an equivalent French law (enacted on January 10, 1936), thus illustrating the similarity of approaches between the two great Western democracies to almost identical social and economic conditions prevailing in Western Europe in the years immediately preceding the Second World War. In both countries there had been frequent public disorders at meetings and in streets occasioned by groups of Fascists and Communists.<sup>25</sup> A decree, promulgated in August 1944, had to be brought in to dissolve all those associations and groups that had collaborated during the period of enemy occupation.

#### IV. Supplementary Note on Freedom of Association

In so far as this freedom has not been discussed separately from the freedom of assembly, we may add here a brief supplementary note on it. As we have seen, some constitutions treat the two Freedoms together in the same provision, while others deal with them separately. It will be sufficient to refer to only two or three representative samples before we turn, again briefly, to the case-law on the subject.

A notable provision is that to be found in Article 56 of the Constitution of Switzerland (1874) which reads:

Citizens have the right to form associations provided that neither the purpose of the association nor the means it employs are in any way illegal or dangerous to the State. Cantonal legislation shall enact the necessary provisions to prevent misuse of this right.

It is clear that this is in common form with the provisions already considered in connection with the freedom of assembly. A significant departure is, however, contained in the following provision of Article 126 of the Constitution of the U.S.S.R.:

In conformity with the interests of the working people and in order to develop the organizational initiative and political activity of the masses of the people, citizens of the U.S.S.R. are guaranteed the right to unite in public organizations, trade unions, co-operative societies, youth organizations, sport and defence organizations, cultural, technical and scientific societies; and the most active and politically-conscious citizens in the ranks of the working class and other sections of the working people

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<sup>25</sup> See *Journal of Comparative Legislation and International Law*, 3rd Series, Vol. XXXIII, Parts I & II, 1951, at p. 73.

unite in the Communist Party of the Soviet Union (Bolsheviks), which is the vanguard of the working people in their struggle to strengthen and develop the socialist system and is the leading core of all organizations of the working people, both public and State.

This follows logically the ideological pattern set by Article 125 of the same constitution in respect of freedom of assembly, to which we have referred earlier.

Section 40(6)(1)(iii) of the Constitution of Ireland complements the provision of the preceding sub-section relating to freedom of assembly. The State guarantees:

The right of the citizens to form associations and unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

As with freedom of assembly, the section also provides in respect of freedom of association as follows:

Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

Article 18 of the Basic Law (1949) of Western Germany provides that the basic rights of the citizen are forfeited if he abuses 'freedom of expression of opinion, in particular freedom of the press, freedom of teaching, freedom of assembly, freedom of association, the secrecy of mail, post and telecommunication, or the right of asylum in order to attack the free democratic order'.

This section came into prominence recently when the Ministers of the Interior of the *Länder* held a meeting in Bonn and decided against applying for a ban which would prevent the National Democratic Party from using public halls for their meetings. It was seriously contemplated at the time, on March 3, 1967, whether an application should not be made by the ruling party to the Federal Constitutional Court to impose a ban, rather than an outright proscription, on the activities of certain members of the extreme Right-wing National Democratic Party and on certain of the party's organs. It was decided that it was better to provide convincing political counter-arguments. The question then was whether it was expedient to leave the National Democratic Party whilst the Communist Party remained legally prohibited; especially since it was pointed out that the danger from Right-wing radicalism was far greater than that from the Left.<sup>26</sup>

The case-law on freedom of association is intertwined with that of freedom of assembly and, therefore, most of the judicial decisions considered earlier apply with equal force here. All that we need do

<sup>26</sup> See *The Guardian*, London, March 4, 1967, p. 9.

then is to highlight the importance of this freedom by a brief reference to some *causes célèbres*.

It was not until *National Labour Relations v. Jones* <sup>27</sup> that the right of workers to join trade unions was recognized for the first time in the United States. Hitherto, trade unions had been regarded as constituting a restraint on inter-State commerce; this was because the United States Constitution contained no specific provision in respect of freedom of association. Since then, however, recognition has been given by the American Courts to the right to strike and the right of peaceful picketing, where their exercise is unaccompanied by violence or malice. <sup>28</sup>

It has even been held, in *National Association for the Advancement of Coloured People v. Alabama*, <sup>29</sup> that 'it is immaterial whether the beliefs sought to be advanced by an association pertain to political, economic, religious or cultural matters'; <sup>30</sup> and, in *Shelton v. Tucker*, <sup>31</sup> it was held to be a violation of the individual's freedom of association to require a person seeking employment in the public service to furnish a list of all the organizations with which he was or had been associated, since it had earlier been laid down in *American Communications v. Douds* <sup>32</sup> that freedom of association includes the individual's right to privacy in connection therewith.

In English law, conspiracy is a *crime* if two or more persons agree to do an unlawful act or to do a lawful act by unlawful means; but such an agreement is also a *tort* (i.e. it gives ground for an action in civil law), only if it is carried into effect, and causes the plaintiff damage. Trade unions were first recognized as possessing a distinct legal personality by the Trade Union Act, 1871. The Trade Disputes Act, 1906 made them not liable for inducing a breach of contract between employers and employees or for interference with business. General strikes, the purpose of which was to paralyse the government or to inflict hardship on the community, were declared illegal by the Trade Disputes and Trade Union Act, 1927; but this retrograde enactment was repealed by a 1946 Act of the same name.

The workings of democracy are illustrated by the well-known Australian case, *Australian Communist Party v. The Commonwealth* <sup>33</sup>: The Communist Party Dissolution Act 1950 had dissolved

<sup>27</sup> (1937) U.S. 301.

<sup>28</sup> *American Federation v. Swing* (1941) 312 U.S. 321; *American Steel Foundries v. Central Trades Council* (1923) 263 U.S. 457.

<sup>29</sup> (1957) 357 U.S. 449.

<sup>30</sup> *Ibid.*, at p. 463.

<sup>31</sup> (1960) 364 U.S. 479.

<sup>32</sup> (1950) 339 U.S. 382.

<sup>33</sup> (1950-1951) 83 C.L.R. 1.

the Party, declaring it to be an unlawful association, and had imposed certain disabilities upon persons and institutions who in the opinion of the Executive were associated with it. The contemplated disabilities related to employment in the Federal public service and in industry as well as membership of trade unions. The majority of the High Court of Australia refused to hold that the Act, specifically directed against an association, could be justified as a proper exercise of the defence power in the condition of ostensible peace then prevailing in 1950. It might have been otherwise had the legislation in question been enacted by Parliament during a state of emergency in Australia. A situation disclosing 'a clear and great national danger, such as an imminent war or actual violence or a threat thereof would have rendered the Act valid'. As it was, however, the Act prescribed no conduct, duties or prohibitions, but sought to impose penalties on a particular organization, by means of a recital in the preamble (reflecting the opinion of the Executive) that certain persons were engaged or were likely to engage in activities prejudicial to defence.<sup>34</sup>

A distinction must be made between a law to dissolve an association falling into a category determined by specific criteria and a law specially dissolving a particular association. It is a familiar provision in the criminal codes of the English speaking African, Caribbean and South-East Asian countries that certain societies may be declared to be unlawful if certain objective conditions are met. These are that the association must be of ten or more persons and that it should have been formed for the purposes of levying war on the Government, killing or injuring persons, destroying or injuring property, subverting or promoting subversion of the Government or of its officials, committing or inciting to acts of violence or intimidation, interfering with or resisting the administration of the law, or disturbing or encouraging disturbance of peace and order in the community concerned.<sup>35</sup>

## V. Summary and Conclusion

The provisions of Article 20 of the *Universal Declaration of Human Rights* regarding freedom of assembly and association are,

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<sup>34</sup> See Anderson: *Australian Communist Party v. The Commonwealth*, 1 Univ. of Q.L.J., p. 34; also, Beasley: *Australia's Communist Party Dissolution Act*, 29 Can. Bar Rev. 490. The whole weakness of the position of the Executive in this respect had been the purported invocation of the defence power at a time of ostensible peace.

<sup>35</sup> See, e.g., Section 62 of the Criminal Code of Nigeria. All such colonial enactments would appear to have been animated by the (English) Unlawful Societies Act, 1799.

therefore, among the most basic to the flowering of democracy in any State. All the newer nations of Africa and Asia that have entrenched a body of fundamental human rights in their national constitutions have in respect of these two freedoms followed closely the pattern set by the 1948 Declaration. The older nations, whether or not they have written constitutions, will agree that they have been influenced by the Declaration, if not in the formulation of the specific provisions, at least in the practical application of its legal ideals in the administration of justice.

The Declaration seeks to guarantee freedom of assembly and association in the manner and within the limits stated in our review of the legal and judicial practices of States in the preceding sections of this study. These freedoms are intended to be universal in their application and not, as we have seen in certain instances, to apply only to sectional interests or privileged elements in the State. It is by virtue of these freedoms that we have and enjoy our free parliamentary institutions, associations of employers and of employees, trade unions, private clubs and societies of various kinds; and with these go inevitably the right to assemble, to organize group activities and to undertake processions, subject always to the overriding requirement of State security and general public welfare as defined in the relevant municipal laws.

The role of the judiciary is definitive of the proper limits within which these freedoms may lawfully be restricted. We have seen how jealously the freedoms of assembly and of association are guarded by the courts, when called upon to review administrative action touching individual rights in this area. As far as we are able to judge on the basis of the cases we have considered, judicial practices seem fairly consistent in giving due weight to the claims of the individual against any apparent arrogation of arbitrary power by the Executive.

The International Commission of Jurists has, in the publication referred to earlier,<sup>36</sup> rightly emphasized, in connection with these two freedoms, the central position occupied in our scheme of values by the need for free parliamentary institutions as a basis for truly responsible and representative government throughout the world. Free elections, free private and public meetings for the lawful discussion of public affairs, free systems of collective bargaining—these are the essential ingredients of true democracy as we know it, and they deserve to be enshrined in the international no less than in the municipal legal order as bulwarks of our constitutional liberties and freedom under the law.

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<sup>36</sup> *The Rule of Law and Human Rights.*

# THE PREVENTION OF GENOCIDE

by

G. LEVASSEUR \*

## *Editor's note*

*The International Association for the Prevention of Crime held its Second International Conference in Paris from 10 to 13 July 1967, in co-operation with the World Federation for Mental Health, the Association for the Development of World Law, and the French League for Mental Hygiene. The International Commission of Jurists, which was invited to be represented at the meetings, delegated Professor Georges Levasseur of the Faculty of Law and Economic Sciences of Paris. The text which follows is taken from his report on the work of this Conference, which discussed The Prevention of Genocide. It should be mentioned that Professor Levasseur took an active part in the Conference, and was the Chairman of its Resolutions Committee. The question of genocide and its prevention is of such importance, and also, unfortunately, of such immediacy, that it is not out of place in this first special issue of the Journal for Human Rights Year 1968. Unfortunately, due to lack of space, the text which follows is in the nature of a summary of the original version.*

Among all the forms of criminal behaviour, international criminality is the most frightening and the most difficult to extirpate; at the heart of this international criminality, genocide is the most abhorrent and damaging to fundamental human values. In barbarian times, the extermination of vanquished peoples was often a matter of course; in our time, which has been called civilized, it is horrifying and almost unbelievable to see that modern genocide is as cruel and more systematically organized than the massacres of antiquity or the paroxysms of religious wars or revolutionary crises. Man's disgust at the excesses of Hitler's regime was such that states unanimously resolved to prevent their recurrence, and at the time that the International Tribunal

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of Nuremberg condemned the Nazi criminals, the United Nations Organization, adopting the term 'genocide' (coined by Lemkin), drew up an international convention to prevent and punish this crime against humanity. Vespasian Pella, Aroneanu, Donnedieu de Vabres and Sottile, to mention only jurists of the past, had contributed significantly to the formulation of this Convention. However, although the acts constituting genocide were defined in detail, the provisions for implementing the Convention were given much less care. It was left to the signatory States to introduce into their national legislation a specified list of crimes which would become part of their respective criminal laws. In addition, the crimes enumerated in the Convention were to be incorporated in a *Code of Offenses Against the Peace and Security of Mankind*, which the United Nations had ordered to be drafted, and at the same time (11 December 1946), it formally recognized the principles contained in the Statute and the Judgment of the Nuremberg Tribunal. In addition, the United Nations had also envisaged setting up an International Criminal Court, which, had it already existed, would have avoided the objections raised against the composition of the Nuremberg Tribunal.

Jurists immediately began to formulate draft rules with enthusiasm; (some of the organisations involved were the International Association of Penal Law, International Bar Association and Judicial Committee of the Resistance), draft laws were submitted, whose effect was greatly diminished when their provisions were examined by international committees composed of government delegates. After repeated amendments from 1951 to 1954, the two drafts (*Code of Offenses Against the Peace and Security of Mankind*, and *Statute for an International Criminal Court*) were submitted to the United Nations and finally adjourned *sine die*, until a satisfactory definition of *aggression* should be reached.\*

The Genocide Convention has thus remained defenceless, its only teeth being in the form of national laws which have been introduced into the criminal legislation of a few of the state parties (e.g. Switzerland, Norway, Poland, Roumania, Yugoslavia and Ethiopia), countries in which there is little likelihood of genocide occurring. It is, on the other hand, disturbing to note that certain major Powers have not signed or ratified the convention (the United States, for example) or have only ratified it with reservations which significantly weaken its effect (as in the case of the Soviet Union).

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\* For an account of this disappointing stage of international law, it is of interest to re-read Volumes 1 and 2 of the *International Criminal Law Review*, which sets out to determine how far international criminal law is recognized. Among those who contributed most valuable articles might be mentioned Graven, Glaser, Dautricourt, J. B. Herzog, Röling, Gerhard Mueller, Jescheck and Quintano Rippolès.



Serious incidents of genocide do not normally occur without the knowledge of the public authorities; they are often encouraged, sometimes provoked and even ordered by the authorities, creating an unhealthy atmosphere in which a systematic persecution is organized. Under such circumstances, it is unlikely that the administrators of justice in a state would have the courage to institute proceedings against the rulers, and to convict them of a crime. The only conceivable sanction in practice is that of a revolution overthrowing the guilty heads of State, but such revolutions are rare. The provisions in the criminal law of a state are therefore illusory; only an international court with a wide jurisdiction could intervene at the right moment; and the realization of an effective system of punishment of such crimes is, unhappily, not to be expected in the immediate future.

On the other hand, genocide is not a catchword to be used on every occasion that the liberties of a group of individuals are endangered. The 1948 Convention does not consider the persecution of political adversaries to be genocide, even though this persecution may rightly shock democratic or liberal opinion. In the same way, certain reprehensible acts cannot constitute genocide, unless the persecution of the victim is part of a plan to exterminate his group. In many parts of the world since the Second World War, men have been dying often as a result of acts of barbarism, sometimes committed between nations, sometimes within one nation, which violate the international laws of war, as laid down in the Geneva Conventions; nevertheless, these acts do not legally amount to genocide. Wars are inhuman, but they would be more so, if they took on that character of genocide which was often a matter of course in ancient times, but which has now become exceptional. It is none the less true that in the presence of certain activities which disgust mankind, public opinion is naturally alarmed, and wishes to attach the name of genocide to them.

In any event, although it is difficult to punish genocide, it is desirable to prevent its occurrence, in so far as this is possible. For that reason the International Association for the Prevention of Crime resolved to extend its field of research to cover international crime and the means of preventing genocide.

Extensive and detailed studies, over the course of many months, were carried out by experts and were then discussed by the scientific commission responsible for the preparatory work of the Conference. A certain number of them are published in No. 11-12 of the International Studies on Criminal Psycho-sociology, which is specifically on the subject of the Conference.

It is clear that at the time, people's thinking, even though influenced by recent aggravated acts of violence (the war in Vietnam, the war in Algeria, the massacres of Ruanda, the racial outbursts in America, the

tribal warfare in Africa), was basically in terms of Hitler's acts of genocide, particularly those against the Jews.

But the International Conference had the fortune (and at the same time the danger) of opening at a moment when the news of the day was to give an immediate relevance to every phase of the discussion. The war in the Middle East was both awakening and dividing public opinion in France and in international diplomatic circles. At the Conference, there were people whose families had been victims of the Nazi camps and who were brothers to the Israelis; Israel itself was represented, and the Arab countries also. Some of the participants did not refrain from declaring their desire that Israel should be removed from the map of Asia Minor, and others from alleging that the war, with its consequent suffering was started by their adversaries, and others spoke of the fate of the Palestinian refugees from Jordan, whose numbers had suddenly multiplied.

It was clearly not within the terms of reference of the Conference to settle political problems which were being debated elsewhere, nor to seek to ascertain whether the constituent elements of genocide were present. An objective assessment, so close to the events, would have been impossible. At the opening session, in the great hall of the First Chamber of the Court of Appeal in Paris, the President of the Bar, Mr. Lussan, in welcoming the members of the Congress on behalf of the Bar, strongly discouraged any discussion of the current events. Very wisely, the organisers of the Conference had established the rule that no treatment of that issue would be permitted. Full credit is due to the chairmen of the meeting and Secretary-General of the Society, Mr. V. V. Stanciu, who was able to ensure that this rule was respected, for the principles outlined in the speeches must have had a clear relevance to the events which were happening at that time.

Special commendation must be given to the outstanding paper of His Excellency Si Hamza Boubakeur, Rector of the Moslem Institute of the Paris Mosque, who, with a rare sensitivity to human values, put forward an appeal for co-operation in safeguarding these values, and expressed his conviction that some progress had already been achieved and his hope that the general atmosphere of intolerance in the world would disappear; if it did not, it might well lead to genocide. He thought that persevering action on the part of religious groups might be the most important element in eliminating this intolerance.

The official opening session, on Monday, July 10, after the welcoming speech of the President of the Bar, Mr. Lussan, included a strong introductory speech by Mr. Stanciu, the Secretary-General. He spoke of historical precedents, and stressed that the Conference was concerned with more than one science; it was intended to be more criminological than legal. He said that the savage instinct which slumbers in the depths of every human being 'sometimes suffers from insomnia'.

He recommended as one of the means of prevention, the establishment of a supra-national police force which would not shirk its responsibilities at the very moment when the danger became menacing.

Unfortunately, it is not possible to publish here even a summary report of the speeches at this Congress, although they were of great scientific interest, nor of the often lively debate during the meetings. There follows a brief account of the principal subjects on the agenda, the basic themes of which are to be found embodied in the final conclusions and resolutions.

The meeting of Monday afternoon was devoted to the history of genocide. Detailed and well-documented reports dealt in particular with the massacre of the Armenians, which were to be forgotten and to remain unpublished, with the acts of genocide committed against the gypsies in various countries, and with the Nazi extermination of the Jews, camouflaged under the euphemism 'final solution'; and more recent aspects of the problem were also dealt with. Particular stress was given at this first working session on the need to instil in the mind of youth, from kindergarten onwards, a new international ethics, and to set up bodies capable of working out an enforceable system of international preventive law.

The subject of the first meeting on Tuesday July 11 was the 'causes of genocide', and of the second meeting 'genocide and philosophy'. The two questions are not unrelated. This day was, moreover, one of the most interesting, due to the original contributions which psychologists, psychiatrists, sociologists and psychoanalysts made to the study of the phenomenon of genocide. An understanding of the underlying causes of genocide is clearly necessary, if it is to be prevented.

The subject of the meeting of Wednesday, July 12, was 'Genocide and the Law'. Here suggestions for securing the implementation of the United Nations' Conventions were put forward. It was thought that an appropriate legal system might be established, which would deter, if not the instigators, at least those actually practising genocide, and which would prevent governments from sheltering behind the plea of domestic jurisdiction, thus making the implementation of international law impossible.

The meetings of the afternoon of 12 July and the morning of the 13th dealt more specifically with the prevention of genocide in the light of man's knowledge of the natural and social sciences, and synthesized the discussions of the Congress. The final meeting was given over to the adoption of resolutions. Many amendments were proposed (and many accepted by the chairman of the resolutions committee, and some only rejected by a slender majority); the articles in the amended text, and the resolutions as a whole were almost unanimously adopted. In this

connection, it is of importance to note that the members of the Conference, who were there by reason of their various qualifications, represented an extremely broad cross-section of nationalities, and hence of legal, economic and political systems. There were, in fact, participants from: Belgium, France, Israel, Lebanon, Mexico, Roumania, Spain, Switzerland, U.S.S.R. and Yugoslavia.

The final text reads as follows:

The 2nd International Conference of the International Association for the Prevention of Crime, meeting in Paris from 10 to 13 July 1967, to study the means of preventing genocide,

*RECALLS* that in face of the abhorrent incidents of genocide which our century has witnessed, the Convention adopted within the framework of the United Nations on 9 December 1948, and at present ratified by 77 States, has made genocide an international crime, has defined it, and has provided for its punishment;

*NOTES* that, in spite of this Convention, behaviour which appears to constitute genocide has continued to take place almost without interruption in the five parts of the world, especially in times of war; that in addition, the ever-present threats to peace and security, in defiance of the purposes and provisions of the Charter of the United Nations, may well lead again to wide-spread acts of genocide that could endanger the very existence of mankind; that the conscience of the world is, in consequence, grievously surprised at the ineffectuality of the existing provisions, and that it has become more than ever important to improve the measures for the prevention of genocide;

*DEPLORES* that the present state of public international law, far from contributing to bringing about the disappearance of genocide, seems to encourage its commission because it remains unpunished, whereas, on the contrary, each State, while having the right to govern its own people by virtue of its sovereignty, must defer to its international commitments and to the principles of existing international organization, which are set forth in the Charter of the United Nations;

*REAFFIRMS* the right of each individual and each human group to a normal existence in accordance with the dignity of the person as well as with the cultural traditions and moral values of the group; that this right of development and self-expression must not be frustrated by behaviour which the Convention of 1948 makes criminal;

*EXPRESSES* the hope that acts constituting genocide, committed and hitherto unpunished, should be punished and reparation made for them;

*URGES* that everything be done to bring about the cessation of all forms of genocide, whether organized or not, whether violent or latent, stressing the fact that genocide is facilitated by certain criminogenic tendencies, ideologies and structures, such as racism, slavery, colonization, racial discrimination and the various prejudices, every manifestation of which should be combated with energy; that, on the contrary, genocide can be effectively countered by the establishment of a political social, economic and cultural democracy;

### *RECOMMENDS*

1. That, for the purpose of developing an atmosphere of mutual comprehension favourable to a fruitful interchange of ideas, a special effort should be made in the field of education and of information, from the earliest years of childhood, in the family and in the school, to prevent the implantation of prejudices, in conformity with the recommendations and decisions of the United Nations and of UNESCO; that the public and the religious authorities should work towards this end, making use of the new techniques of mass media; and that there may be a widespread knowledge of the scientific data relating to the equality of the rights of all races, to the irrational nature of discrimination, and to the cultural and moral values of the different peoples, so that the acceptance of a pluralism of values may correspond to the modern concept of the deep-rooted solidarity of the human race;

2. That the Governments, using educational and social measures, should take steps against the discrimination in law or in fact against certain individuals by reason of their belonging to a group claimed to be inferior;

3. That an International Institute should be established with the task of making a comparative study of the language used in speeches, in publications and in text-books, where there may appear an expressed or concealed incitement to hatred against a given group, in particular in time of conflicts;

4. That the States which have not yet adhered to the Convention on the Prevention and Punishment of the Crime of Genocide (1948) or to the Convention against All Forms of Racial Discrimination (1965) should ratify these Conventions and modify their national legislation accordingly; similar modifications should likewise be made by the States which are already signatories;

5. That the national criminal laws should include severe provisions against all kinds of incitement to hatred or to the contempt of a human group, all defamation of such a group, and all propaganda in favour of racial, religious, social or other discrimination, whether committed on national territory or abroad;

6. That an International Criminal Court should be set up, to which actions might be brought by a State, by the United Nations Organization, by international organizations having consultative status with the United Nations, by any group that is victimized, or by the Centre that it is decided to establish. This court should have jurisdiction to give opinions, to impose penalties and to order reparation in all cases, whether serious or not, whether genocide in the strict meaning of the term has been committed, or attempted genocide, or conspiracy to commit genocide, or the misprision of genocide, or incitement to genocide or to the hatred or contempt of a human group, or the defending of such acts;

7. That the United Nations Organization may show a greater concern, at the political and diplomatic level, in ensuring that the obligations undertaken by its members in the field of genocide and non-discrimination are scrupulously observed.

### *DECIDES*

To establish a Centre of Observation, Information and Study on Genocide, having as its task:

(a) to gather in various countries the information necessary to detect the warning symptoms of genocide in time, to alert world opinion accordingly, and to counter false information by establishing the truth;

(b) to continue the scientific research into genocide and its prevention, begun by the Conference, as deeply in the field of psychological, psychiatric and social sciences, as in that of the legal and criminological sciences;

(c) to take the first steps toward establishing, in Paris, a permanent and international museum and library on genocide.

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Most of these provisions are as a direct result of the discussions. Some of the recommendations expressed are addressed to national governments or international organizations; among these will be found the recommendation that an International Institute should be set up, with the task of undertaking a comparative study of the language used in speeches and publications, and the recommendation for the establishment of an International Criminal Court. It is true that governments are unlikely to agree to the wide range of persons or

groups who may be parties to this court; but it is worth seeking, step by step, to bring such an institution into being. Even an International Court with jurisdiction to give opinions on minor acts tending to genocide, would be a most useful starting point, from which a gradual advance could be expected.

The official international institution which it is hoped may be established should not be confused with the Centre of Observation, Information and Studies on Genocide which it has been decided to set up. As we have seen, this Centre is intended, on the one hand, to work as a kind of radar, capable of detecting the warning signals of a possible genocide, and of re-asserting the truth which may have been grossly distorted in certain propaganda, and, on the other hand, to continue the scientific research into genocide, so auspiciously begun for the preparatory work of the Conference. To this has been added the task of undertaking the establishment, in Paris, of a permanent and international museum and library on genocide.

It must be recognized that the Second Conference of the International Association for the Prevention of Crime accomplished a praiseworthy scientific task, both objective and practicable, which it did without the benefit of any subsidies from official sources. The subject under discussion was naturally of interest to the International Commission of Jurists, and the resolutions adopted were in keeping with the basic texts which the Commission has formulated in the course of its various world and regional conferences.

# THE COURTS OF HIGHER JURISDICTION IN FRANCE

## *Editor's Note*

*The Supreme Court in France for civil and criminal matters is the Court of Cassation. In 1958, a special court was created to safeguard the principle of the Separation of Powers and to ensure, to some extent, the law's compatibility with the provisions of the Constitution—the Constitutional Council.*

*The article by Monsieur Letourneur, which follows immediately, introduces a concept, administrative jurisdiction, and a Court, the Conseil d'Etat, which have no equivalent in Common Law systems, but which have proved a most effective means of protecting the individual from arbitrary acts of the Executive. (The articles on the Court of Cassation and the Constitutional Court have been written by the Staff of the ICJ Secretariat).*

## THE FRENCH CONSEIL D'ÉTAT

by

MAXIME LETOURNEUR \*

The French *Conseil d'Etat* has, as its most distinctive quality, two apparently conflicting tasks. Its first is to advise the Government on the legality of draft laws and decrees, and on any other questions of law put to it by Ministers; its second is to give judgment as an independent court on disputes between government departments or between a government department and a citizen.

A complete description of the organization and procedure of the *Conseil d'Etat* would be outside the scope of this article and, since

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\* Councillor of the Conseil d'Etat.



there are already many excellent works <sup>1</sup> on the subject, it would be superfluous.

However, at a time when many countries are considering how best to provide greater protection for the individual in face of the ever-increasing powers of the State, a short description of how France has resolved this problem might not be inappropriate.

First, a brief summary of France's particular historical background will make it easier to understand how the *Conseil d'Etat* came to prove that it was quite possible for a court to have a restraining influence on the Administration without impeding its proper functioning, and to create, side by side with the existing courts, a parallel jurisdiction, the *administrative jurisdiction*, to protect individuals from the arbitrary acts of the Executive.

An outline will then be given of the original structure of the *Conseil d'Etat*, its composition and procedures, in order to explain how the *Conseil* was able to carry out its two-fold task.

Finally, illustrations will be provided of the substantial achievements of France's administrative court.

## **I. The concept of an administrative jurisdiction is of earlier origin than the 19th and the 20th centuries.**

Rome was the first state to establish an 'Administration', such as we know it today, and as soon as it took shape, the Emperors, particularly after Hadrian, felt it necessary to set up a council (*concilium principis*) of expert jurists to assist them in drafting laws and decrees and in examining petitions by Roman subjects against the acts of public servants addressed to the monarch as the supreme authority.

This council, the prototype of the *Conseil d'Etat*, appears to have owed its existence to the establishment of an *Administration* and to the absolute power of the Emperor. It was to be developed in the Byzantine Empire, and, indeed, it was the Emperor Heraclius who originated the title of *Master of Requests* <sup>2</sup>, which still exists today.

In France, as the kings gradually established their authority over the feudal lords and at the same time founded a national administration, one of their first steps was to set up a King's *Curia* on the model of the

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<sup>1</sup> Apart from the excellent books on Administrative Law by Professors Waline, de Laubadaire, Vedel, and Rivero, all of whom devote considerable space to the organization of *administrative jurisdiction*, there is also the recent *Treatise on Administrative Litigation* by Professors Auby and Drago, whose study is as thorough as it is accurate. There are also two excellent text-books in English: *Executive Discretion and Judicial Control* by Professor Hamson, and: *French Administrative Law* by Professors N. Brown and Gerner.

<sup>2</sup> 'Maître des Requêtes'.

Emperors' Councils, which was perfected over the centuries and was to continue to play its administrative and judicial role until 1789.

1789 was the year of the French Revolution.

The Judiciary is distinct from and will always remain separated from the Executive. Judges may not, on pain of dismissal, interfere in any way with the work of administrative bodies, nor may they sub-poena administrative servants acting in their official capacity.

When the leaders of the French Revolution, by the law of 16-24 August 1790, enacted in these terms the political principle of the Separation of Powers and the legal rule separating the Administration from the Judiciary, their intention was to remove from the courts the cognizance of disputes involving the Executive, thereby avoiding a return to the practice of the old 'Parliaments'<sup>3</sup> of interfering with the Executive, against which the kings had waged a continual battle. But they were not unaware of the criticism and complaints caused by the prerogative courts set up under the crown for fiscal and other matters, and had no plans for establishing a special jurisdiction over disputes involving the Administration. In fact, they formally dismissed any such idea. Their conception of the Separation of Powers implied a control by the Administration over itself, and a law of 7-14 October 1790 was quite clear on the subject: 'Under no circumstances shall claims to annul acts of administrative bodies lie within the jurisdiction of the courts, they shall be brought before the King as head of the general administration . . .'

As was to be expected, this led to an increase in the arbitrary and absolute power of the Administration, which was beyond any jurisdiction.

When Napoleon reorganized the *Conseil d'Etat* to what it is today, he none the less retained the principle established in the Revolution. In addition to its legislative and administrative functions, the *Conseil d'Etat* was made responsible for 'settling any difficulties that may arise in administrative matters' (Article 52 of the Constitution of the year VIII),<sup>4</sup> and for adjudicating 'any conflicts that may arise between the Administration and the courts and on any matters previously left to the Minister's discretion which ought to be the subject of judicial decision', but it went no further than to deliver opinions given by its administrative divisions: the decision was given in the form of a decree by the First Consul and in the last instance by the Emperor alone. However, a decree of 2 June 1806 established a *Judicial Committee*,<sup>5</sup> whose task was to examine applications and to

<sup>3</sup> Provincial High Courts.

<sup>4</sup> 1799-1800.

<sup>5</sup> 'Commission du Contentieux'.

make a report to the General Assembly; shortly afterwards a decree of 22 July 1806 was issued, laying down the Committee's procedure. *Administrative jurisdiction*, which was to be established sixty-six years later, can be traced back to these two decrees; nevertheless, the judicial work of the *Conseil d'Etat* during the Napoleonic period was neither plentiful nor particularly noteworthy.

The Restoration was a difficult period. No doubt because of its origin, the *Conseil d'Etat* was not abolished, but it was the object of fierce criticism and its close links with Napoleon's regime caused it to be regarded by liberals as an instrument of dictatorship.

These criticisms had two consequences.

In France, a series of reforms under the July Monarchy<sup>6</sup> had the effect of improving the procedural safeguards for individuals.

Abroad, on the other hand, *administrative jurisdiction* was discredited. When Belgium became independent and entrusted the protection of individual rights strictly to the ordinary judges, the young Nation's decision was hailed as a major victory by all the liberals in Europe. Then, the new Kingdom of Italy hastened to follow Belgium's example, and in 1865 removed most of the judicial functions from the Italian *Conseil d'Etat*.

In the Netherlands, the *Conseil d'Etat*, which in 1814 had nevertheless been reorganized on the French model after the fall of the Napoleonic regime, passed through the same period of unpopularity.

Nor did the *administrative jurisdictions* established on the lines of the French system in the early 19th century by certain German States escape criticism. Article 182 of the Frankfurt Constitution of 1848 provided that all questions of law were thenceforth to be decided by the ordinary courts of the land.

The Grand-Duchy of Luxembourg was no exception. The 1856 Constitution established a *Conseil d'Etat*, in which French and more particularly Dutch influences were clearly discernible, but this was more because that Constitution marked a return towards absolute power and was intended as a movement away from the liberalism of the 1848 Constitution, which had established the principle of a single jurisdiction vested in the common law courts.

Far from serving as a model, therefore, it seems that the *Conseil d'Etat* in France was, on the contrary, regarded as an institution to be avoided. Yet, curiously enough, the Second Empire was to mark a turning point in the history of *administrative jurisdiction* in France. The *Conseil d'Etat* gained more independence and unquestionably increased its authority. A Decree of 2 November 1864, in fact, gave it more power to decide questions of *ultra vires*.<sup>7</sup>

<sup>6</sup> Louis-Philippe (1830-1848).

<sup>7</sup> 'Excès de pouvoir'.

At the same time, the *Councils of the Prefecture*, which, since their establishment in the year VIII<sup>8</sup> as district courts, had come under heavier and more justified attack, were reorganized under a law of 21 July 1865 and made subject to strict rules of procedure.

But the starting point for the development of *administrative jurisdiction* lies in a law of 24 May 1872, which delegated to the *Conseil d'Etat* the judicial power to make binding decisions, and recognized it as the court to which claims against the Administration should be brought. But the law of 1872 was not and could not be anything more than a starting point. There were many obstacles confronting the new Court. For a long time, there was to be criticism at the parliamentary level that it was not sufficiently independent, as well as academic doubts as to its effectiveness. There was, moreover, the need to gain 'acceptance' and respect from an Administration that had hitherto been accustomed to an almost untrammelled freedom of action, and there was the need to formulate precise rules distinguishing its jurisdiction from that of the ordinary courts.

Undoubtedly, the highest praise that can be given to the *Conseil d'Etat* in the Third Republic is that by delicately balancing caution and boldness, it overcame all these difficulties. Patiently at first, it gained total independence. It then proceeded to tighten its control over the Administration, yet without ever impeding or paralysing its action, while simultaneously providing the individual with safeguards such as no other jurisdiction was able to provide. In the main, this very considerable achievement was completed in less than fifty years.

No longer now was the French *Conseil d'Etat* regarded as a royal instrument for taking the people away from the ordinary courts, but as a body that had given them a court with jurisdiction over matters where there had previously been none, and had offered them remedies against the unlawful acts of the authorities. The action for a declaration of *in excess of power* which was created and developed by the *Conseil d'Etat* alone, unaided by any law or precedent, has proved the most effective weapon against misuse of authority, and the rules that the *Conseil* has formulated in regard to the liability of public authorities has given France a system of legal responsibility which has no peer.

The French *Conseil d'Etat* now became a model for other democratic countries; and *Conseils d'Etat* were set up in Greece, Turkey, and Belgium, while that of Luxembourg was given judicial power.

Another (perhaps less fortunate) consequence of the *Conseil's* success was an increase in the number of cases brought before it, to the prejudice of its proper functioning; judgments were delivered after such long delays that there was a serious risk to the effectiveness and influence of its decisions. A decree of 30 September 1953 remedied

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<sup>8</sup> 1799-1800.

this situation by replacing the existing district courts, the *Councils of the Prefecture*, by Administrative Courts, which would hear claims against the Administration, and by transforming the *Conseil d'Etat* essentially into a court of appeal. The need for this reform lay in the overwhelming number of cases, and its expected success was due to improved methods of recruitment of first instance judges.

## II. How the *Conseil d'Etat* was able to carry out its task.

A. *The first problem that arises from the establishment of an administrative jurisdiction, and not an easy one to solve, is the recruitment of the judges.* Since they are called to adjudicate on the acts of the Administration, the judges must be independent of it. Furthermore they must have expert knowledge not only of Constitutional and Administrative Law, but also of the machinery of government, its functions and restrictions. At least to a certain extent, these two requirements appear to conflict with each other, and they have to be reconciled. The *Conseil d'Etat*, which is the Legal Adviser to the Government as well as the final administrative court, is a fairly successful example of such a reconciliation.

a) Its independence is guaranteed by its autonomy. It has had its own particular method of recruitment, originally by means of a competitive examination, then, since 1946, from the National College of Administration. It has a standard career structure with four grades of members: *Listeners*,<sup>9</sup> *Masters of Requests*,<sup>10</sup> *Councillors*,<sup>11</sup> *Divisional Presidents*. At its head, the Prime Minister or his delegate, the *Keeper of the Seals*,<sup>12</sup> is the titular president. The real power, however, lies solely with the Vice-President, usually chosen from the Divisional Presidents, or, exceptionally, from distinguished personalities in the legal world.<sup>13</sup> Ultimately, however, the independence of the *Conseil d'Etat* is strictly traditional and is founded on the moral authority which it has acquired since 1872.

The irremovability of its members is a difficult principle to accept for a body which, by means of its advice, plays some part in the exercise of executive power. It has moreover never been incorporated in any statute or any provision of the constitution; but, to quote the authors, Auby and Drago, 'there is no real need for this principle (of irremovability) to be formally enacted for it relies on immemorial custom, which has the force of a written rule'.

<sup>9</sup> 'Auditeurs'.

<sup>10</sup> 'Maitres des Requêtes'.

<sup>11</sup> 'Conseillers d'Etat'.

<sup>12</sup> 'Garde des Sceaux'.

<sup>13</sup> One of the most eminent vice-presidents of the *Conseil d'Etat* was M. René Cassin, a professor at the Paris Law Faculty, who held the post from 1944 to 1960.

By another tradition, promotion to the rank of *Councillor* is strictly on the basis of seniority. While this must inevitably frustrate the recognition of exceptional ability, it puts the judges out of the reach of political intrigues or the influence of popularity or unpopularity.

b) The judges' knowledge of administration is guaranteed in various ways.

In the first place, although the *Conseil d'Etat* performs two quite distinct functions, and is split up into four 'Administrative Divisions' and one 'Judicial Division', it is nevertheless a single body. Each one of its members is assigned during the course of his career either to an Administrative Division or to the Judicial Division, and usually to both at the same time. Furthermore all the *Councillors*, even those belonging to the Judicial Division, take part in the *Conseil's* General Assembly, which gives opinions of highest importance on legislative or administrative matters. Conversely, the Presidents of each Administration Division sit on the *Judicial Assembly*, which hears the most difficult cases under the chairmanship of the Vice-President. In other words, the members of the *Conseil* have no absolute specialization.

The consultative work, which consists in giving opinions on draft laws or decrees and on all matters submitted by the Government, involves close collaboration between members of the *Conseil* and the heads of Ministries. An opinion is never given without prior discussion with representatives of the Administration or the departments concerned.

In the second place, one out of every four *Masters of Requests* and one out of three *Councillors* are appointed by the Government, with an absolute discretion, not from members of the *Conseil* but from persons who have hitherto worked in the Administration, such as prefects, under-secretaries, and generals. This means that high-ranking officials, experienced in administrative practices, sit with jurists who have been successful in the examination or graduated from the National College of Administration.

There is a third feature that must be referred to even though it is purely a matter of convention. It is a tradition that during their careers, members of the *Conseil* are temporarily detached and appointed to administrative or Government posts, as ministerial under-secretaries, or as expert officials or advisers in a ministerial department.

As can be seen, the points of contact between the *Conseil d'Etat* and the Administration are numerous and sometimes very close. This characteristic is considered of great importance and often regarded, in France, as one of the reasons for the success of *administrative jurisdiction*, which has managed to assert its authority over the Administration without impeding its proper functions.

B. *The second general problem arising from the existence of an administrative jurisdiction is that of its internal organization.*

In France, this is based on the principle that the *Conseil d'Etat* should be prepared to consider any decisions by the authorities or administrative courts.

For example, it acts as a court of first and last instance in certain cases specified by law, such as actions for a declaration of *in excess of power* against a decree or against measures which are not subject to the jurisdiction of an administrative court, or which have been taken by officials appointed by decree (high-ranking officials).

It hears appeals from the judgments of first instance, chiefly from the district administrative courts, which on 1 January 1954, became the courts with ordinary administrative jurisdiction.

One interesting feature is that there is a right of appeal in all cases, without exception, while this is not so in cases before the common law courts if the amount at stake is small.

The *Conseil d'Etat* is also a court of *cassation*, responsible for giving rulings strictly on points of law, in final appeals from decisions of bodies exercising *administrative jurisdiction* as, for example, the *Court of Accounts*,<sup>14</sup> or professional disciplinary bodies. No jurisdiction is outside such an appeal. According to established precedents, when a law provides that an administrative jurisdiction is empowered to give a 'final' judgment or 'without appeal', the right of appeal on a point of law is not affected.

This means that the *Conseil d'Etat* is the final court with jurisdiction over all administrative matters, and can thereby ensure that there will be an absolute consistency not only in the interpretation of laws, but also as to the policy to be followed in establishing the law on any given matter.

C. *How does the Conseil d'Etat achieve this consistency in practice? The question involves its internal organization and procedures.*

The clearest and most graphic way of answering this question is to take an application to the *Conseil* and follow its course until it reaches judgment.

1. The first step is the registration of the application at the Registry. The procedure for filing an action is quite simple and totally devoid of formalities. An action for a declaration of *in excess of power* may be registered by the petitioner himself, if he thinks fit. The only conditions are that he should state the grounds of his claims and attach a copy of the decision that he wishes to have annulled. In

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<sup>14</sup> A judicial body which acts as auditor to the national finance.

an ordinary action against the Administration (usually claiming damages), the application must be signed by one of the advocates of the *Conseil d'Etat* and the *Court of Cassation*. (The sixty advocates of the *Conseil d'Etat* and the *Court of Cassation* are officers of the court with exclusive right to represent litigants before these two courts).

As soon as the application has been registered, the procedure is entirely in the hands of the court.

The application is forwarded for examination to one of six Sub-divisions of the Judicial Division, each of which consists of a president, two *Councillors*, and seven or eight *Masters of Requests* or *Listeners*.<sup>15</sup>

The Sub-division appointed lays down the procedure to be followed in the examination of the case; it, in fact, orders the communication of the file of the case (dossier) to all parties, so that the facts can be argued in full during the proceedings, and invites each of the parties to set out its observations within fixed time limits. For example, in a case brought by a civil servant, Monsieur Durand, against an order by the Minister of Finance granting promotion to Monsieur Dupont, the Sub-division will order:

Communication of the dossier to M. Dupont within two months;

Communication to the Minister of Finance within two months;

Communication to the Minister responsible for the civil service within one month;

Communication of dossier with appended observations and relevant documents to M. Durand, who must file his 'Reply' within one month.

If one of these time limits is disregarded a summons is served on the party in default, and, should there still be no response, under the provisions of the law, the *Conseil d'Etat* may, if the defendant is in default, give judgment for the petitioner, and, if the petitioner is in default, rule that his action has been withdrawn.

Fortunately, this is quite rare and it can be assumed that the examination procedure ordered by the Sub-division has been carried out. The case is now 'ready for hearing' and the President of the Sub-division appoints a *Rapporteur* from one of his *Masters of Requests* or *Listeners*.

The *Rapporteur* examines the case thoroughly. His report must include a statement of the facts, a study of all the submissions put forward by the applicant and, lastly, his own reasoned opinion. He should give details of the relevant legal provisions and mention all previous legal decisions analogous to the case. The search for

<sup>15</sup> The Judicial Division has three other Sub-divisions which, without any preliminary stage, give judgment in tax disputes.



precedents is one of the Rapporteur's main responsibilities. Finally, he prepares a draft decision.

His next step is to send the completed dossier to the President of the Sub-division. The President (or one of the assessors whom he appoints) studies it, and checks the Rapporteur's work to ensure, in particular, that all relevant precedents have been examined, and all the submissions considered. He will then set the case down for one of the Sub-division's sessions (which take place once a week). The Rapporteur reads his report and puts forward his draft decision. The President makes any personal comments that he may have. A discussion ensues and the Sub-division agrees upon a draft decision, which may be that of the Rapporteur, either as it stands or amended to a greater or lesser degree or an alternative draft. The dossier is then delivered to one of the two Government Commissioners attached to the Sub-division, who was present at the preliminary examination. The appointment of the Government Commissioners to the Judicial Division is one of the most original features of the *Conseil d'Etat* and is worth studying more closely.

The original intention behind the Ordinance of 12 March 1831, which created the office was to establish a law officer on the *Conseil*, who would represent the State. But the fact that this 'parquet'<sup>16</sup> had no hierarchical structure prevented the Government from insisting that its members should submit written conclusions in its favour. So much so, indeed, that the Government Commissioners became accustomed to speak freely. After 1872, this tendency grew stronger and they very soon became totally independent—in spite of their traditional title, which was retained.

On 10 July 1957, while referring to the 'Judicial Councils', (the highest Courts of *administrative jurisdiction* over the Overseas Territories), the *Conseil d'Etat* gave a decision which defined their position very accurately:

The Government Commissioner . . . is not the Administration's representative . . . his duty is to explain to the *Conseil* the issues to be considered in each case, and, in an independent conclusion, to make known his impartial assessment of the facts in dispute, the relevant law, and his own opinion as to the right solution to the dispute under consideration.

Like private individuals, the State and other public corporations may only be represented by an advocate of the *Conseil d'Etat*.

Just as they are independent of the Government, the Commissioners are no less independent in the *Conseil*. Neither the Vice-President, nor the Divisional President, nor the President of the Sub-

<sup>16</sup> In France, the State is represented in court by State Advocates, who are collectively called 'the *parquet*'.

division, may, for any reason, give them instructions. Their only master, and undoubtedly an imperious one, is their own conscience.

The Government Commissioners are selected by the Vice-President of the *Conseil d'Etat* and the President of the Judicial Division from the ranks of the *Masters of Requests* or sometimes from *Listeners* who have proved their worth and ability as *rapporteurs*. Their role is three-fold:

They, in their turn, carry out a thorough examination of the dossier involving, necessarily, a re-examination to some extent at least, of the work done first by the *Rapporteur* and then by the Sub-division.

It is their duty to set out the facts of the case in open court. As most of the *Councillors* hearing the case will gain their knowledge of it solely from the Government Commissioner's conclusions, it is easy to understand the great need for clarity, conciseness and impartiality.

Moreover, on account of their detailed knowledge of the law, the Government Commissioners are traditionally regarded as its faithful guardians. In particular they ensure the consistency of its decisions. However, it is they who make proposals for changes and improvements in the law. They give their conclusions in open court, but may not take part in the subsequent deliberation. They do not vote. They do no more than deliver their opinions in public, and their authority is none the weaker for being purely moral.

To quote Professors Auby and Drago: 'The contribution of the Government Commissioners to the doctrine and logic of the law is considerable. The whole evolution of administrative case-law from 1872 to the beginning of the 20th Century can be traced by reading the conclusions of the great Commissioners of the period.'

Since the judgments of the Conseil are usually short, the Government Commissioners' conclusions, which, for important cases, are published in the various legal journals, are a useful complement.

The Government Commissioner's work is most absorbing. While a *Rapporteur* studies an average of eight applications each month, the Government Commissioner (who, it must be remembered, has the benefit of the *Rapporteur's* and the Sub-division's work on each case), gives his opinion on about thirty applications each month. But the fascination lies just as much in the total freedom of action in performing the work as in the work itself. The holders of the office enjoy a high degree of prestige and are held in great respect by the *Conseil*.

This digression is, it is felt, justified by the originality of the institution; but it is time to return to our case, which is at present in the hands of the Government Commissioner. After studying the dossier, his next step is to set the case down for a session; and here he is faced with a choice. He must decide on the composition of the

court that will hear the case. When the *Conseil* is sitting in its judicial capacity, its bench can be composed of different members, according to the difficulties involved in the case: a joint session of two examining Sub-divisions for cases without any points of law of particular difficulty, the Judicial Division for cases that raise new or delicate points of law, the Full Bench of the Judicial Division for cases of exceptional importance.

Whatever the composition, decided by the Government Commissioner in agreement with the President of the Sub-division and of the Division and, where necessary, the Vice-President of the *Conseil d'Etat*, the procedure is the same. The hearing is in open court. In every case set down for judgment, the Rapporteur gives a summary of the points raised by the petitioner. Counsel for the petitioner and for the defendant may make oral submissions. The Government Commissioner gives his conclusions. When this has been done, the court rises.

The judges immediately go into deliberation. The hearing of each appeal starts with the Sub-division's draft decision being read out by the Rapporteur, who may, if he thinks fit or if requested, add any further comment. Then, a discussion ensues and a decision is eventually reached, if necessary after a vote.

The *Conseil d'Etat* attaches great importance to the wording of its judgments. Very often, therefore, the discussion, and the vote (if any), bears not only on the decision to be reached but also on the way it should be expressed.

The judgment is not made public for fifteen days. In the meantime, whoever presided over the hearing (the Vice-President for the Assembly, the Divisional President for the Division, the Deputy-President for the joint Sub-divisions) makes a final examination of the written proceedings and the judgment.

As soon as the terms of the judgment are made public, they are communicated by the Registry to the Ministers and parties concerned.

In cases solely concerned with points of law (actions for a declaration of *in excess of power* and appeals in *cassation*), a petitioner to whom judgment is given is not liable to pay costs. If his case is dismissed, he is subject to a charge of about 65 new francs.

In ordinary administrative litigation, costs are awarded against the losing party, but are fairly low (a charge of 115 new francs).

It is the responsibility of the Ministers concerned to execute judgments of the *Conseil d'Etat*. The Court has no direct means of enforcement. Consequently it can happen, on rare occasions, that a judgment is executed badly or not at all. In such cases, the successful party has no other remedy but to ask the *Conseil* to award him compensation for damage suffered as a result of the non-execution of the

judgment. Since a decree of 31 July 1963, he may also apply to a special committee of the *Conseil d'Etat*, which will communicate with the Minister concerned and supply him with any necessary explanations on the meaning and scope of the judgment.

This procedure has proved to be very effective, for the Ministry's failure to execute the judgment is usually due to ignorance as to precisely what should be done, rather than to any bad faith. In the exceptional event of deliberate non-execution, the Committee brings the matter to the attention of the Prime Minister who will secure execution.

2. This long description gives rise to a few general comments.

The feature that stands out most sharply is undoubtedly the careful study given to each case: the basic examination by the Rapporteur is followed by those of the President of the Sub-division, the Government Commissioner and the President of the Court. Of course, the main object of these examinations is an accurate analysis of the application, the submissions, the conclusions and the propriety of the decision; but an additional task is the search for precedents to ensure that, on each of the legal grounds, the *Conseil* has not already given a ruling on an identical or analogous point. The paramount aim is to ensure that the law is absolutely consistent; and this is what the whole procedure is designed to achieve.

It is true that the various stages through which applications have to pass before being heard have the disadvantage of lengthening the proceedings. This disadvantage is undeniable. But it should not be exaggerated. In any case before it, the *Conseil* prefers its work to be well done, rather than hasty and imperfect. Moreover, when an action is of real urgency, the *Conseil* is able to work very quickly. It is not exceptional for a case which is ready for hearing after an examination of less than a month, to be tried within a period of ten to fifteen days.

Another characteristic of the French *Conseil d'Etat* whose importance needs to be stressed is the fact that *Listeners*, *Masters of Requests*, and *Councillors* must all take part in the judicial proceedings. Professor Hauriou has emphasized the advantages of a body having three grades of judges corresponding to the three ages of man. It also prevents the rigidity of ideas that can affect courts composed entirely of aged judges. In the judicial work, as has been described, any one case demands constant co-operation between youth, middle age, and old age. This ensures a balanced and cool judgment, reasoned boldness, a lack of senility and a realistic point of view, which is certainly one of the most important factors in the success of *administrative jurisdiction*.

The 'team spirit', which is created by the organization of the examination and judgment of cases, is further improved and enhanced

by one of the most cherished traditions of the *Conseil*, which the Vice-President described in 1938 in the following terms: ' In our house, the privileges of rank are subordinate to the rules of courtesy '.

One of the the prime concerns of the *Conseil* is to develop the individuality of its judges.

For instance, the *Listeners* and the *Masters [of Requests]* are entitled to speak and vote in cases in which they have acted as *Rapporteurs*. Even in his first case, during the deliberation, the youngest *Listener*, no less than the Vice-President, votes entirely as he wishes. It may be considered unusual or unwise to give such responsibility to a beginner. Yet the success of the experiment is conclusive. A sense of responsibility is instilled in the younger members from the beginning and plays a large part in their training.

Equally, there is no system of seniority between the Divisional President and his Division, between the President of the Sub-division and the Sub-division. The authority that they exercise is mainly in the form of advice. This authority exists, and to a great degree, but it cannot be explained in terms of senior rank. Its source is in the greater experience of an older man.

Furthermore, because of the order of the proceedings, the Government Commissioner, who is usually a *Master of Requests* but may only be a *Listener*, examines the written proceedings after the rapporteur and after the Sub-division, thereby benefiting from the work done by other *Masters of Requests* and *Listeners* and by the *Councillors*. He, necessarily, forms an opinion of the work that has been done, and equally necessarily, he may discover errors or omissions which he will bring to the attention of their authors with the greatest of courtesy. An outside observer might find this pyramidal supremacy, due to his being the last person to see the dossier, an extraordinary state of affairs. In the context of the *Conseil d'Etat*, and of its traditions, it is quite natural.

These various factors show clearly that any judicial decision is the result of a close and friendly co-operation between judges of different ages, different ranks, often with different duties, but always with one purpose, to do justice.

A third comment of a different nature must be made: the litigants can confidently leave their case in the hands of the court, knowing that the proceedings will be informal, and the costs minimal. Unfortunately, this can by no means be said of ordinary litigation in France.

### III. Some achievements of the Conseil's Judicial Division.

Undoubtedly the greatest achievement is the action for a declaration of *in excess of power*. Created by the *Conseil d'Etat*, and per-

fected throughout its cases, it has served as a model in a number of countries and is today the most valid justification for an *administrative jurisdiction*, since only States with an *administrative jurisdiction* enjoy real protection against the unlawful acts of the administration.

The action for a declaration of *in excess of power*, which seeks the annulment of unlawful administrative acts, is now well-known. Space does not permit a detailed description, but its more important features are these:

#### A. Admissibility

1. The action may be brought against all unilateral administrative acts.

This definition excludes the acts, decisions and measures of the legislature or of the judiciary, on the principle of the separation of powers; and acts arising from contracts.

It covers all acts, decisions or measures affecting the public in general or a particular individual, regardless of the executive authority by which they are made: the President of the Republic, the Prime Minister, Ministers, Prefects, Mayors, or Public Committees with authority to make decisions. The action is therefore admissible against all decrees, even if they stem from delegated legislation — measures normally in the province of the legislature but taken by the government (decree-laws), and even if they have been the subject of advice given by the *Conseil d'Etat* (in its consultative capacity). In this connection, it has sometimes seemed strange that the Judicial Division of the *Conseil d'Etat* should be able to annul a decision taken on the advice of the General Assembly of the same *Conseil* when all the *Councillors* were sitting, including the members of the Judicial Division. But there is nothing particularly exceptional in the way this comes about, nor is it as extraordinary as it appears at first sight to be. When the *Conseil d'Etat* is requested to give an opinion on a decree, it usually has a very short time to examine the law, which is likely to contain a large number of articles. It is not able to consider the question of legality as methodically as the Judicial Division, which hears an action with legal submissions against certain articles of the same decree, and has all the time necessary to make a detailed study of the individual articles. It is quite possible therefore that a law on which an opinion has been given by the *Conseil* might contain some illegal elements. Furthermore, for reasons of traditional courtesy, appeals against decrees of the *Conseil d'Etat* are heard by a Full Bench of the Judicial Division.

So-called 'Acts of State', that is to say acts of the government in its relations with the legislature and with foreign powers, are no exception and may be subject to an action for a declaration of *in*

*excess of power*. It can be seen, therefore, that this action has a very wide scope.

2. The action may be brought by any person with an interest in the annulment of the relevant act, decision or measure.

An ordinary interest is sufficient, and there is no need to prove damage. The law has always given a very liberal interpretation to the concept of interest.

The mere fact of being a citizen or taxpayer is insufficient to constitute an interest. Some additional ground is necessary, for example, a rate-payer has an interest in bringing financial or fiscal decisions of the local Council before the Court. A property owner has an interest in administrative acts involving his property. The tradesman, in acts relating to commerce; a civil servant, in decisions that are liable to affect his position, or more usually his status.

Groups (e.g. associations, trade-unions) are entitled to appeal against acts in which all or part of their members have a collective interest.

Many other such categories could be given as evidence of the liberal application of the law.

3. The action is not admissible unless it is brought within two months of the date of publication of the decision, if it affects the public in general, or of its notification to the party concerned, if it only affects an individual.

This is a short time limit, since the public interest requires that administrative decisions should not be left in suspense for long periods.

It is not necessary to make an informal appeal to the Minister concerned, nor an appeal through official channels prior to the action; but if such an appeal is made within a period of two months, time does not run against the petitioner.

It should also be noted that if, within a period of four months, the Administration does not reply to a request made by an individual, the end of the time limit gives rise to a presumption of rejection, against which an *in excess of power* action can be brought within two months.

B. *The arguments raised against a particular act or decision can only be on questions of law.* This is a fundamental principle. The court examines the legal validity of the administrative decision; it does not consider the wisdom of any particular action; to do so would amount to interference in the administration and would be undermining the freedom of judgement of administrators, which is the counterpart of their responsibilities. It states whether a minister had the right to take a decision; it cannot state whether the minister acted rightly or wrongly by exercising the right. The scrupulous respect that

the *Conseil d'Etat* has always shown for this principle explains the lack of resistance and the ease with which *administrative jurisdiction* established its authority side by side with the public authorities. It has ensured that the latter have walked within the law; it has not impeded their progress, and has always refused to become a substitute for them. This is in accordance with the rule which requires the strict separation of the administrative authorities from the administrative court. Also, more simply, it is the application of that wise old saying: 'to each man his trade'.

There are four defects, any of which invalidates an administrative act. The first two concern the extrinsic legality of the decision; the last two its intrinsic legality. They are:

1. Lack of competence on the part of the author of the decision.
2. A defect in the form: the violation of one of the formal requirements that the law often imposes, before a decision may be taken.

These formalities, intended as protection for individual rights, have become more and more common recently. There is, for instance, usually a requirement to hold an enquiry, or to seek an opinion from an authority, a Commission or a Council. When the number of formalities became larger, the *Conseil d'Etat* drew a distinction between substantial formalities, the omission or incorrect performance of which could affect the decision made, and ordinary formalities. Only the former are grounds for setting aside the decision as being *in excess of power*.

To quote a typical case, a decree fixing details of an expropriation procedure on grounds of public interest provided that an enquiry should be held and previously advertised in the local newspapers, and that the advertisement should be printed in bold type. The *Conseil* held that the publication prescribed constituted a substantial formality, but the fact that it had been printed in ordinary type did not taint the whole procedure with illegality. Yet in disciplinary matters, all formalities, even the least important, it seems, are always regarded as being substantial.

3. The violation of a rule of law. This is the most important defect, particularly since the court has continually extended its scope.

There are several aspects of the violation of a rule of law:

- a) First, the direct or indirect violation of a law or a government regulation, or a wrong interpretation. This is the most common case.

The consideration of an interpretation is of particular interest, since it involves an examination of the grounds of the contested



decision, which may lead to an error of law or an error of fact being uncovered.

In the case of an error of law, the administrative authority performs an act which it is not permitted to do, or performs an act which was permitted, but on grounds that are legally incorrect. A Minister dismisses a petition on grounds that the law does not allow him to accept it, when, in fact, the law authorized him to consider it.

In the case of an error of fact, the administrative authority has based its decision on a false fact, one that is materially incorrect. For example, it retires an official 'at his own request', when the official concerned has never made such a request.

b) *The violation of a general principle of law.* It is strange to see the concept of general principles of law in the jurisprudence of a country like France, which has a written code.

A general principle of law is a principle not referred to in a binding legal text, which is given force of law at the court's discretion and is applied as though it were statute law.

What explanation can there be for such a bold step on the part of the court? The fact is that the court takes the view that French institutions as a whole, and their democratic and liberal characteristics in particular, must inevitably give legal status to a number of rules which exist without ever having been formulated expressly. These rules so clearly emanated from the political system in force, that it was no doubt considered unnecessary to place them on the statutes. They are not, then, created by the court. The court does no more than give them judicial recognition by interpreting the presumed intentions of the legislator, when the needs of justice so require.

The *Conseil d'Etat's* source for most of these rules is the *Declaration of the Rights of Man* of 1789. By promoting them to general principles of law, it has indirectly given force of law to certain articles in that Declaration, which has never had, or no longer has any legal force. By referring explicitly to the 1789 Declaration, the Preambles of the 1946 and 1958 Constitutions have given special support to this practice of the administrative court.

The principle of freedom is one that should be mentioned.

This principle is embodied in particular laws in various forms (freedom of trade, freedom of association, of assembly, of education, of the press, of trade unions). There is no general statute on the subject. Consequently the *Conseil d'Etat* relied on the general principle of freedom, and not on any specific law when it annulled a decree issued by the mayor of a town, which was both a spa and a tourist centre, allotting a certain area to visitors taking the cure and prohibiting them from walking elsewhere.

One of the most frequently applied general principles, from every point of view, is the principle of equality: equality of individuals before the law and in eligibility for public employment; equality between users of the same public service, between officials of the same grade. It is on this principle that the law on the liability of public authorities depends. It is always upheld rigorously as can be seen in the following case. Every Sunday by rotation, the French Broadcasting Corporation used to broadcast concerts given in Paris by the four main orchestras. It then decided not to broadcast concerts given by one of the orchestras. The *Conseil* set aside this decision as being a violation of the principle of equality and awarded damages.

Another principle that must be mentioned (sometimes called the principle of the rights of defence, or the rule *audi alteram partem*) prohibits an administrative authority from taking a decision that damages the material or moral interests of a member of the public, without giving him advance notice to enable him to make his observations *à propos* the decision.

The rule against retroactivity (which is prohibited in the Civil Code only in the case of laws) is also consistently applied in relation to administrative acts.

c) The violation of *res judicata* by an administrative or judicial court is another example of the violation of a rule of law.

d) Finally, the same applies to the violation of an individual administrative decision that has become final.

According to the law, an individual administrative decision, even an unlawful one, confers certain rights on its beneficiary, and becomes final at the expiry of the time limit for a judicial action.

Once this time limit has expired it cannot, of course, be contested in an administrative court, nor can it be revoked or amended by the author (unless obtained by fraud), and a decision withdrawing or amending a final decision would be unlawful. The rationale of this rule is to ensure the certainty of administrative acts.

#### 4. Abuse of power.

The appropriate administrative authority, for example, while respecting the formal requirements, has taken a decision that it had the right to take, but has used its powers for a purpose other than the one for which they were granted, usually for a purpose extraneous to the public interest for which it is responsible.

The interesting thing about this fourth defect is that it introduces a subjective element into the search for legal objectivity. This makes it a delicate matter. To a certain extent at least, the court has to scrutinize the intention of the author of the act under dispute in order to form its opinion.

At the beginning of the twentieth century, the allegation of *abuse of power* was much used, because it enabled unlawful acts to be contested when no other ground could be submitted. Today, it is steadily being replaced by that of a violation of a rule of law, mainly due to the fact that the courts have in an increasing number of instances held themselves entitled to examine the reasons behind administrative acts; whenever possible, the court prefers to base its decision on strictly objective grounds of law rather than on an examination of intent, which necessarily contains an element of uncertainty.

C. *The court hearing an in excess of power action will only consider questions of law.*

However, while adjudicating on an alleged violation of a rule of law it may sometimes be compelled to consider questions of fact.

In practice, a law granting certain defined powers to an administrative authority very often makes the exercise of such powers subject to one or more conditions.

In examining the validity of the authority's act, the court will inevitably have to consider whether or not the condition or conditions fixed by the law for the exercise of the administrative power have been fulfilled, and it does so, regardless of what kind of matters it must enquire into, even if they are purely questions of fact. The examination of the facts by a court considering an *excess of power* is therefore quite proper when the act's lawfulness depends on questions of fact.

A mayor, for example, has powers in his own commune to enforce the maintenance of the peace. A mayor's enforcement decree is not lawful, therefore, unless its purpose is to prevent or suppress a breach of the peace. Yet such a breach could only arise from a combination of purely factual elements. A court, with this decree before it, would not only have to decide whether the constituent elements were present, but also whether they were of the sort to justify action by the local authorities interfering with public freedom.

Cases requiring examination of the facts are frequent. It widens the court's responsibility in *in excess of power* actions, but it is an integral part of the examination of the legality, and should in no circumstances be mistaken for a judgement on the administrator's discretion, which is outside the court's jurisdiction.

Another great achievement of the *Conseil d'Etat* is unquestionably its case law on the liability of public authorities.

The *Conseil d'Etat* has on its own initiative determined, in a most liberal manner, the conditions under which damage caused by public bodies is capable of being the subject of an action and the damages that can be claimed by private individuals.

A discussion of the cases would require a separate study, but an illustration of its liberal practice is seen in a number of cases, (such as actions for damage caused by public works) where the *Conseil d'Etat* has imposed on the Administration strict liability for acts which, although legal, incidentally cause damage (e.g. financial loss caused by economic measures, or damage caused by police in performance of their duty).

Two conclusions can probably be drawn from this short study on the French *Conseil d'Etat*.

1. First, the vital need for an *administrative jurisdiction* to give the individual effective protection against the unlawful acts of the Administration. This is all the more urgent today when all over the world the State is constantly extending its activity and acquiring new powers.

In terms of effectiveness, no legal procedure can compare with the action for a declaration of *in excess of power*, which can only exist within an *administrative jurisdiction*.

The Ombudsman, for instance, can in no way be compared with the administrative court. He is able, certainly, to improve administrative procedures and, in this way to bring about a better protection for individuals, but only indirectly and in a piecemeal fashion. In France, as in many countries, every large ministry has a general inspectorate to perform this work.

2. The second comment on the French system is that it gives rise to certain complications attributable to the existence of two jurisdictions, and in particular to two courts, the *Conseil d'Etat* and the *Court of Cassation*, each sovereign within its own jurisdiction. The difficulties in delimiting the jurisdiction of each was resolved by the establishment of a special court, the *Court of Conflicts*. Some have been all too ready to seize upon this complication and its inherent difficulties to justify their criticism of an *administrative jurisdiction*.

However, in practice, conflicts of jurisdiction are far more rare than certain critics like to think, and are almost all settled without difficulty in the light of the clear and consistent rules evolved by the *Court of Conflicts*.

Particular care must be taken not to confuse an *administrative jurisdiction* with a *Conseil d'Etat*.

The *Conseil d'Etat* is merely one of the possible forms of *administrative jurisdiction*. In France, as has been shown, it has grown to maturity through her particular historical evolution.

Some States (for example Yugoslavia, and most of the new African States) however, which have felt the need for an *administrative*

*jurisdiction*, have found simpler methods of organizing it. They have, for instance, created a single Supreme Court, divided into specialized chambers (administrative, civil and criminal) and avoided in practice all conflicts of jurisdiction.

The hazards of history ordained that the French *Conseil d'Etat* should lay the foundations, and by creating the action for a declaration of *in excess of power*, demonstrate the need for an administrative court.

By its originality and character, the *Conseil d'Etat* has brought into being a particular kind of *administrative jurisdiction*; its defect that I have referred to is rendered unimportant in face of all its advantages, and it has provided a model from which a large number of states have benefited.\*

## THE COURT OF CASSATION

The Revolutionaries of 1789, anxious to unify French Law, decided to establish a *Tribunal of Cassation*, which would ensure a consistent interpretation of the law.

A law of 1 December 1790 provided that 'the *Tribunal of Cassation* will annul any proceedings in which the proper formalities have not been observed, and any judgment which is *ex facie* inconsistent with any provision of the law'.

In fact, it was not until the Civil Code was drawn up that a 'Court of Cassation' became the Supreme Court, responsible for the consistency of legal decisions, and provided litigants with fundamental safeguards. It removed the possibility of error of law or failure to apply a rule of law on the part of the courts of lower jurisdiction.

Owing to the increasing number of cases before the *Court of Cassation*, several reforms have had to be introduced to prevent undue delay in trials. The most recent reforms were on 23 July 1947, 21 July 1952, 4 August 1956, 22 December 1958 and 3 July 1967.

### I. ORGANIZATION

#### A. Functions of the Court

Technically the *Court of Cassation* is not a final court of appeal. It hears applications alleging an error of law in a judgment of a court of appeal, or of a court from whose judgment there is no appeal, (e.g. the Assize Courts, and civil courts in minor cases).

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\* Note: an earlier version of this article appeared in German in: *Staatsbürger und Staatsgewalt. Jubiläumsschrift*, 1963, (F.C. Müller, Karlsruhe), Vol. 1, pp. 337-357.

If the Court grants an application, it will give '*judgment in Cassation*': this sets out the error (or errors) of law in the contested judgment, and is accompanied by a *cassation order*, setting aside the earlier judgment, and an order of *renvoi*, sending the case back to be retried (on fact and law) by a court of the same jurisdiction as the one whose judgment was set aside. If the Court dismisses the application, the previous judgment stands, and there is no *renvoi*, except in criminal cases.

The previous *Tribunal of Cassation* only set aside judgments where there was a defect in the form of the lower court's proceedings, or a clear error on the face of the record. But, very soon the *Court of Cassation* began to exercise control over the interpretation of law and custom, even where no clear error of law was involved. Consequently, the number of applications *in cassation* increased considerably.

## B. Powers of the Court

The *Court of Cassation* has no power to judge the merits of a case; it must make an order of *renvoi* to a lower court. The Court has no jurisdiction to consider a judgment on its own initiative: an application must be made by one of the parties to the case. The Court is not bound by its previous decisions. Its judgment *in cassation* is not even binding on the court of lower jurisdiction<sup>1</sup> to whom the case is sent back for retrial. If the lower court does not comply with it, it is probable that the previous applicant will take the case back to the *Court of Cassation*. Under the provisions of a new law (not yet in force)<sup>2</sup> a Full Bench of the *Court of Cassation* will then consider the application, and if it sends the case back again to the lower court (of different composition), the new court is bound to comply with its judgment.

## C. Composition

After the reforms of 21 July 1952, 4 August 1956 and 22 December 1958, the *Court of Cassation* consisted of:

- one Senior President
- five Presidents (of Chambers)
- seventy-seven Councillors
- one Attorney-General
- one Senior Advocate-General
- sixteen Advocates-General
- one Registrar
- eight Deputy-Registrars

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<sup>1</sup> This is normally the Court of Appeal with a different bench.

<sup>2</sup> A law of 3 July 1967—See below.

But on 3 July 1967, a law was promulgated reforming the *Court of Cassation* with effect from 1 January 1968; under its provisions, the composition of the Court will be modified by the appointment of *Referee Councillors*, (the Government has talked of twenty-four such Councillors); and judges of the second degree in judicial seniority will be promoted to this new office. Although they will be junior judges, they cannot be compared with *Listeners* of the *Conseil d'Etat*, since their appointment will be for a period of ten years, at the end of which they may be appointed as independent judges or as State advocates outside the *Court of Cassation*. They will hold such an appointment for at least five years before returning to the *Court of Cassation*. Parliament has clearly taken careful precautions to prevent the *Referee Councillor* from becoming 'heir apparent' to the Bench, or a separate body specializing in the *Court of Cassation* to the exclusion of other judges.

The Court will be divided into six chambers: five civil chambers with fifteen *Councillors* (one of which will specialize in commercial and another in social matters) and one criminal chamber with seventeen *Councillors*.

When the Chambers are sitting separately, the presence of seven *Councillors* constitutes a quorum. The Full Bench, which under the new law will be composed of judges from more than one chamber, will meet in four circumstances: first, when there has been an equal vote in a hearing before a single chamber; second, when there is a possibility of a conflict of decisions between chambers; third, when there is a question of law of public importance. The fourth circumstance has already been referred to. It is the case where the *judgment in cassation* sending the case back to the lower court is not followed in that court, and the applicant once more brings his case to the *Court of Cassation*. Under the new law the Full Bench will consist of a Senior President, the Presidents and Deans of all six chambers, in addition to two councillors appointed annually by the Senior President, from each chamber.

## II. INFLUENCE OF THE COURT OF CASSATION ON THE DEVELOPMENT OF LEGISLATION AND CASE LAW

Although French law does not admit the principles of *stare decisis* or the theory of the Anglo-Saxon Common Law, the *Court of Cassation* in its interpretation of the laws has played a very important part in the development of law. Although its decisions have not been so bold as those of the *Conseil d'Etat*, the branches of Law where it has 'stated the law' have been codified; it has in this way contributed (and still contributes) to the defence of the rights of the individual.

Since it has jurisdiction over all matters concerning private law, mercantile law, industrial law and criminal law, the *Court of Cassation* to a large degree consolidates the rights of the citizens to liberty, equality, property, the inviolability of the person and other fundamental rights and freedoms. For example, in private law, the Court decides questions pertaining to the freedom of movement, the certification of lunatics, the right to privacy, a man's honour or reputation, the sanctity of the home, and the principle of equality between individuals, even in their own home. Again, in mercantile law, the Court upholds respect for the great Commercial Charter, drawn up in the Revolution and incorporated in article 7 of the Law of 2-17 March 1791, which establishes the right of 'every person to engage in the business, trade or profession of his choice' subject only to paying a new tax. This right of all individuals to equal access to commerce and industry is one of the fundamental elements of the respect for Human Rights. In industrial law, the Court will hear applications concerning the right to work and the right to a paid holiday, the welfare of sick workers and their families, security in employment and equality of opportunity for candidates with equal qualifications for a post. In criminal law, with its dual function of protecting society against dangerous individuals and protecting individual liberty against abuse by public authorities, the Court plays a vital role in preventing serious encroachments upon individual freedoms. In addition to protecting the citizen from violations of his right to property or from injury to his person, it enforces his right to be considered innocent until proved guilty, his right to counsel of his own choice and, if he is convicted of an offence, his right to be treated as a human being. Finally, it is the guardian of the two major principles that serious offences shall not be created with retroactive effect, and that of *nullum crimen* and *nulla poena sine lege*.

## THE CONSTITUTIONAL COUNCIL

Under the 1946 Constitution, a *Constitutional Commission* consisting of members appointed by the National Assembly had been established to exercise indirect control over laws and to ensure their compatibility with the provisions of the Constitution. However, this Commission performed a minor role, particularly since the Preamble of the 1946 Constitution was expressly outside its competence.

Today the Constitutional Council is an independent court responsible for:

ensuring the Separation of Powers provided for in the constitution and its Preamble;



ensuring that presidential and parliamentary elections are held in accordance with law.

It was established by an Ordinance of 7 November 1958, and amended by an Ordinance of 4 February 1959.

The Preamble of the 1958 Constitution states that 'the French people solemnly proclaims its belief in Human Rights and the principles of National Sovereignty as defined by the Declaration of 1789, as confirmed and complemented by the Preamble of the 1946 Constitution'.

But this control, with such wide scope, is limited in that the individual may not bring an action before the Council, except in the event of a contested election, and provided that his name is on the electoral roll of the constituency.

## I. ORGANIZATION

### A. Functions and Powers

The functions of the Council are:

1. to examine laws
2. to ensure that presidential elections and referenda are conducted in accordance with law
3. to decide election disputes
4. to exercise emergency powers.

#### 1. *The examination of laws*

The examination of laws may have two purposes:

To protect the individual against misuse of legislative power, infringing Human Rights and Fundamental Freedoms guaranteed by the Constitution.

To ensure that the Legislature does not enter into the domain of the Executive or *vice versa*.

The *Constitutional Council* has been given the task of realizing essentially the second of these purposes: in practical terms, this means that it enforces the distinction between the two legislative instruments provided for in Articles 34 and 37 of the most recent Constitution—namely, *laws* and *regulations*.

*Laws* are enacted by Parliament: *Regulations* are decreed by the Government. Article 34 gives a list of subjects in respect of which Parliament is competent to make *laws*; (these subjects include civil rights, nationality, status, criminal law, the judiciary, taxation and all other matters of major importance). The article also gives a list of

subjects whose basic principles shall be determined by *laws*. All matters not listed in Article 34 are determined by *regulations* (Article 37).

There are two categories of laws submitted to the Council:

- a) Those which are automatically placed before the Council:
  - (i) organic laws (i.e. those implementing the Constitution) after their final vote but before promulgation,
  - (ii) regulations governing the procedure of the Houses of Parliament, and resolutions by a House amending its regulations.
- b) Laws brought before the Council by one of the four persons responsible for ensuring the observance of the provisions of the Constitution: the President of the Republic, the Prime Minister, the President of the Senate and the President of the National Assembly. They alone may bring a matter before the Council, although there is no obligation on them to do so.

The laws brought to the Council by one of these four persons are:

*Ordinary laws* before promulgation

*International treaties* before ratification.

Laws or Ordinances after 1958 which the Prime Minister wishes to amend by means of a decree. Prior consultation with the *Constitutional Council* is necessary to ensure that the instrument is one that is within the province of government *regulations*, and not of *laws*.

## 2. *The Regularity of presidential elections and referenda*

### (a) Presidential elections:

The Council prepares a list of candidates for the presidential election, ensures that each of the candidates has equal access to State publicity media and decides contested elections. It is in this particular case that 'any voter' may lodge a complaint. According to the degree of irregularity, the Council may either uphold the election, or declare it void either partially or totally. It also announces the results.

### (b) Referenda:

The Council keeps a watching brief over the proper organization of referenda, hears complaints from any voter, pronounces final judgment, is empowered to declare them void partially or totally and announces the results.

## 3. *Election disputes*

Before the Fifth Republic, disputes over parliamentary elections were settled by Parliament itself. Since 1958, they have been the responsibility of the *Constitutional Council*. The election of a Member of Parliament may be contested within ten days by a person on the appropriate electoral roll. If necessary, the Council orders an investigation, and the candidate gives an explanation. Should there have been

any irregularity, the Council declares the election void. In the event of incompatibility between the parliamentary and the professional duties of a candidate, the matter may be brought before the Council by the *Keeper of the Seals*, the office of the Member's House, or by the Member himself, and the Council gives a final ruling on the matter with which the Member must comply.

#### 4. *Emergency powers*

The *Constitutional Council* exercises emergency powers in two circumstances:

a) In the event of the 'incapacitation' of the President of the Republic. The Government brings the matter before the Council which, by an absolute majority of its members, has the power to declare the President of the Republic to be 'incapacitated'. If the incapacitation is temporary, the President of the Republic is replaced by the President of the Senate: if it is permanent, new presidential elections must take place not less than twenty days and not more than thirty-five days thereafter.

b) In the event of the President's having recourse to Article 16<sup>1</sup> of the 1958 Constitution, which 'in periods of emergency' grants him full powers.

The Council gives its Opinion as to whether the conditions enabling the exercise of these powers have been fulfilled. This Opinion is not legally binding on the President, but since it is required by law to be published in the Official Gazette, politically, it carries considerable weight.

In the second place, the Council must be consulted on all measures taken by the President of the Republic pursuant to Article 16; but its Opinions are confidential, and are not, therefore, published in the Official Gazette. Furthermore, if the Council considers that the conditions laid down in Article 16 no longer apply, and that, in consequence, the President should end the emergency period, it has no means of making its Opinion known. In other words, the only way of terminating the emergency period is by a decision of the President, unchecked by any constitutional safeguard.

### B. *Composition*

The *Constitutional Council* consist of:

a) *Ex officio members appointed for life.*

They are former presidents of the Republic. They are mentioned for the record, since Vincent Auriol and René Coty, both presidents of the IV Republic, have died.

<sup>1</sup> *Article 16*: If there is a serious threat to the institutions of the Republic, the Nation's independence, its territorial integrity, or the fulfilment of its international undertakings, and the constitutional machinery of government breaks down, the President of the Republic takes the measures that the situation demands, after consulting the Prime Minister and the presidents of the Houses and of the Constitutional Council. He informs the Nation by a Message. The measures referred to must be designed to ensure that the constitutional machinery of government is restored as soon as possible. The Constitutional Council must be consulted about them. Parliament meets as of right. The National Assembly may not be dissolved while the emergency powers are in force.

b) *Nine appointed members*

three appointed by the President of the Republic  
three appointed by the President of the Senate  
three appointed by the President of the National Assembly.

Their appointment is for nine years and is not renewable. Members of the Council are partially replaced every three years. The President of the Republic appoints a President from one of the *ex officio* members or one of the appointed members, who has a casting vote in the event of an equal division.

*Status of Members of the Council*

No Member of the Council may be a Member of the Government, a Member of Parliament, or a Member of the French Economic and Social Council. On appointment, a Member of the *Constitutional Council* must resign from such posts within eight days of his appointment.

On the other hand, being a Member of the Council is not incompatible with other public or private appointments, subject to the rule that Members of the Council during their office, may not be appointed to any public post, or, if they are already civil servants, receive especial promotion.

Members must swear an oath on taking office. They must not divulge details of discussions or voting, nor adopt a public position either in writing or verbally, nor give advice on matters which may be brought before the Council.

In the event of a breach of the obligation to behave in a manner compatible with Membership of the Council or a violation of the oath of secrecy, penalties may be imposed by the Council itself. The Council may remove one of its Members from office.

The salary of the President of the Council is that of the highest grade of Civil Servant; Members of the Council receive the salary of the grade immediately below. When Civil Servants are appointed to the Council, their salaries are halved.

By virtue of a decree, the Constitutional Council sits at the *Palais Royal* in Paris.

*Administrative Organization*

The organization is limited. It consists of a Secretary-General and a small staff of clerks and secretaries; but the Council has recourse to members of the *Conseil d'Etat* or the *Court of Accounts* to obtain detailed reports on matters connected with elections and referenda.

## II. THE INFLUENCE OF THE CONSTITUTIONAL COUNCIL

An important decision of the Council concerned the French Broadcasting Corporation. The Government purported to make a decree revising the Corporation's statute. The Council held that this was a matter to be determined by a *law* (under Article 34 of the Constitution), and the government was thus compelled to present a Bill to Parliament.

The Constitutional Council has been called upon to play no mean part towards the protection of Human Rights and Fundamental Freedoms. A criticism that might be levelled, is that it has not used all the authority that it has been given for ensuring the constitutionality of laws. Its potential for upholding the Rule of Law, however, should not be underrated.

# DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

*Compiled and Annotated*

by

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## ADMINISTRATIVE INQUIRIES AND ORDERS

Supreme Court of Israel

### DUTY TO COMPLY WITH RULES OF NATURAL JUSTICE

ALTAGAR v. MAYOR OF RAMAT GAN

(Reported in 20 Piskei Din, I, p. 29)

*Tenure of office of municipal officers and their removal—Municipal Corporation Ordinance does not provide that an interested person has right to be heard at deliberations of the Municipal Council—nevertheless, municipality is a public body and cannot act arbitrarily—City Councillors must act in a quasi-judicial manner—rules of natural justice require that powers must be exercised subject to the observance of natural law and justice—employee cannot be dismissed without having been given an opportunity to explain or deny allegations against him.*

Before Mr. Justices Cohn, Halevy and Kister.

Decided on January 6, 1966.

The decision regarding the removal of the petitioner from office was passed at a closed meeting of the Municipal Council; the petitioner was not given an opportunity to appear and plead against his arbitrary removal from office, or to explain the accusations brought against him.

The Municipal Corporation Ordinance does not provide that any interested person has a right to be heard at the deliberations of the Municipal Council, and counsel for the municipality argued that where a dismissal complies with the formal requirements of the law it must be deemed valid.

In the course of its judgment in favour of the petitioner, the High Court made the following observations:

1. [The rules of natural law are well established, and the legislator is presumed to assume their observance; it is not necessary that legislation should expressly provide that powers are to be exercised subject to the observance of natural law and justice.
  2. A municipality is a public body and must act in all matters on the basis of relevant considerations only, and not arbitrarily.
  3. The city councillors must act in a quasi-judicial manner and—even where they have the power to do so, as where the employees hold office at pleasure—they should not dismiss an employee without a valid reason.
  4. A resolution regarding dismissal for a valid reason cannot be properly adopted without giving the employee concerned an opportunity to explain or to deny the allegations brought against him.
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## Supreme Court of the Philippines

## LIMITS ON POWER TO SUSPEND OR DISMISS AN OFFICER

## CORPUS v. CUADERNO

(G.R. No. I-23721)

*Constitution of the Philippines provides that the removal or suspension from public office be "for causes as provided by law"—petitioner held a highly technical position in the Central Bank—he was charged administratively with dishonesty and abuse of authority—after hearing, investigating committee found no basis for charges and recommended his re-instatement—nevertheless Monetary Board, acting on a mere statement of the Bank Governor that he had lost confidence in the petitioner, decided to dismiss him—such decision violated the constitutional safeguard requiring removal or suspension from office to be "for causes as provided by law"—reason for dismissal all the more insufficient as petitioner occupied a highly technical position—substantial grounds for alleged loss of confidence should be shown to exist—allegation clearly a pretext to cure the inability to substantiate charges.*

Decided on March 31, 1965.

The petitioner, a Special Assistant in the Central Bank, a position which is admittedly highly technical in nature, was charged administratively with dishonesty and abuse of authority. The investigating committee, after a hearing, found no basis for taking disciplinary action against him and recommended his re-instatement. Notwithstanding this recommendation, the Monetary Board, acting on a formal statement of the respondent, the Governor of the Central Bank, that he had lost confidence in the petitioner, approved a resolution dismissing him from the office.

The petitioner challenged the validity of the decision in the Supreme Court. At the argument, the respondent urged that officers holding highly technical positions could be removed at any time if the appointing power lost confidence in them.

The Supreme Court held that, in dismissing the petitioner, the Monetary Board had relied solely on the respondent's statement that he had lost confidence in the petitioner and that dismissal on a mere statement such as this violated the constitutional safeguard requiring that removal or suspension from office should be "for causes as provided by law". The Supreme Court also observed: "We find that this is clearly a pretext to cure the inability to substantiate the charges upon which the investigation had proceeded. The constitutional safeguard requiring removal or suspension from office to be 'for causes as provided by law' at least demands that the dismissal of one occupying a highly technical position, for alleged loss of confidence, if at all allowed, be attended with prudence and deliberation to show that the ground for dismissal exists."

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## Supreme Court of Cyprus

## REASONS FOR ADMINISTRATIVE DECISIONS

CONSTANTINIDES v. REPUBLIC OF CYPRUS,  
THROUGH THE MINISTRY OF EDUCATION

(1967—1, Judgments of the Supreme Court of Cyprus,  
pp. 29-35, Case No. 231/65)

*Section 12(a) of Law 10/63 prescribes several grounds on which a schoolmaster may be found unqualified for promotion—administrative decision finding him unqualified must give reason or reasons for such finding—merely stating that applicant did not satisfy requirements of Section 12(a) of Law 10/63 insufficient—such statement does not provide clear and complete picture of reasons for refusal—reasoning for administrative decision should not be obscure—need for due reasoning in administrative decisions is well established.*

*Before* Triantafyllides, Clerides and Mitsides with Tornaritis JJ.

Decided on January 14, 1967.

Applicant, a schoolmaster, Grade B, had proceeded to England in 1964/65 on post-graduate studies and there obtained, *inter alia*, a Diploma of English Studies at the University of Cambridge, which according to the Education Division of the British Council was a language test superior to the requirements for a Bachelor of Arts pass degree.

On his return from abroad, the matter of the applicant's promotion came up before the Educational Service Committee which decided that, having in mind the diploma and the other qualifications which the applicant had obtained in England, he could not be promoted to Grade A "as he did not satisfy the requirements of section 12(a) of Law 10/63". Nothing more was recorded by the Committee as to why the applicant did not satisfy the said requirements.

The applicant, who was informed of this decision, applied for a reconsideration of his case, but at the reconsideration it was once again decided "that he did not satisfy the requirements of section 12(a) of Law 10/63" and nothing more was said.

Section 12(a) of Law 10/63 provides that permanent schoolmasters in Grade B may be promoted to Grade A if, while being in service, they had obtained through post-graduate studies additional special qualifications by attending a specialized school abroad for two full academic years.

It was common ground that the applicant's post-graduate studies in England had not lasted for two full academic years. He contended, however, that the Cambridge Diploma of English Studies was a qualification which normally requires studies of two full academic years and that therefore the relevant prerequisite of section 12(a) had been satisfied.

The applicant then took the matter to Court. At the first hearing of the case, the respondent reiterated the reason given by the Educational Service Committee for refusing the petitioner his promotion to Grade A as a correct reason for such refusal. At the continuation of the hearing on another date the respondent, who

was now represented by a different counsel, gave quite a different reason as the principal reason for the decision not to promote the petitioner, adding the applicant's failure to study abroad for two academic years as a subsidiary reason.

In his judgment in this case Justice Triantafyllides observed:

"As under section 12(a) of Law 10/63 there are more than one reasons for which a schoolmaster may be found to be unqualified for promotion, it follows, necessarily, that stating simply that the applicant did not satisfy the requirements of section 12(a), without specifying why this was so, does not provide a clear and complete picture of the reasons for which the applicant was refused promotion. In a recent Administrative Law case in England, in which there existed a statutory requirement for reasons to be given for a Minister's decision, it was held that such requirement was not satisfied when the reasoning given was obscure and would leave in the mind of an informed reader real and substantial doubt as to the reasons for the decision concerned<sup>1</sup>. I am of the view that the reasons given for not promoting the applicant are obscure and would leave any informed reader in real and substantial doubt. We are, thus, faced with a situation in which the *sub judice* decision is not duly reasoned and the changing line of the respondent at the hearing, as aforesaid, has, indeed, resulted in showing how necessary it was for the *sub judice* decision to have been duly reasoned.

"Well-established principles of Administrative Law prescribe the need for the due reasoning of administrative decisions, such as the subject-matter of this case . . .

"The lack of due reasoning for the *sub judice* decision renders it, in the circumstances, a decision contrary to law—viz. the aforesaid principles of Administrative Law—and in abuse and excess of powers. It is, therefore, hereby declared to be null and void and of no effect whatsoever. The whole matter has to be reconsidered, and a duly reasoned decision has to be reached, and communicated to the applicant."

## High Court of East Pakistan

### RIGHT TO BE HEARD

#### HOSSAIN v. GOVERNMENT OF EAST PAKISTAN

(Dacca Law Reports 1966, Vol. 18, p. 736)

*Defence of Pakistan Ordinance and Rules enabled Government to forfeit property in certain circumstances—they also provided for adjudication on such forfeiture by a Court or other competent authority—printing-press belonging to the petitioner, who had been printing and publishing a newspaper, forfeited by a Government Order made under the said Ordinance and Rules—no rules had been made providing for adjudication in cases of forfeiture of property—rule-making authority bound to make such rules and not free to omit directions given in Ordinance—where rule has been framed for forfeiture of property without provision for adjudication, such rule void and inoperative in law—drastic action such as*

<sup>1</sup> See *Givaudan & Co. v. Minister of Housing*, [1966] 3 All E.R. p. 696 at p. 698.

*forfeiture of property must not be taken without affording affected person at least an ex post facto hearing—order of forfeiture should have been made final only after hearing all parties concerned—rules of natural justice must be applied as far as possible where there appears to have been a reasonable chance that the authorities might have altered result after such hearing.*

*Before:* Siddiky, Khan. Ahmad, Sayem and Abdulla JJ. (Full Bench).  
Judgment delivered by Siddiky J.

Decided on August 9, 1966.

A printing-press belonging to the petitioner, who had been printing and publishing a newspaper, was forfeited by an order of the Provincial Government under the Defence of Pakistan Ordinance & Rules. In the order forfeiting the press, it was alleged by the Government that the petitioner contravened certain orders of the Government by publishing in his newspaper certain items, the publication of which was prohibited under the Defence of Pakistan Ordinance and Rules.

The petitioner challenged the order of forfeiture in the High Court of East Pakistan. The case was heard by a full Bench of five Judges; and by a majority judgment dated August 9, 1966, the High Court quashed the order of the Government of East Pakistan forfeiting the press as being bad in law and of no legal effect.

Section 3 of the Defence of Pakistan Ordinance provided that the Central Government might make rules for the purposes mentioned in Sub-section (1), and further, by Sub-section (2), that such rules might provide for any of the matters enumerated in Sub-section (3). Clause (iii) of Sub-section (3) provided amongst other things for forfeiture of property and also for adjudication on such forfeiture by a court or other competent authority.

The questions in issue were (1) whether the Central Government was bound to make a rule providing for adjudication in case of forfeiture of property, and whether forfeiture in the absence of such a rule was legal and valid, and (2) whether an opportunity should have been given to the petitioner to show cause prior to the order of forfeiture.

The High Court held that, although Sub-section (3) of Section 3 of the Defence of Pakistan Ordinance was an enabling provision, it did not leave the rule-making authority with the freedom of choosing to omit the directions mentioned in clause (iii) of that Sub-section. If a rule had been framed for forfeiture of property with no provision for adjudication, then that rule was bad and inoperative to that extent.

The Court also observed that there was some force in the contention that so drastic and complete an action as forfeiture of property should not have been taken without affording the petitioner at least an *ex post facto* hearing. Where there was a reasonable chance that the authority might have altered the result, the Court must insist on the application of the rules of natural justice to the extent that was possible in the facts and circumstances of the case. The petitioner was entitled to have an opportunity to represent his case before the authority against the forfeiture of his press, and the order of forfeiture should have been made final only after hearing all parties concerned.

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**The Judicial Committee of the Privy Council**  
(On appeal from the Supreme Court of Ceylon)

**RIGHT TO BE HEARD**

**MAYOR OF JAFFNA v. FERNANDO AND OTHERS**

(Privy Council Appeal No. 29 of 1966)

*Ceylon Municipal Council's Ordinance enabled Minister of Local Government to dissolve a Municipal Council when it appeared to him upon representations made or otherwise that the Council had persistently defaulted in performance of its duties—several complaints received by Minister regarding conduct of affairs of Jaffna Municipal Council—Minister sent Commissioner of Local Government to Jaffna to inquire into complaints—he reported to Minister without having first questioned anyone or given members of Council opportunity of expressing their views—Minister, acting on this report, dissolved Council and appointed Special Commissioners to supersede it—a Municipal Council is vested with considerable measure of independence from Central Government within defined local areas and fields of Government—Minister cannot dissolve it without allowing it the right to be heard and principle of audi alteram partem must apply—Council alleged to have persistently neglected its duties must be heard in defence before order affecting it is made.*

*Before:* Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Upjohn, and Lord Pearson. Judgment delivered by Lord Upjohn.

Decided on December 15, 1966.

Section 277 (1) of the Municipal Councils Ordinance of Ceylon enacts that:

If at any time, upon representation made or otherwise, it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order published in the Gazette, direct that the Council shall be dissolved and superseded, and thereupon such Council shall, without prejudice to anything already done by it, be dissolved, and cease to have, exercise, perform and discharge any of the rights, privileges, powers, duties, and functions conferred or imposed upon it, or vested in it, by this Ordinance or any other written law.

A number of complaints were received by the Minister of Local Government in regard to the conduct of the affairs of the Municipal Council of Jaffna. The Minister, thereupon, sent the Commissioner of Local Government to Jaffna to enquire into these complaints with instructions to make an immediate report on them. The Commissioner visited Jaffna on 27 and 28 May 1966 and was afforded every facility, including full access to the minutes of the Council by the Appellant, the Mayor of

Jaffna. The Commissioner did not ask anyone any questions or give any member of the Council any opportunity of expressing his views. His report, first oral and then in writing, was received by the Minister on 29 May, who on the same day made an order stating his finding that the Jaffna Municipal Council was not competent to perform the duties imposed upon it and directing that the Council be dissolved and that its powers be exercised by the first, second and third respondents who were appointed Special Commissioners for the purpose. The order was unsuccessfully challenged by the Appellant in the Supreme Court of Ceylon, the Court holding that words such as, "where it appears to" or "if it appears to the satisfaction of" or "if the . . . considers it expedient that" or "if the . . . is satisfied that" standing by themselves without other words or circumstances of qualification exclude a duty to act judicially. The Appellant appealed from this decision to the Privy Council, which disagreed with the view taken by the Supreme Court and made the following observations:

"As to the first matter, it cannot be doubted that the Council of Jaffna was by statute a public corporation entrusted like all other Municipal Councils with the administration of a large area and with the discharge of important duties. No one would consider that its activities should be lightly interfered with. Their Lordships may notice here an argument addressed to them that as this was a local authority subject to the superior power of the Minister under section 277, the exercise of this power was a matter properly left to him as the one responsible to the Legislature, to whom he was answerable for his actions, and he could not be responsible to the Courts under the principle *audi alteram partem*. Their Lordships dissent from this argument. The Legislature has enacted a statute setting up municipal authorities with a considerable measure of independence from the central government within defined local areas and fields of government. No Minister should have the right to dissolve such an authority without allowing it the right to be heard upon that matter, unless the statute is so clear that it is plain that it has no right of self-defence.

"It seems clear to their Lordships that it is a most serious charge to allege that the Council, entrusted with these very important duties, persistently makes default in the performance of any duty or duties imposed upon it. No authority is required to support the view that in such circumstances it is plain and obvious that the principle *audi alteram partem* must apply.

"Equally, it is clear that if a Council is alleged persistently to refuse or neglect to comply with a provision of law, it must be entitled (as a matter of the most elementary justice) to be heard in its defence. Again this proposition requires no authority to support it."

Their Lordships of the Privy Council, however, while disagreeing with the reasons given by the Supreme Court for refusing to grant the Appellant's prayer, dismissed his appeal on another ground, namely that although the Council should have been given the opportunity of being heard in its defence, it deliberately chose not to complain and took no step to protest against its dissolution. Their Lordships felt that in these circumstances there was no reason why any other person, such as the Appellant in this case, should have the right to intervene and ask for redress on behalf of a body which itself had not chosen to do so.

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## High Court of Borneo

## RIGHT TO BE HEARD

## SIM YAN HOO v. MATU AND DARO DISTRICT COUNCIL

(1967 1 Malayan Law Journal, p. 71)

*A District Council purported to vary the terms of a boat hawker's licence granted by it—no opportunity given to licensee to be heard before decision was made—Council, in ascertaining facts or law involving the right of a person, under duty to act judicially notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law—person affected should be given reasonable opportunity to be heard—failure to do so infringes rights of natural justice.*

*Before:* Lee Hun Hoe J.

Decided on August 19, 1966.

In view of complaints received against the applicant, the Matu and Daro District Council had varied the terms of his boat hawker's licence and directed that he should not be permitted to trade in certain kampongs. The Council did not give the applicants an opportunity to be heard before the decision was made.

The applicant filed a motion for an order of *certiorari* to quash the decision of the District Council.

Lee Hun Hoe J., in his judgment allowing the motion for *certiorari*, having examined the judgment of the Privy Council in the Ceylon Case of *Trustees of Maradana Mosque v. The Minister of Education and Another*<sup>1</sup> and several earlier English decisions, observed:

"I think it is not unfair to say that the Council being a licensing authority should be regarded in the same position as the English licensing justices. It is obvious that the Council acted on the complaints of certain people. There is also evidence to indicate business jealousy. In other words they heard one side only. It is true that his licence had not been revoked. But the amendment made was such as to curtail the usefulness of the licence to such an extent almost amounting to a revocation. The right of the applicant to trade in those kampongs had been taken from him arbitrarily. Council in ascertaining facts or law involving the right of a person may be under a duty to act judicially, notwithstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law. It may well be that the applicant was at fault, but that is not in issue. What is in issue is that he had not been given a reasonable opportunity to answer his accusers. In the circumstances the council had infringed the rules of natural justice.

"It does not seem surprising that the council was unable to indicate to the court what particular provision of the Local Authority Ordinance or other relevant legislation purported to give it such power. Local authorities do not have unlimited

<sup>1</sup> See *Digest of Judicial Decisions on Aspects of the Rule of Law*, Journal VIII, No. 1. of the International Commission of Jurists, pages 107-111.

power. The powers of local authorities are defined in the Local Authority Ordinance and subsidiary legislation made thereunder. No rules, regulations or by-laws made under the Local Authority Ordinance must go beyond or be repugnant to the Ordinance under which they are made. Where the law is silent with regard to any particular power, the council should be cautious in its action. For it may find itself acting *ultra vires*. In my view that is what precisely happened in this case.

"From the evidence, the applicant has shown that the council had acted *ultra vires* and also infringed the rules of natural justice. Accordingly, an order for *certiorari* will be granted and the decision of the Matu and Daro District Council preventing the applicant from trading at Kampong Bruit, Tekajong and Penyipah will be quashed."

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## EUROPEAN CONVENTION OF HUMAN RIGHTS

**European Commission of Human Rights**  
(on application contesting Judgment of the  
Supreme Court of Norway)

### RIGHT NOT TO BE SUBJECTED TO FORCED LABOUR

**IVERSEN v. NORWAY**  
(Application No. 1468/62)

*Article 4 of European Convention of Human Rights provides that no one shall be required to perform forced labour—a Norwegian act provided that persons who qualified as dentists could be required to take up positions in the public dental service in districts determined by Ministry of Social Affairs for a period of two years—such service not forced or compulsory labour within the meaning of Article 4 of Convention—nor does it offend spirit of Norwegian Constitution—such service was for a short period, provided favourable remuneration and did not involve any diversion from chosen professional work—there was no discriminatory application—the service to be performed was not unjust or oppressive.*

Decided on December 17, 1963.

On July 28, 1949 the Norwegian Parliament enacted an Act providing for a Public Dental Service. For the purpose of implementing this Act, the country was divided into districts with a district dentist in each district responsible to a regional dentist who would be the head of the Public Dental Service in his particular region. It was realized at the time when the Act was passed that it would be difficult to fill all the positions of district dentists, especially in northern Norway.

In order to ensure the effective operation of the Act, a Royal Decree was published in 1954 requiring students admitted to the Norwegian Dental College, as well

as those studying abroad, to make a statement at the commencement of their studies undertaking on completion of their studies to work for a period not exceeding two years in the Public Dental Service in any district to which they were assigned by the Ministry.

The students graduating in 1955 had doubts about the legal force of the undertakings they had given and they wrote to the Ministry of Social Affairs stating that they considered themselves legally justified in breaking the agreement. This led to the passing on June 21, 1956 of a Provisional Act relating to obligatory dental public service for dentists. The Act provided that persons who in 1955 or later had passed the examination in dentistry in Norway or had obtained a similar qualification abroad could be required for a period up to two years to take up a position in the public dental service which, though having been advertised, remained vacant.

In 1957, the applicant passed his dental examination at the Medical Academy of Düsseldorf, Germany, where he had gone for his studies on his own initiative. On his return to Norway he attended a supplementary course at the Norwegian Dental College, which was compulsory for all candidates with a foreign diploma. Having obtained his diploma in 1958, he carried out his military service until December 1959 as a military dentist. Towards the end of his service he was served by the Ministry of Social Affairs with a list of vacancies in the public dental service and asked to indicate the post or posts for which he wished to apply.

On November 2, 1959, the applicant wrote to the Ministry applying for a position in southern Norway, but was informed that his application could not be considered and that he would be directed to take over a position in a region in northern Norway. After vain protest he accepted the post, but on May 20, 1960 gave up his work and left, having written to the Ministry of his intention to do so. Criminal proceedings were subsequently instituted against him and he was ordered to pay a penalty of kroners 2,000 or, alternatively, to serve a prison sentence of 30 days for violation of the Provisional Act.

The applicant appealed against this judgment to the Supreme Court on February 28, 1961, submitting:

- 1) That the Provisional Act of 21 June 1956 was invalid as being contrary to the Constitution;
- 2) that the Act was invalid as it was contrary to Article 4 of the European Convention for the Protection of Human Rights; and
- 3) that the Act was only intended to apply to students who, before commencing their studies, had made a statement undertaking, for a period of not more than two years after the completion of their studies, to serve in the public dental service, and that the Act did not therefore apply to him, who had made no such statement.

Article 4 of the European Convention of Human Rights runs thus:

- (1) No one shall be held in slavery or servitude.
- (2) No one shall be required to perform forced or compulsory labour.
- (3) For the purpose of this Article the term "forced or compulsory labour" shall not include:
  - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;

- (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
- (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
- (d) any work or service which forms part of normal civic obligations.

On December 16, 1961 the Supreme Court dismissed the appeal. Of the five members of the Court, three Judges held that none of the three objections could be accepted, while the other two Judges held that objection (3) was valid and the applicant should be acquitted.

Delivering the judgment of the majority of the Court, Justice Hiorthøy stated:

"Defending Counsel's attack, on constitutional grounds, on the general validity of the Provisional Act of 21 June 1956 regarding civilian service for dentists is, I think, clearly ill-founded. I do not entirely rule out the possibility that courts may, in extreme cases, find a law to be inapplicable because it is contrary to certain general principles of law of a constitutional nature, even if it does not violate any definite provision in the Constitution. But it goes without saying that it would take a good deal for a law, enacted by Parliament (*Stortinget*) and approved by the King, to be ruled out in this way as being contrary to the spirit and principles of the Constitution. In view of the history and background of the above-mentioned Law, the manner in which it is applied and the restrictions as to time governing both the law and the orders of assignments which are based on it, it seems to me quite clear that the law cannot be ruled out on such grounds.

"The position is much the same as regards the claim that the Law is invalid, as being contrary to Article 4 of the European Convention of 4 November, 1950 for the Protection of Human Rights and Fundamental Freedoms. There is little doubt to my mind that the Convention's stipulation that no one shall be required to perform forced or compulsory labour cannot be reasonably interpreted as applying to the obligations of a public nature arising in the present case. The work in question is of short duration, well-paid, based on the professional qualifications of the person concerned and in immediate continuation of his completed studies. Even if, at the time, such service is, as may occur in many cases, contrary to the interests of the individual concerned, it is clear to me that it cannot be regarded as an infringement, let alone a violation, of Human Rights. As, therefore, I do not find that there is any conflict between the Convention and the Norwegian Law in question, there is no need for me to go into the question as to which should be given preference in the event of a conflict."

The applicant then submitted an individual application to the European Commission of Human Rights. The majority of the Commission, consisting of 6 members out of the 10 members present and voting, took the view that the service of Iversen in Moskenes, northern Norway, was not forced labour within the meaning of Article 4 of the Convention and declared his application inadmissible in terms of Article 27 (2) of the Convention. Four members of the majority made the following observations:

"Although Article 4, paragraph (3) of the Convention delimits the scope of Article 4, paragraph (2), by declaring that four categories of work or service do not constitute forced or compulsory labour for the purpose of the Convention, the expression 'forced or compulsory labour' is not defined in the Convention and no authoritative description of what it comprises is to be found elsewhere.

"The concept of compulsory or forced labour cannot be understood solely in terms of the literal meaning of the words, and has in fact come to be regarded in international law and practice, as evidenced in part by the provisions and application of ILO Conventions and Resolutions on Forced Labour, as having certain elements, and it is reasonable, in the interpretation of Article 4, paragraph (2) of the Convention to have due regard to those elements.

"These elements of forced or compulsory labour are first, that the work or service is performed by the worker against his will and, secondly, that the requirement that the work or service be performed is unjust or oppressive, or the work or service itself involves avoidable hardship.

"The attribution of these elements to 'forced and compulsory labour' in Article 4, paragraph (2), of the Convention is not inconsistent with the other provisions of that Article or of the Convention.

"It is true that the Provisional Act of 1956 imposed obligatory service, but since such service was for a short period, provided favourable remuneration, did not involve any diversion from chosen professional work, was only applied in the case of posts not filled after being duly advertised, and did not involve any discriminatory, arbitrary or punitive application, the requirement to perform that service was not unjust or oppressive; the Law of 1956 was properly applied to Iversen when he was directed to take up the post at Moskenes; further, in the particular case of the Applicant, the hardship of the post was mitigated by the reduction in the required term of his service from 2 years to 1 year."

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### Court of Appeal of Bremen, Germany

#### RIGHT TO TRIAL WITHIN REASONABLE TIME

##### IN RE ARTICLE 121, PARA. 1 OF THE CRIMINAL PROCEDURE CODE

(Neue Juristische Wochenschrift, 1965, pp. 2361 ff.)

*Article 121, Para. 1 of German Criminal Procedure Code provides that no one may be detained on remand for more than 6 months—this Article takes account of Article 5, Para. 3 of European Convention of Human Rights, which provides that arrested persons shall be entitled to trial within reasonable time or to release pending trial—exceptions to rule contained in Article 121, Para. 1 only permissible to a very limited extent—difficulties of a personal character, such as judge's inability to conduct proceedings on account of illness or absence on leave, do not constitute sufficient reason for delaying commencement of proceedings.*

Decided on September 9, 1965.

Article 121, paragraph 1, of the German Criminal Procedure Code provides that no one may be kept in detention on remand for more than 6 months. However, this paragraph recognizes certain important grounds which could justify continued

detention. This provision is supposed to take account of Article 5, paragraph 3, of the European Convention of Human Rights which provides that:

Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

The accused was arrested on a charge of perjury on March 3, 1965. He was available for trial during the period May 13, 1965 to August 9, 1965 and again since August 17, 1965. The investigations had been completed and there was no ground for protracting the proceedings. The main hearing could have been held during the six months following his arrest, but it was not held because the Chairman of the Criminal Chamber fell ill before July 12, the date finally set for hearing. Owing to this illness and the "impossibility" of completing the panel—one lay assessor being on vacation till July 19—the hearing was cancelled on July 2. A new date for hearing was not set until August 24, when the hearing was fixed for October 4, 1965.

The Court took the view that the personal difficulties which intervened constituted no serious ground for postponing the main hearing, and observed that it was inadmissible for a defendant to be detained on remand for more than six months merely because of a judge's inability to conduct proceedings on grounds of illness and because of members of the Court being on leave at the same time.

The Court pointed out that Section 67 of the Judicature Act provided that, if a regular member of Court was unable to sit on the Bench, a temporary member should be appointed. Besides, the case in question was not particularly voluminous or difficult. The accused had admitted to the examining magistrate that he had made false statements and had asked that the proceedings be carried out quickly. He had thus largely removed the difficulties which had arisen from the fact that, during the preliminary investigation, he had denied having committed perjury.

## FUNDAMENTAL RIGHTS AND FREEDOMS

### Supreme Court of Trinidad and Tobago

#### FREEDOM OF ASSOCIATION

#### COLYMORE and ABRAHAM v. THE ATTORNEY-GENERAL

(Ref. Civil Appeal No. 3/1966)

*Freedom of association one of the fundamental rights guaranteed in Constitution of Trinidad and Tobago—however, individual freedom in any community never absolute—no person in an ordered society can be free to be anti-social—for protection of his own freedom he must pay due regard to conflicting rights and freedoms of others—it is function of the law to regulate the conduct of human affairs, so as to balance competing rights and freedoms of those who comprise society—there is a clear distinction between freedom to*

*associate, objects to be pursued in association and means to be employed to attain those objects—if objects or means offended against the law, the associates could be criminally charged or made liable in tort, notwithstanding right to freedom of association—freedom to associate confers neither right nor licence to commit acts inimical to peace, order and good government—in like manner, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel—Supreme Court the guardian of the Constitution—it has right and duty to declare enactments of Parliament ultra vires when they abrogate, abridge or infringe fundamental rights and freedoms recognized in the Constitution.*

*Before:* Sir Hugh Wooding, C. J., Phillips, J. and Frazer, J. Judgment delivered by Sir Hugh Wooding, C. J.

Decided on January 27, 1967.

Chapter 1 of the Constitution of Trinidad and Tobago comprises the first eight sections of the Constitution and deals with "The Recognition and Abrogation of Human Rights and Fundamental Freedoms". Section 2 of the chapter provides that, subject to certain provisions, none of which are relevant to this case,

no law shall abrogate, abridge or infringe or authorize the abrogation, abridgment or infringement of any of the Rights and Freedoms hereinbefore recognised and declared . . .

Section 36 of the Constitution provides that:

Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Trinidad and Tobago.

The Appellants contended that the Industrial Stabilisation Act, 1965, was *ultra vires* the Constitution in that it abrogated or abridged the right of free collective bargaining and the right to strike, both of which were inherent in the freedom of association, one of the fundamental freedoms guaranteed by the Constitution. They prayed that the Act be therefore declared null and void and of no effect.

At the hearing of the Appeal, the respondent advanced the argument that Section 2 of the Constitution was not an act of limitation but rather a rule of construction. With this argument the Court profoundly disagreed. Commenting in his Judgment on the decision of the Supreme Court as an interpreter of the Constitution, the Chief Justice said:

"I am accordingly in no doubt that our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is *ultra vires* and therefore void and of no effect because it abrogates, abridges or infringes or authorizes the abrogation, abridgment or infringement of one or more of the rights and freedoms recognized and declared by s. 1 of the chapter. I so hold."

Dealing with the principal issue in the case, namely, whether the freedom of collective bargaining and the right to strike are inherent in the freedom of association guaranteed by the Constitution, the Chief Justice made, *inter alia*, the following observations:

"My first observation is that individual freedom in any community is never absolute. No person in an ordered society can be free to be antisocial. For the protection of his own freedom everyone must pay due regard to the conflicting rights and freedoms of others. If not, freedom will become lawless and end in anarchy. Consequently, it is and has in every ordered society always been the function of the law so to regulate the conduct of human affairs as to balance the competing rights and freedoms of those who comprise society. Hence, although at common law, as is now under the Constitution, every person was free to associate with his fellows, a clear distinction was at all times drawn between the freedom to associate, the objects to be pursued in association and the means to be employed to attain those objects. If the objects or the means offended against the law, then, notwithstanding the freedom to associate, all or any of the associates could be charged with the commission of a crime or might be held liable in damages for the commission of a tort. In either case, the crime or tort was conspiracy. And while the legislature has from time to time intervened when it has found intervention necessary or expedient to redress any imbalance between the competing rights and freedoms, the distinction between association on the one hand and objects and means on the other has nonetheless remained unaffected.

...

"In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country. In like manner, their constitutionally-guaranteed existence notwithstanding, freedom of movement is no licence for trespass, freedom of conscience no licence for sedition, freedom of expression no licence for obscenity, freedom of assembly no licence for riot and freedom of the press no licence for libel."

Having applied these criteria to the facts and circumstances of the particular case, the Supreme Court refused the appellants the relief sought and dismissed the Appeal.

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## Supreme Court of the United States of America

## FREEDOM OF POLITICAL ASSOCIATION

## ELFBRANDT v. RUSSELL

(384 U.S.—Part 1 at 11)

*Public servants in Arizona required to take oath to support Federal and State Constitutions and State Laws—Arizona law also subjected a public servant who knowingly and wilfully became or remained a member of the Communist Party or who joined an organization, having as its purpose the overthrow of the Government, to prosecution for perjury and dismissal—those joining an organization without sharing its unlawful purposes pose no threat to Constitutional Government—one cannot presume that those joining “a subversive organization” share in its unlawful aims—Arizona law, in as much as it is not confined to those joining with specific intent to further the illegal aims of such organization, an unnecessary infringement on freedom of political association.*

Opinion of the Court delivered by Mr. Justice Douglas, White J., dissenting.

Decided on April 18, 1966.

Public servants in the State of Arizona were required to take an oath to support the Federal and State Constitutions as well as the State Laws. They were subject to prosecution for perjury and dismissal from office if they knowingly and wilfully became or remained members of the Communist Party of the United States, or of any of its subordinate organizations or of any other organization having as one of its objects the overthrow of the State Government.

The Petitioner, a teacher by profession, having decided that she could not, in good conscience, take the oath, and having not realized the consequences of her failure to do so, filed a suit for declaratory relief.

The Supreme Court of Arizona held that the oath was valid, whereupon the Petitioner appealed to the Supreme Court of the United States. The Supreme Court of the United States sent the case back to the Arizona Supreme Court for reconsideration, but that Court confirmed its earlier judgment. The Petitioner then appealed once again to the Supreme Court of the United States, which held that:

1. Political groups may embrace both legal and illegal aims, and one may join such groups without subscribing to the illegal aims.
  2. Persons who join an organization without sharing its unlawful purposes pose no threat to constitutional government, whether they be citizens or public servants.
  3. One cannot presume conclusively that those who join a subversive organization share its unlawful aims.
  4. The Arizona law unnecessarily infringes on the freedom of political association in that that law is not confined to those who join an organization with the specific intent of furthering its illegal aims.
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## Supreme Court of India

## FREEDOM TO RESIDE IN PLACE OF ONE'S CHOICE

## STATE OF MADHYA PRADESH v. THAKUR BHARAT SINGH

(Supreme Court Notes, Vol. IX, No. 4,  
pp. 51 and 52/Feb. 15, 1967)

*Section 3 (1) (b) of Madhya Pradesh Public Security Act 1959 purported to enable State of Madhya Pradesh to order a person to reside where he ordinarily resided or to require him to go or reside elsewhere within the State—section also purported to empower the State to enforce its order and punish those failing to carry out directions given—section held invalid as it sought to impose unreasonable restrictions on the freedom of the individual.*

*Before:* Subba Rao C. J., Shah, Shelat, Bhargava and Mitter, JJ.  
*Judgment by* Shah J.

*Decided on* January 23, 1967.

Section 3 (1) (b) of the Madhya Pradesh Public Security Act 1959 authorizes the State to order a person to reside in the place where he is ordinarily residing, and also to require him to go to any other area or place within the State and stay in that area or place. The Act also provides that, if the person so ordered fails to carry out the order, he may be removed to the area or place designated, and may also be punished with imprisonment for a term which may extend to one year or with fine, or with both. The Act gives no opportunity to the person affected of being heard before the place where he is to go to or remain is selected. The Act also nowhere provides that the person directed to be removed shall be provided with any residence, maintenance or means of livelihood in the place designated.

The Supreme Court held that Section 3 (1) (b) of the Act in question, insofar as it requires any person to reside or remain in such place or within such area in Madhya Pradesh as may be specified by order, purported to authorize the imposition of unreasonable restrictions on the freedom of the individual.

The Supreme Court added that there were grounds for arguing that the portion of Clause 3 (1) (b) which provided that an order requiring a person to reside or remain in the place where he ordinarily resides could be validly passed, but that, since the clause was not severable, it had to be struck down in its entirety as unreasonable.

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## Supreme Court of India

## FREEDOM TO TRAVEL ABROAD

## SATWANT SINGH SAWHNEY v. THE GOVERNMENT OF INDIA

*Right to travel is a fundamental right and an integral part of right to personal liberty—in modern times it not only controls exit from one's State, but also entry into another, and has therefore become a condition of free travel—denial of a passport to a citizen to travel abroad infringes fundamental right to travel—discretion claimed by Government to issue, deny, withdraw or cancel a passport is also a violation of doctrine of equality before the law, enshrined in Article 14 of Indian Constitution.*

*Before:* Subba Rao, C. J., Hidayatullah, Shelat, Vaidialingan and Bachawat, JJ.  
Majority Judgment delivered by Subba Rao, C. J., Shelat and Vaidialingan, JJ.  
agreeing, Hidayatullah and Bachawat JJ. dissenting.

Delivered on April 10, 1967.

On August 31, 1966, the Assistant Passport Officer, New Delhi, and thereafter the Regional Passport Officer, Bombay, called upon the petitioner to surrender his passport as the Government had decided to withdraw the passport facilities extended to him. The petitioner challenged the legality of the decision to withdraw his passport facilities in the Supreme Court of India. The majority judgment of the Supreme Court in this case, which is popularly referred to as the "Passport Case", held that a person in India enjoyed the fundamental right to travel abroad, and that therefore the refusal by the Government to issue a passport to such person was an infringement of this fundamental right.

The judgment also held that the discretion claimed by the Indian Government to issue, deny, withdraw or cancel a passport was a violation of the doctrine of equality before the law, enshrined in Article 14 of the Indian Constitution. The exercising of this discretion was not regulated by any law or rule, and its exercise therefore rested solely on the arbitrary selection of the Executive.

The judgment observed that, as a result of international conventions and usage among nations, it was not possible for a person residing in India to visit foreign countries, with a few exceptions, without the possession of a passport. A passport was required for protection; it was a document of identity and was *prima facie* evidence of nationality; in modern times it not only controlled exit from the State to which one belonged but also entry into other States. It had in effect become a condition of free travel. The want of a passport prevented a person from leaving India, and the Government, by withholding such passport, deprived him of his right to travel abroad. This right was a right which every person living in India, whether a citizen or not, enjoyed. No person should be deprived of this right to travel, except according to the procedure established by law. There existed no law made by the State regulating or depriving persons of the right to travel.

In the circumstances the Government of India was directed to withdraw or to cancel the orders made by it calling upon the petitioner to return the two passports held by him.

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## Supreme Court of India

**PARLIAMENT CANNOT REMOVE OR ABRIDGE  
FUNDAMENTAL RIGHTS GUARANTEED IN CONSTITUTION**

**GOLAK NATH v. STATE OF PUNJAB**  
**KRISHNA BHATTA v. STATE OF MYSORE**  
**RAMAKRISHNA MALLY v. STATE OF MYSORE**

(Writ Petitions Nos. 153, 202, and 205 of 1966)

*Indian Constitution contains guarantees of fundamental rights—Article 13 (2) of Constitution provides that the State shall not make any law which takes away or abridges these fundamental rights—Parliament of India has no power to make constitutional amendments taking away or abridging these fundamental rights—such constitutional amendments void.*

*Before:* The Full Bench of the Supreme Court consisting of Mr. Justice Wanchoo, C.J., Hidayatullah, Shah, Sikri, Bachawat, Ramaswami, Shelat, Bhargava, Mitter and Vaidialingan JJ.

Judgment of the majority of the Court delivered on February 27, 1967.

Part III of the Indian Constitution guarantees the fundamental rights of the individual, subject to such limitations as are contained in the Constitution itself. Article 13 (2) provides that the State shall not make any law which takes away or abridges the rights conferred by this Part, and any law made in contravention of this clause shall, to the extent of the contravention, be void.

On two previous occasions the Supreme Court had held that Parliament had the right to amend the fundamental rights provisions of the Constitution and certain amendments had been made by Parliament on that basis. In this case the Full Court, by a majority of 6 to 5, decided that the fundamental rights were outside the amendatory process and declared that Parliament had no power from the date of this decision to amend any of the provisions of Part III of the Constitution, so as to take away or abridge the fundamental rights enshrined therein. The Court also took the view that two of its earlier decisions which conceded to Parliament the power to amend these provisions, had been made on an erroneous view of the law. It declared that the present decision would have prospective and not retrospective effect.

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**European Commission of Human Rights**  
 (on application contesting Judgment of the  
 Supreme Court of Norway)

**RIGHT NOT TO BE SUBJECTED TO FORCED LABOUR**

**IVERSEN v. NORWAY**  
 (Application No. 1468/62)

(See pp. 125-128 above)

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## Supreme Court of the United States of America

## RIGHT TO CITIZENSHIP

AFROYIM v. RUSK

(387 U.S. 253-293)

*Right to citizenship a fundamental right which cannot be trifled with—citizenship clause of 14th Amendment does not empower the State to forcibly strip a person of his citizenship—State can only allow a citizen the right to renounce his citizenship voluntarily—the law which permitted expatriation of citizens who had voted in a foreign political election was bad, and could not be enforced against such citizen.*

Judgment of the Court delivered by Mr. Justice Black, Warren C. J., Brennan, Douglas and Fortas JJ. agreeing, Harlan, Clark, Potter Stewart and White JJ. dissenting.

Decided on May 29, 1967.

The citizenship clause of the 14th Amendment to the Constitution of the United States of America specifies that all persons born or naturalized in the United States of America are U.S. citizens.

The Petitioner, Beys Afroyim, a 73-year-old artist, was born in Poland and became a naturalized U.S. citizen in 1926. In 1951, he voted in a foreign political election, namely the Israeli Parliamentary election, and the State Department refused to renew his passport on the ground that he had lost his citizenship under a 1940 law, which purported to empower the State to forcibly expatriate a naturalized citizen who had so voted.

The Supreme Court of the United States, by a 5 to 4 vote, held that Congress had no power to strip a person of his citizenship against his will and could only allow a citizen the right to renounce his citizenship voluntarily.

Mr. Justice Black, basing the opinion of the Court on the citizenship clause of the 14th Amendment, observed that citizenship was no light trifle to be jeopardized at any moment that Congress decided to do so under the name of one of its general or implied grants of power.

He added that, while the citizenship clause was primarily aimed at securing the rights of the newly freed slaves, its framers also intended to put citizenship beyond the power of any governmental unit to destroy.

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## Supreme Court of the United States of America

### RIGHT TO MARRIAGE

#### LOVING v. VIRGINIA

(388 U.S. 1-13)

*Marriage one of the basic civil rights of man, fundamental to his very existence and survival—freedom to marry or not marry a person of another race resides with the individual and cannot be infringed by the State—Laws restricting that freedom violate Equal Protection Clause of 14th Amendment.*

Decided on June 12, 1967.

Opinion of the Court delivered by Warren J.

Loving, a white construction worker, married a negro wife in the District of Columbia in 1958. Both of them belonged to the State of Virginia, where they returned to live.

Virginia, like 15 other States, had anti-miscegenation laws, which barred mixed marriages, and therefore, according to Virginian law, Loving and his wife had violated the laws of their State in coming to live in Virginia.

The American Civil Liberties Union took the issue to the Supreme Court of the United States on behalf of Loving and his wife. The Supreme Court by a 9-0 decision held that laws prohibiting marriages between negroes and whites were invalid, in that they violated the Equal Protection Clause of the 14th Amendment.

In his Judgment, Chief Justice Warren declared: "We have consistently denied the constitutionality of measures which restrict the rights of citizens on account of race. There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the equal protection clause [of the 14th Amendment]."

"Marriage is one of the 'basic civil rights of man', fundamental to our very existence and survival . . . to deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the 14th Amendment, is surely to deprive all the State's citizens of liberty without due process of law."

"Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State."

## District Court of Tokyo

### RIGHT TO PRIVACY

#### ARITA v. HIRAOKA

(Hanrei Jiho No. 385)

*Novel written by Defendant in which main characters were modelled on Plaintiff and his former wife—Plaintiff a well-known politician and public figure—he complained that readers could easily identify main characters in the novel as himself and his former wife, and that descriptions in the*

*book of private disputes and bedroom incidents could be understood to relate to them—there had thus been a violation of his right to privacy—Defendant claimed freedom of expression—also claimed that his work was primarily artistic, and that the characters were not co-dimensional with the persons on whom they were modelled—court held that Plaintiff's right to privacy had been violated, although the work had literary merit—it pointed out that the right to privacy had already been recognized in many Japanese statutes—an aggrieved person would be granted relief if he could show that there had been a public disclosure of a matter generally unknown which could be understood to relate to his private life and which had caused him mental suffering.*

Decided on September 28, 1964.

This case, which is popularly referred to as the "After the Banquet" case, raised the question of the right to privacy for the first time in the Japanese Courts. The case attracted great public attention because both parties were well-known public figures. The novel at issue, "Utage no Ato (After the Banquet)", written by the Defendant, Kimitake Hiraoka, a famous novelist, under his pen name "Yukio Mishima", disclosed the private affairs of Hachiro Arita, a statesman and diplomat, and a Foreign Minister of Japan during the pre-war period. The decision in the case could be called a land-mark in the field of the law of privacy in Japan.

The Plaintiff claimed that, although the main characters in the novel purported to be fictitious, they were modelled on himself and his former wife, and that the reader could easily identify the alleged fictitious characters with himself and his former wife. He complained that the publication of the novel had therefore caused him great pain of mind. He asserted that this novel was therefore a violation of his right to privacy, particularly that portion of it in which the author described private disputes and bedroom incidents.

Although he did not dispute that he used the Plaintiff and his former wife as models for his novel, the Defendant argued that his fictitious characters were not co-dimensional with the people actually modelled, and that therefore the reader could not be led to believe that the whole story which the novel disclosed represented actual happenings in the lives of the Plaintiff and his wife. Besides, his object was to show the part which love often played in political life and his book was purely artistic. His further contention was that, in writing the book, he was exercising his right to freedom of expression.

The Court took the view that it was difficult for readers to distinguish neatly between the fictitious and non-fictitious parts of a model story, and they might take it without such distinction.

The two main points at issue in the case were:

- 1) Whether there is an expressed or implied recognition of the right to privacy in the law of Japan;
- 2) Whether in cases where a work or publication is extremely valuable from an artistic view-point, the cause of art has preference over other values such as privacy, which is a personal right of any individual.

The Court answered the first issue in the affirmative, pointing out that there are several provisions in the statutory law of Japan which have the effect of recognizing the right to privacy: for example, provisions making peeping into other people's houses an offence, and making the opening of a sealed letter a crime.

On the second issue, the Judgment held that the bases of artistic expression and of the right to privacy were utterly different in character, and that it was not the province of the law to determine which took precedence. Accordingly, it was clear that even literature appraised as art could constitute an invasion of privacy, though it was also undeniable that the artistic or literary value of a work would influence the decision as to whether there was, in fact, an invasion of privacy. Therefore, while recognising that "After the Banquet" was not a vulgar work like the so-called "Scandal sheets", but one whose literary value must be admitted, the Court concluded that the book violated the Plaintiff's right to privacy.

The Judgment held that the Japanese Courts would grant legal protection and damages to a person who complained that his right to privacy had been invaded, if he could show that a) there had been a public disclosure, the substance of which could be taken as a fact in his private life; b) that the disclosure caused him mental suffering, and c) that the disclosure related to a matter which was generally unknown.

*Editor's Note:* There was an appeal filed against this Judgment, but the appeal was not proceeded with, since the parties arrived at a settlement after the death of Hachiro Arita, the original Plaintiff.

### Court of Appeal of Nîmes, France

#### RIGHT TO SANCTITY OF THE HOME

##### PAM AND ANOTHER v. BRUN

(Recueil Dalloz Sirey, 24<sup>e</sup> cahier, 21 June 1967, p. 423)

*Article 184 of the French Penal Code makes it an offence to enter the dwelling place of another by use of threats or force—it does not specify, however, the nature of the force necessary to constitute the offence—plaintiff absent from apartment, having locked main door—had left window open—defendant, his landlord, entered apartment through open window—he sought to justify his entry on ground that plaintiff owed him five months rent—he also pleaded that the entry was not forcible—defendant guilty of violation of right to sanctity of the home—window ordinarily meant for ventilation and not for entry onto premises—not essential that intruder should have obstacle to overcome in order to render himself liable under Article 184.*

Decided on December 17, 1966.

Article 184, paragraph 2 of the French Penal Code provides that:

Any person who, by the use of threats or force, introduces himself into the dwelling place of a citizen, shall be punished with imprisonment and with a fine.

Brun, the defendant, had let out a furnished apartment at Bagnols-sur-Cèze to Pam, the plaintiff. The plaintiff was in the habit of keeping the window of his apart-



ment open. One day, when the plaintiff was not on the premises, the defendant, taking advantage of the fact that the window remained open, entered the apartment through the open window and removed certain articles belonging to the plaintiff. He did so, notwithstanding the fact that the main door was locked.

The plaintiff, alleging that his right to the sanctity of his home had been violated by the defendant, filed a claim for damages and the *ministère public*, whose duty it is to watch the interests of the State in criminal matters, sought to have the defendant fined for breach of Article 184. The defendant pleaded that he had not used any force in order to enter the premises, since he had entered them through an open window on the ground floor, and that he had therefore not committed a breach of Article 184. He explained that he had taken this course, because the plaintiff owed him five months' rent.

The court of first instance, the *Tribunal Correctionnel* of Nîmes, found Brun not guilty of the offence of violating the sanctity of the home and non-suited the plaintiff. The plaintiff thereupon appealed to the Court of Appeal of Nîmes, which allowed the appeal and quashed the finding of the *Tribunal Correctionnel*.

The Court of Appeal observed that Article 184 of the French Penal Code did not specify the nature of the force necessary to constitute the offence of violation of the sanctity of the home, and that therefore it was not essential that there should be an obstacle which the intruder must overcome in order to gain entry to the premises. The plaintiff had locked his room and the defendant had, notwithstanding the fact that the room was locked, taken advantage of the plaintiff's practice of leaving the window open, to enter his premises. A window did not constitute the normal means of access into a room for any person whomsoever, and its ordinary object was to ventilate the premises and to provide the occupant with a view. The defendant had therefore, in putting the window to a use for which it was not meant, committed the offence of violating the plaintiff's right to the sanctity of his home.

Having regard to all the circumstances of the case, the defendant was fined 300 francs. He was also ordered to pay 300 francs as compensation to the plaintiff.

## German Federal Constitutional Court

### RIGHT TO PROPERTY

#### REFERENCE BY ADMINISTRATIVE COURT OF NEUSTADT AN DER WEINSTRASSE ON CONSTITUTIONALITY OF VITICULTURE LAW

(Ref. 1 BvL 17/63)

(Neue Juristische Wochenschrift (1967) 1175-1177)

*Article 14 (1) of Basic Law of Federal Republic of Germany guarantees rights of property and inheritance—it also provides that limits on these rights shall be regulated by laws—Viticulture Law of 1961 provides that an official licence must be obtained for planting vines—plaintiff refused such licence on ground that his land was unsuitable for vine-growing—Viticulture Law held constitutional as its object was to maintain quality and marketability of German*

*wine—although limitation which this Law imposed on use of land was a restriction of the power over one's property, there were legitimate economic goals justifying such limitation.*

Decided on February 14, 1967.

By Paragraph 1 of the Viticulture Law of August 29, 1961, the planting of vines with a view to the production of wine requires an official licence, which could only be refused on the ground that the land in question was not suitable for the cultivation of grapes.

A cultivator had been refused a licence to plant vines on land he had hitherto used as pasture, on the ground that it was not suitable.

Article 14 (1) of the Basic Law of the Federal Republic of Germany provides that:

The rights of property and inheritance are guaranteed. The nature and limits of these rights shall be regulated by laws.

On the basis of Article 14 (1), it was argued before the Constitutional Court that the Viticulture Law was not a proper limitation of the right to property, because there was no overriding public interest justifying it.

The Constitutional Court held that the limitation imposed by Para. 1 of the Viticulture Law was constitutional, since its object was to maintain the quality and marketability of German wine. In particular, when the final tariff and quota restrictions were removed from the wine trade within the Common Market—probably in the autumn of 1969—German wine would be subjected to severe competition from cheaper wines from France and Italy, and would only be able to hold its own in the market if its higher prices could be justified by its quality.

While it was true that the limitation imposed a substantial restriction on the powers of the proprietor over his own property and could cause hardship to small proprietors, it was nevertheless justifiable in the circumstances. The maintenance of the quality of German wine, the securing of its marketability and the protection of the German wine-growers were legitimate economic goals.

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## Court of Appeal of England

### RIGHT TO WORK

NAGLE v. FEILDEN

(1966, 1 All England Reports, p. 689)

*Stewards of the Jockey Club enjoyed monopoly of horse-racing in Great Britain—the rules of the club also gave them power to grant and withdraw trainers' licences—plaintiff, a woman, applied for a trainer's licence which was refused—she alleged that she was refused a licence because she was a woman—no contractual nexus between her and the stewards—yet Court held in her favour on ground that an association exercising a monopoly in an important field of human activity cannot exercise their discretion capri-*

*ciously and deprive person's right to work—a person's right to work at his trade or profession just as important to him and perhaps more important than his right to property—Courts will intervene to protect this right.*

*Before:* Lord Denning, Master of the Rolls, and Lord Justices Danckwerts and Salmon.

Decided on February 22, 1966.

The stewards of the Jockey Club enjoyed the monopoly of horse-racing (other than steeple-chase) in Great Britain. A rule of the club provided that no person could train horses for racing at their meets, unless he had first obtained a licence from the stewards, who were given power at their discretion to grant and withdraw licences to officials, trainers and jockeys. An application made by the plaintiff, Mrs. Nagle, for a trainer's licence was refused by the stewards. Alleging that she had been refused the licence because she was a woman, she brought an action for a declaration against the stewards that their practice of refusing to grant a licence to train race-horses to a female applicant was void as being against public policy, and she prayed for an order on the stewards to grant her the licence applied for. The stewards applied to the Master in Chambers to strike out the statement of claim on the ground that there was no contractual nexus between them and Mrs. Nagle, and that therefore she had no *locus standi*. The application was successful.

The plaintiff appealed against the order, but the appeal was dismissed. She then sought leave to appeal before the Court of Appeal on the preliminary point striking out the statement of claim on the ground that it disclosed no cause of action. She contended that the stewards, in publishing the rules of racing, had in effect made an offer which she accepted, and thereby a contract had come into existence. The Court rejected this argument but allowed the appeal on the basis of "the right to work". Lord Denning M.R. stated in his judgment that an association exercising a virtual monopoly in an important field of human activity cannot exercise their discretion capriciously and deprive a person of his right to work. In the course of his judgment, Lord Denning observed:

"All through the centuries, courts have given themselves jurisdiction by means of fictions; but we are mature enough, I hope, to do away with them. The true ground of jurisdiction in all these cases is a man's right to work... a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the courts will intervene to protect his rights of property, so they will also intervene to protect his right to work."

The other members of the Court shared Lord Denning's view and Salmon L.J. spoke in a similar strain, when he said that legal fictions belonged to a "bygone age".

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**JUDICIARY AND COURTS****Supreme Court of Trinidad and Tobago****COURT THE GUARDIAN OF THE CONSTITUTION****COLYMORE AND ABRAHAM v. ATTORNEY-GENERAL**

(See pp. 129-131 above)

**High Court of Justice, Sudan****LIKELIHOOD OF BIAS IN A  
JUDGE VITIATES PROCEEDINGS****SUDAN GOVERNMENT v. ZAHRA ADAM OMER AND ANOTHER**

(The Sudan Law Journal and Reports 1965, pp. 31-47)

*Court has prerogative power to vitiate any proceedings which do not accord with natural justice—natural justice requires judicial or quasi-judicial activities to be carried out in good faith—Court will quash decision made maliciously or with improper motive—where objection to proceedings is taken on ground of magistrate's bias, question is not whether he was really biased or in fact decided partially, but whether there was real likelihood of bias—bias denotes departure from the standard of even-handed justice, which law requires from those occupying judicial office—persistent and abnormal desire to carry case forward at all costs gives rise to suspicion of bias—sole purpose of law in a civilized community is preservation of peace and order—it should not be allowed to be used for collateral or extraneous purposes or as instrument of political or any kind of oppression.*

Decided on July 1, 1962.

The facts of this case are involved and it is not proposed to refer to them at all, but only to the observations made by the Court on the application of the principles of natural justice in judicial proceedings and on the effect of bias or the likelihood of bias in a magistrate on the validity of a criminal trial.

Abdel Mageed Imam J. made the following observations in his judgment vitiating the proceedings of the investigation in question and discharging the accused:

"Now to turn to the acts and activities displayed by the magistrate which grasped my attention at some later and closing stages of this investigation, it should initially be pointed out that this court has power to vitiate any proceedings which do not accord with natural justice. This it can do by the use of its prerogative power of *certiorari*.

...

"Finally, natural justice requires judicial or quasi-judicial activities <sup>1</sup> to be car-

<sup>1</sup> *Marshall v. Blackpool Corporation* (1935) Appeal Cases p. 16.

ried out in good faith, and the court will quash a decision which has clearly already been arrived at maliciously, *i.e.*, from some unworthy or improper motive or for some purpose other than that for which the discretion was conferred.

"In *The King v. Justices of Sunderland*<sup>1</sup>, it was held that, there being a 'real likelihood' of bias on the part of the before-mentioned justices with regard to the subject matter of the application to the confirming authority, the writ of *certiorari* must be issued.

"It is difficult, however, to lay down hard and fast rules about principles of natural justice.

"If there is one principle which forms an integral part of English law it is this, that every member of a body engaged in judicial proceedings must be able to act judicially; and it has been held over and over again that, if a member of such body is subject to a bias (whether financial or other) in favour of or against either party to the dispute or is in such a position that a bias must be assumed, he ought not to take part in the decision or even to sit upon the tribunal. This rule has been asserted, not only in the case of Courts of Justice and other judicial tribunals, but in the case of authorities which, though in no sense to be called courts, have to act as judges of the rights of others . . .

"What is bias is, however, not easy to define. In *Franklin v. Minister of Town Planning*, Lord Thankerton said that the proper significance of the word 'bias' is 'to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator'.

"Where objection is taken on the score of bias, the question is not whether the justices were really biased, or in fact decided partially, but whether there was real likelihood of bias. Actual bias on the part of the authority need not be proved, nor need it be proved that the actual decision is biased. But all the same, mere possibility of bias is not enough. There must be actual apprehension of bias. Where there is a real likelihood that the judge would from kindred or any other cause have a bias in favour of one of the parties, it would be very wrong for him to act. . . .

"Moreover it is an admitted principle that justice should not only be done but should manifestly and undoubtedly be seen to be done. Even if a magistrate having an interest sat along with others but took no part in the proceedings, they must be quashed.<sup>2</sup>

"From the above it is clear that the criterion is actual or the likelihood of bias. One single fact or factor may or may not be enough.

"It is contended, however, that in respect of both these cases, *i.e.*, actual or likelihood of bias, all facts and circumstances must be taken into consideration in order to reach a fair decision.

"Now to come to the point: It has been revealed that the magistrate conducting the investigation was a subscriber to a certain party known for both its political and sectarian views. This party has been, like others, dissolved by statute, and several of the accused persons used to belong to some party antagonistic or potentially antagonistic to the one referred to above."

Commenting on the conduct of the magistrate in relation to the investigation, his Lordship observed:

<sup>1</sup> (1901) 2 King's Bench pp. 357, 371-373.

<sup>2</sup> 3 Chaudri, *Constitutional Rights and Limitations* (1958) pp. 2027-2029.

"... he showed a fanatical desire to bring the case forward; that the manner in which the arrests were carried out was persistent and abnormal; that his persistence and abnormality were such as to make him act in direct disobedience to explicit directions from this court; and that he attempted to arrest the Minister of Foreign Affairs by abnormal and improper means, which conduct has caused him to stand his trial in a Court of Discipline.

"It is true that the mere holding of certain views should not be enough to establish bias. But when these views affect overtly the conduct of a magistrate while he is discharging his judicial functions, it should be a different thing.

"I do not doubt the personal integrity of the magistrate concerned. But from his acts, activities, demeanour, beliefs and views as can be collected from the above-mentioned statement, I cannot rule out the likelihood of bias."

His Lordship concluded by emphasizing that the law should not be allowed to be used for collateral or extraneous purposes, nor should it be allowed to be an instrument of political or any kind of oppression. In a civilized community its sole purpose was the preservation of peace and order.

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High Court of Justice, Sudan

### PRINCIPLES OF NATURAL JUSTICE APPLICABLE IN JUDICIAL PROCEEDINGS

SUDAN GOVERNMENT v. ZAHARA ADAM OMER AND ANOTHER

(See above)

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### TRIALS AND APPEALS

Supreme Court of the United States of America

### RIGHT OF INDIGENT APPELLANT TO FREE COPY OF TRANSCRIPT

LONG v. DISTRICT COURT OF IOWA

(385 U.S., 192)

*State must furnish indigent person appealing or petitioning to a higher Court with free copy of trial proceedings—an indigent is entitled to appellate review of adverse decision as adequate as that afforded to those able to purchase transcript of proceedings.*

Per Curiam.

Decided on December 5, 1966.

The petitioner, an Iowa State prisoner, made an application for a writ of *habeas corpus* to the State Court claiming, *inter alia*, that there had been a denial of counsel at the preliminary hearing of a charge against him. The Court, having found against him on the facts at the hearing of his case, he applied 1) for counsel and 2) for

a free transcript of the proceedings for use in his appeal. The Trial Court refused his application on the ground that *habeas corpus* was a civil proceeding and the Supreme Court of Iowa refused to interfere with the refusal.

The petitioner then applied to the Supreme Court of the United States by way of *certiorari*. The Supreme Court held that it was the duty of the State to furnish an indigent petitioner with a free copy of the transcript, since otherwise an indigent client would not have the benefit of appellate review of a decision adverse to him as adequate as that available to prisoners who were in a position to purchase a transcript.

### Federal Tribunal of Switzerland

#### RIGHT TO BE HEARD

##### F. B. v. THE APPEAL DIVISION OF THE SUPERIOR TRIBUNAL OF THURGOVIE

(Journal des Tribunaux, RO 92 1 185)

*According to recognised principles of jurisprudence founded on the principle of equality of citizens before the law (Article 4 of the Federal Constitution), parties both in civil and criminal proceedings have general and absolute right to be heard—in dealing with an appeal, Appeal Court, acting on a psychiatrist's report which had been produced in some other proceedings, declared appellant criminally unanswerable and ordered his hospitalisation—appellant had not been given notice of the report and had not been heard on it—Federal Constitution guarantees to the citizen an irreducible minimum of rights relating to his defence—Thurgovie Civil Procedure Code, which obliges judge to communicate to parties the report of an expert and to fix date to hear them in answer, should apply also to expert reports submitted in some other proceedings and which Court proposes to use—failure to do this amounts to violation of right to be heard.*

Decided on October 26, 1966.

F. had been found guilty in the Court of First Instance in the Canton of Thurgovie for defamation, sentenced to 15 days imprisonment and ordered to pay 200 francs as compensation to the complainant. He appealed against this judgment.

The Appeal Division of the Superior Tribunal of the Canton of Thurgovie, acting on a report of a psychiatrist, which had been produced in some other proceedings and which the Appeal Division had directed to have produced before it, declared F. criminally unanswerable, and ordered his hospitalisation under Article 15 of the Swiss Criminal Code.

F. appealed against this decision to the Federal Tribunal, alleging that the Superior Tribunal of Thurgovie had violated his right to be heard, in that it had not given him notice of the expert's report.

The Federal Tribunal, in allowing the appeal, held that the right to be heard was defined by the cantonal laws of procedure. Where these laws were inadequate,

Article 4 of the Constitution, prescribing the rules of procedure in regard to the federal law, had direct application. In all suits it guaranteed to the citizen an irreducible minimum of rights relating to his defence. The Supreme Tribunal of Thurgovie had obviously misconstrued Section 253 of the Thurgovie Civil Procedure Code, which obliged the judge to communicate to the parties the report of an expert, and to fix a date to hear them in answer. This provision ought also to apply to expert reports submitted in some other proceedings and which the Court proposed to use. Although the appellant had not expressly invoked Section 253, he had pleaded a violation of Article 4 of the Constitution, which guaranteed the right to be heard. Inasmuch as this right was involved in the right given under Section 253, the foundation of the appellant's argument was basically the same.

According to the recognized principles of jurisprudence, parties had the general and absolute right to be heard both in civil and in criminal proceedings.

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### Court of Appeal of Bremen, Germany

#### RIGHT TO TRIAL WITHIN REASONABLE TIME

#### IN RE ARTICLE 121, PARA. 1 OF THE CRIMINAL PROCEDURE CODE

(Neue Juristische Wochenschrift, 1965, pp. 2361 ff.)

(See pp. 128-129 above)

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### Supreme Court of the United States of America

#### RIGHT TO SPEEDY TRIAL

#### KLOPFER v. NORTH CAROLINA

(386 U.S., Part 1, 213)

*Accused, whose trial had been postponed for two terms, filed motion to ascertain when the State intended to bring him to trial—before any decision was made on this motion, State prosecutor moved for permission to enter a nolle prosequi whereby accused was released but remained subject to prosecution at any time at prosecutor's discretion—by indefinitely postponing prosecution while accused's objection was pending, State denied him the right to a speedy trial guaranteed by Sixth and Fourteenth Amendments of the Constitution.*

Opinion of the Court delivered by Chief Justice Warren, Stewart and Harlan JJ. concurring.

Decided on March 13, 1967.

The accused was charged on a North Carolina indictment with criminal trespass. The jury having failed to reach a verdict, a declaration of a mis-trial was made. The fresh trial of the accused was postponed for two terms, and as the accused had not even by then received any indication of when his trial would take place, he filed a motion in the trial court praying that the Court ascertain when the State intended to bring him to trial. While this motion was pending, the State prosecutor moved for permission to enter a "nolle prosequi with leave", a procedural device whereby the



accused is released from custody, but remains subject to prosecution at any time in the future, at the discretion of the prosecutor. Despite the accused's objections that the entry of the *nolle prosequi* order would in the circumstances violate his federal right to a speedy trial, the trial court granted the motion of the State prosecutor.

The accused appealed to the State Supreme Court which dismissed the appeal, holding that, while a defendant has undoubtedly a right to a speedy trial if there were to be a trial, that right did not require the State to prosecute if the prosecutor, in his discretion and with the Court's approval, elected to enter a *nolle prosequi*.

The accused then appealed to the Supreme Court of the United States, which held that the State, by indefinitely postponing prosecution on the indictment while the accused's motion was pending, and without stated justification, had denied the accused the right to a speedy trial, a right guaranteed to him by the Sixth and Fourteenth Amendments of the Federal Constitution.

Chief Justice Warren, in delivering the opinion of the Court, observed:

"We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English Law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, 'We will sell to no man, we will not deny or defer to any man either justice or right'".

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### Cour de Cassation of Belgium

#### UNFETTERED RIGHT OF DEFENCE TO TENDER ITS SUBMISSIONS AT TRIAL

VERSCHUEREN v. HUYSKENS

(pasicrisie Belge, November-December 1966, pp. 1175-6)

*In criminal cases, right of defence to tender its submissions at trial cannot be fettered—no legal obligation to communicate such submissions or grounds of defence to ministère public prior to commencement of proceedings—violation of rights of the defence to brush aside such submissions or grounds for reason that they were not so communicated.*

Decided on May 16, 1966.

In a criminal trial the *Tribunal Correctionnel* of Anvers had refused to entertain the accused's grounds of defence because they had not been communicated to the *ministère public* before the commencement of proceedings, and found the accused guilty of the offence with which he was charged.

He appealed against the judgment to the *Cour de Cassation* of Belgium. The *Cour de Cassation* allowed the appeal and set aside the judgment of the *Tribunal Correctionnel* of Anvers, holding that in criminal matters there was no legal obligation whatsoever on parties to communicate the grounds on which they rely to the *ministère public* before the commencement of proceedings. The *Cour de Cassation* also held that a decision which brushed aside grounds of defence which were properly submitted at the hearing by the accused, for the reason that these grounds had not been communicated to the *ministère public* before the commencement of the hearing, violated the rights of the defence.

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