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INTRODUCTION

THE PROMISE OF HUMAN RIGHTS YEAR

This is the second part of a Special Human Rights Year Issue of the *Journal*. Like the first part (Volume VIII, No. 2), it contains a series of studies written by eminent lawyers from different parts of the world.

The greatest service that the authors of the articles in these two volumes have done, is to demonstrate the fact that human rights are no longer a stray collection of moral principles which ought to influence the legislator. Every human right can be legally defined, interpreted and implemented; human rights now form a coherent body of law. While the Law of Human Rights deals with aspects of Constitutional and Criminal Law, Jurisprudence and International Law, it is itself a subject demanding comprehensive and separate study. In some universities it is a separate branch of law; this is a trend that needs encouragement.

Since the publication of the first part of the Special Human Rights Year issue of the *Journal* in January 1968, three major international conferences on human rights have taken place.

Two were non-governmental: the Geneva NGO Conference on Human Rights (29th - 31st January 1968), whose General Conclusions were published in *Bulletin* No. 33 (March 1968), and the Montreal Assembly for Human Rights (22nd - 27th March 1968), whose Statement is published in this issue of the *Journal*. The Geneva NGO Conference consisted of 146 representatives of seventy-six international organisations interested in different aspects of human rights; it included representatives from all major non-governmental organisations. The Montreal Assembly consisted of some fifty individual experts on human rights issues. Both conferences were representative of the different disciplines and were by no means limited to jurists: they were also representative of differing—and often conflicting—ideologies. These two conferences were representative of the non-governmental sector as a whole. Their conclusions, which were unanimous, and which coincided with each other, can be taken as representing world public opinion as distinct from governmental or bureaucratic opinion.

The third major conference was the International Conference on Human Rights convened by the United Nations, held in Teheran (22nd April - 13th May 1968). It consisted of 391 governmental delegates representing 84 states. While Observers from a substantial

number of non-governmental organisations attended the Teheran Conference, they were not allowed to address it; they were, however permitted to circulate written statements. Thus, the Conclusions of the Geneva and Montreal Conferences were circulated to the Teheran Conference.

There was a very marked difference between the approach of the two non-governmental conferences and that of the governmental conference at Teheran.

This difference epitomizes the growing conflict which has become apparent in recent years between the conservatism of most governments in regard to human rights and the importance and urgency which the non-governmental sector attaches to the more effective protection of human rights. It is a clear indication that public opinion is far in advance of the official governmental attitude.

The two-non governmental conferences which were convened for the purpose of making available to the governmental conference at Teheran the considered and expert views of the non-governmental sector, not unnaturally concentrated on the question of providing effective *implementation machinery* for the protection of human rights and fundamental freedoms. They were only too conscious that twenty years after the adoption of the Universal Declaration of Human Rights, there was as yet, apart from the regional machinery provided by the Council of Europe and the Organisation of American States, no international machinery to which an individual or group of individuals whose rights had been infringed could turn for protection. They therefore urged that the important task was the setting up of implementation machinery at national, regional and international level—preferably of a judicial nature—that could afford some protection to the individual. Although representing widely differing disciplines and ideologies, the non-governmental conferences eschewed polemical discussions of the sharp problems that divided the world and got to grips with the task of recommending the setting up of implementation machinery.

Unfortunately, the governmental conference never came to grips with the problem of implementation—despite the efforts of a few delegations. It devoted most of its time to a repetition of current political attitudes in emotive terms. An indication of the atmosphere may be had from the fact that for the first few days of the Conference no agreement could be reached even on the choice of the Conference Officers (Vice-Chairmen, Committee Chairmen and Rapporteurs); thus, from a working point of view, the two Committees of the Conference only began their work some six days after the opening of the Conference. Even then, the discussions were constantly side-tracked into polemics. It is possible that some

delegations prolonged the polemical discussions so that the task of implementation could never be effectively reached. The final *Proclamation of Teheran* reflects the failure of the Conference to make any real progress. It contains a series of unexceptional declarations which could have been written and accepted by everyone without any elaborate Conference. There is nothing new in it, and no indication that governments realise the urgency of providing effective international machinery for the protection of human rights.

When the Conference terminated, some 18 resolutions, many of them dealing with implementation, had not been reached. A blanket resolution was then adopted inviting the Secretary General of the United Nations to transmit these resolutions to 'the competent organs of the United Nations for further consideration'. It is hoped that they will receive serious consideration ultimately.

If the overall results of the Teheran Conference were disappointing, some useful work was done by it in regard to Women's Rights, Apartheid, Education and Economic and Social Rights. In all, twenty-eight resolutions were adopted and some declaratory progress was registered in these fields. In one very important field,—the protection of human rights in armed conflicts—some concrete progress was made. A Resolution sponsored by India, Czechoslovakia, Jamaica, Uganda and the United Arab Republic was unanimously adopted (with two abstentions) drawing attention to the inadequacy of the existing humanitarian conventions both as regards their scope and effective application to the armed conflicts which disgrace our age. The resolution also calls for the conventional protection of the victims of racist and colonial regimes and the protection under international law of such victims who are imprisoned and for their treatment as prisoners of war or political prisoners under international law. In the operative portion of the Resolution, the Conference:

1. *Requests* the General Assembly to invite the Secretary General to study
 - (a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts, and
 - (b) The need for additional humanitarian international conventions or for possible revision of existing Conventions to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.
2. *Requests* the Secretary General, after consultation with the International Committee of the Red Cross, to draw the attention of all States Members of the United Nations system to the existing rules of international law on the subject and urge them, pending the adoption of new rules of international law relating to armed conflicts, to ensure that in all armed conflicts the

inhabitants and belligerents are protected in accordance with ' the principles of the laws of nations derived from the usages established among civilised peoples, from the law of humanity and from the dictates of the public conscience '.

3. *Calls on* all States which have not yet done so to become parties to the Hague Conventions of 1899 and 1907, the Geneva Protocol of 1925, and the Geneva Conventions of 1949.

This Resolution is really worthwhile and may well be the most valuable concrete result of the Conference. It is to be hoped that top priority will be given to its implementation.

It is noteworthy that this important Resolution was no doubt inspired by the sustained pressure of the non-governmental sector for action in this much neglected area of human rights; it is the area in which the most massive destruction of human life and rights occur. Both the Geneva NGO Conference and the Montreal Assembly had forcibly called for action in this field. The International Commission of Jurists and other international organisations have been pressing for such action for some considerable time.

The next major event of Human Rights Year will be the NGO Conference on Human Rights which is to be held in Paris on 15th-19th September 1968. It will be the task of this Conference to evaluate the results of the governmental Conference at Teheran, and to chart the areas on which the non-governmental sector should concentrate its efforts.

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

HUMAN RIGHTS

THE UNITED NATIONS AND 1968

by

JOHN HUMPHREY *

Twenty years ago, in the night of December 10, 1948, the United Nations adopted the *Universal Declaration of Human Rights* 'as a common standard of achievement for all peoples and all nations'. In commemoration of that unique event, 1968 is being observed throughout the world as International Year for Human Rights. It is an appropriate time, therefore, to ask what the United Nations has done to promote respect for human rights. The answer is that it has done a great deal. Whether it should have done more, and whether what it has done should have been done better are quite different questions.

1. United Nations Machinery

The history of human rights in the United Nations extends, of course, beyond the two decades which followed the adoption of the Declaration. The Charter was adopted twenty-three years ago, and it is twenty-one years since Eleanor Roosevelt presided over the first session of the Commission on Human Rights. The period before the adoption of the Declaration is very important, for it was then that the foundation was laid for everything that has happened since.

An essential part of this foundation was the Charter itself. One of the most revolutionary innovations of the Charter and what distinguishes it most sharply from any previous international constitution was its attitude towards human rights. The Dumbarton Oaks Proposals recommended that their promotion should be included in the chapter on economic and social co-operation, 'with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations'. At San Francisco, the promotion of human rights became one of the four or five stated purposes of the Organization, as enunciated in Article 1 of the Charter; and other articles dealing

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with human rights were included, the most important being Articles 55, 56 and 68. This was due chiefly to energetic lobbying carried on by certain non-governmental organizations, to the attitude of certain small countries and to the imaginative leadership of the United States' delegation which, once it had been impelled to act by the voluntary organizations, was able to obtain the agreement of the other sponsoring powers, without which the articles would never have been adopted.

The Charter reflected, of course, the reaction of people everywhere to the indescribable violations of the most fundamental rights which had taken place in certain countries during and immediately before the Second World War. Their effect was to make the promotion of human rights a matter of international concern, whereas they had traditionally been considered as coming within a State's domestic jurisdiction. This has been as radical a development as has ever taken place in the history of international law and international relations. It is enough to compare the Charter with the Covenant of the League to realize its revolutionary character.

No attempt will be made here to analyse the human rights articles of the Charter.¹ It can be said, however, that they firmly established human rights as a proper subject for discussion and at least general recommendation by the United Nations (including the General Assembly, the Economic and Social Council, and the Trusteeship Council), that they provided for the creation of a Commission on Human Rights,² and that they pledged all Member States 'to take joint and separate action in cooperation with the Organization' for the achievement of universal respect for human rights.³

The Charter could have taken a stronger stand, and it is a pity that it did not. It could have spoken of the 'protection' of human rights instead of their 'promotion', and it could have included an International Bill of Rights, as was strenuously proposed by several of the smaller countries. It could have given the Human Rights Commission the status of a Council in direct relationship with the General Assembly; and, like the Constitution of the International Labour Organization, it might have created some international machinery for the enforcement of human rights. Notwithstanding these relative deficiencies and the fact that it nowhere defines the human rights and fundamental freedoms of which it speaks, the

¹ I have done this in the chapter which I contributed to Luard (ed.) *The International Protection of Human Rights* (London, 1967).

² Art. 68.

³ Art. 56.

Charter is—in the context of its historical environment—a really remarkable achievement and has served as the constitutional basis for everything that the United Nations has done since in relation to human rights. It might well have been otherwise. The World Revolution of ‘rising expectations’ and other historical developments would have forced the Organization to concern itself with human rights even in the absence of these constitutional provisions; but the difficulties would have been far greater and the result might have been quite different. It is possible that there would never have been a Universal Declaration of Human Rights or, indeed, a Commission on Human Rights.

The second important development before the adoption of the Declaration was the creation of a number of institutions. The General Assembly, the Economic and Social Council, the Trusteeship Council, the Commission on Human Rights, and the Secretariat were part of the structure created by the Charter. To this were soon added the Commission on the Status of Women, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, and the Sub-Commission on Freedom of Information and of the Press. In the Secretariat a Division of Human Rights was created. All of these were meant to be, if not permanent, at least to have a continuing existence. There were also various *ad hoc* arrangements like the United Nations Conference on Freedom of Information of 1948. Later there were to be many more. In addition, there were the various bodies created by the Specialized Agencies (particularly the International Labour Organization) and, later, by regional international organizations.

Institutions soon develop a life of their own, a rule to which these new bodies were no exception. In spite of the fact that they consisted of government representatives, even the two Commissions (particularly the Commission on the Status of Women, which almost immediately became a pressure group presuming to speak for the women of the world) soon developed an *esprit de corps*—and it might even be said a vested interest which quickly became a factor in ensuring that the United Nations would not turn back from the road which it had so dramatically taken at San Francisco. Once such bodies have been set in motion, it is very hard to curb their activity and *a fortiori* to eliminate them. When the members of the bodies act not as representatives of governments but in their personal capacity, they tend to take on an even more independent life. An incident in the history of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities illustrates the point. Largely because the Sub-Commission was taking its mandate too seriously, particularly by reviving the issue of the international protection of minorities (which most

governments wanted to bury notwithstanding their lip service to the matter in the General Assembly), the Economic and Social Council decided, in 1951, to abolish it; but public reaction (for the development of which the Sub-Commission was in part responsible) was so strong, that, at the next session of the General Assembly the Council was asked to reconsider its decision, and the Sub-Commission was able to undertake a new programme which has more than justified its existence. The Sub-Commission on Freedom of Information and of the Press was less fortunate. Also abolished by the Council in 1951, partly because it had gained the animosity of professional journalists in the West by its insistence that freedom and responsibility go together, it found no supporters in the General Assembly to take up its cause. One result of this is the highly unsatisfactory record of the United Nations in relation to the problem. Had the Sub-Commission on Freedom of Information and of the Press been given the same opportunity to demonstrate its usefulness as was given to its sister sub-commission, it is reasonable to believe that it would have been equally successful and that the United Nations' progress in this field would have been more significant.

I have said that the Charter should have given the Human Rights Commission the status of a Council. In some respects this development is coming about informally. More and more the Commission acts under the mandate and as the agent of the General Assembly—at times indeed as a drafting committee for the Third Committee. This is a healthy development because, by and large, the Economic and Social Council, preoccupied by economic problems, has been an obstacle rather than a help to the Commission and the human rights programme. In other cases, as in the drafting of the *Universal Declaration of Human Rights*, its role has been little more than that of a post office. The development cannot be formalized however, without an amendment to the Charter which, in present circumstances, is most unlikely.

Enough has probably been said to establish the fact that the United Nations was endowed with a constitutional and institutional base on which it could build. I now turn to the uses to which this base has been put, dealing first with a number of specific rights and groups of rights.

2. The Status of Women

Since it is difficult to establish any hierarchy of values in such matters, I will begin at random with the status of women. A reason, if one is needed, could be the relative success of the Organization in dealing with the subject.

Although the Charter does not define human rights and fundamental freedoms, its position in the matter of the equality of the sexes is clear. Not only does its preamble specifically refer to 'the equal rights of men and women', but discrimination based on sex is condemned at various points.

One of the first acts of the Economic and Social Council was to establish a Sub-Commission on the Status of Women under the Human Rights Commission. At its second session, however, the Council decided to give it the rank of a commission. This decision to break the organic relationship with the Human Rights Commission was criticized at the time because it was said to be inconsistent with the fact that the rights of women are human rights. Some women even said that the decision was in itself discriminatory. In practice, however, the Commission's record has fully justified the decision. Any advantage, moreover, that might have accrued from the fact that members of sub-commissions act in their personal capacity and not, as in the case of commissions, as representatives of governments has been balanced by the attitude which both governments and the members of the Commission have taken towards the Commission's work. The Commission on the Status of Women is one of the most highly integrated bodies in the United Nations, representing on the whole functional rather than national interests.

In the early years, the Commission was chiefly concerned with the legal and political rights of women; but it now devotes much of its time to economic and social values and is particularly concerned with the position of women in the economically under-developed countries. This change in emphasis has increased its usefulness and its prestige; for it is in these countries that the condition of women is still a particularly acute problem. It is possible indeed that many of the other problems facing these countries will not be solved until there has been a radical improvement in the position of women. Over-population may be mentioned as an example. Improving the status of women is therefore something to be pursued not only for its own sake but as an instrument for achieving other purposes. Had this simple truth been perceived earlier, relations between the Commission on the Status of Women and its parent body would have been both easier and more serious, and the Commission would have had more cooperation from the Secretariat.

The Commission undertook the preliminary drafting of a number of international conventions, which were adopted by the General Assembly and are now in force, including a convention on the political rights of women, another on their nationality, and one on consent to marriage, the minimum age for marriage and registration of marriages. There are also, of course, the pertinent articles of the

Universal Declaration of Human Rights and of the two Covenants on Human Rights⁴ to the drafting of which the Commission contributed. More recently it drafted a *Declaration on the Elimination of Discrimination against Women*, which was adopted by the General Assembly on November 7, 1967. Equally important, perhaps, has been the documentation prepared by the Secretariat and the discussions which have resulted from it, as elements in the development of a new international awareness of the importance of the question and in the undoubted general acceptance of new standards and values. Finally, the Commission has stimulated the Specialized Agencies, particularly the International Labour Organization, to devote more attention to the question. Relations between the Commission and the International Labour Organization have been especially close.

3. The Prevention of Discrimination and the Protection of Minorities

I have referred to the violation of human rights during and immediately before the Second World War to which the human rights provisions of the Charter were a response. The worst of these violations involved discrimination on racial, religious or political grounds. Against such a background, the circumstances under which the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was created were almost commonplace. The delegation of the United States in the Human Rights Commission had proposed the creation of a Sub-Commission on Freedom of Information and of the Press. When the matter came before the Economic and Social Council, delegates from the Soviet Union said that it was just as important to prevent discrimination and protect minorities as it was to promote freedom of information. 'Even in the most highly developed countries', their representative said, 'rights of minorities are not respected'. The Council then authorized the Commission to create three sub-commissions: one on freedom of information, one on the prevention of discrimination, and another on the protection of minorities. The Commission decided, however, to include the last two functions in the mandate of a single sub-commission.

The Sub-Commission on the Prevention of Discrimination and the Protection of Minorities was to have a stormy history. As already noted, the Council decided in 1951 to abolish it and it was saved only by the intervention of the General Assembly. Many of

⁴ On Civil and Political Rights, and on Economic, Social and Cultural Rights. For the texts of the two Covenants see *Journal of the International Commission of Jurists*, Vol. VIII, No. 1, pp. 52-80.

the Sub-Commission's difficulties, especially in its early years, were caused by the confusion of functions implicit in its mandate; for the protection of minorities is quite different from the prevention of discrimination. To protect minorities (which need not necessarily be numerical minorities) is to help them to preserve and maintain characteristics to which they attach value and which they wish to preserve. It is in a sense a disintegrative process and the very opposite to assimilation. To prevent discrimination on the other hand, is to ensure that all groups and individuals are treated equally in all essential respects, insofar as they want equal treatment. This is not to say that the two functions are incompatible; but to assume that all that is required to promote human rights is to ensure that everyone is given the equal enjoyment of those rights is obviously wrong. There is a human right to be different, and in certain historical and political contexts this may involve more than mere equality.

The international protection of minorities has a long history. It is sufficient to recall here that the concept was basic to the Versailles peace settlement and that the League of Nations was given important responsibilities in the matter. Through no fault of the League, the system established by it for the protection of minorities soon fell into disrepute—partly because it was discriminatory in that it did not apply to all countries, but mainly because it was abused by the Nazi *Reich*. After the Second World War, moreover, effective international power fell into the hands of countries which were chiefly interested in assimilating their minorities so that there was no disposition to continue the League machinery. There was no mention of the protection of minorities in the Charter. Equally significant, the General Assembly refused to include an article on the matter in the *Universal Declaration of Human Rights*. But the same countries which refused to recognize the principle continued, in order to dodge the issue, to pay lip service to it, with the result that the Sub-Commission was importuned by requests from the General Assembly to pursue its studies on the matter. It was because the Sub-Commission loyally attempted to carry out its mandate that, as already noted, the Council attempted to abolish it in 1951; the Sub-Commission continued its studies in this field, however, until 1955, when the Secretariat informed it that because of the attitude of higher bodies, it would not prepare a study on 'the present position of minorities in the world'. The Sub-Commission then decided to concentrate on the prevention of discrimination and to defer further work on the protection of minorities until the Commission should give it special further instructions in the matter; this the parent body has never done.

There has recently been some change in attitude towards minorities. In 1965, the Secretariat organized in cooperation with the government of Yugoslavia a seminar in Ljubljana on the multinational society; in 1966, the General Assembly adopted the *International Covenant on Civil and Political Rights*, which by Article 27 gives minorities, in very general terms, the rights 'to enjoy their own culture, to profess and practise their own religion, or to use their own language', but does not impose on States Parties any obligation to provide the means necessary to these ends; and in 1967, the Sub-Commission decided to give 'thorough consideration in the context of the subject of the protection of minorities' to the conclusions of the Ljubljana seminar. But it seems unlikely, that there will be any significant developments in the matter in the near future. For one thing, the governments of most of the new Member States of the United Nations are, as part of their preoccupation with nation-building, more likely to want to assimilate their minorities than to encourage their continued distinct cultural existence.

So that, apart from the doubtful value (having regard to its great generality) of article 27 of the Covenant on Civil and Political Rights, the United Nations has done very little to create machinery or establish norms for the protection of minorities. This, however, is less a reflection on the United Nations and its constitutional capacities than a consequence of political motivations which determine the policies of governments.

In the matter of the prevention of discrimination, the achievement of the United Nations and of the Specialized Agencies has been more positive. Not only have they adopted a number of conventions and declarations, in the drafting of which the Sub-Commission played a substantial role (including the important *Convention on the Elimination of All Forms of Racial Discrimination*), but the Sub-Commission has conducted a series of useful studies in the matter. One of these studies, that on discrimination in education, gave birth to the UNESCO Convention on the same subject.

The Sub-Commission now faces another crisis. Since it has nearly exhausted the list of possible studies on discrimination, the question arises as to what it will now do. Two years ago, the Economic and Social Council gave it a new and potentially important function in the field of implementing human rights: that of examining the periodic reports of governments on human rights. But the Sub-Commission failed to respond to its new responsibilities and, in 1967, the Council made other arrangements. It has been suggested that the Sub-Commission might become the expert body

of the Commission with competence to assist in a variety of matters not necessarily related to discrimination or minorities.

4. Freedom of Information

Once it has been said that United Nations efforts to promote freedom of information have been characterized by failure, little else remains to be said. The work began bravely enough. We have already seen that one of the first acts of the Commission on Human Rights was to create a Sub-Commission on Freedom of Information and of the Press; and, in 1948, the Organization sponsored the United Nations Conference on Freedom of Information, which, on the day its Final Act was signed, any objective observer would have called a success. Both of these initiatives soon came to grief. It is impossible to consider here all the reasons for this result; but two of the most important can be mentioned: the negative attitude of professional journalists in the Western World, who are inclined to regard freedom of information as an absolute right to gather and impart information without responsibility and without regard to the right of the public to receive information;⁵ and the equally irresponsible position taken by those governments, unfortunately in the majority, which control the press and other information media and use them as instruments of policy. Nothing further will be added here to the sad story of the Sub-Commission, except to make the obvious suggestion that one practical and simple way to put new life into freedom of information in the United Nations and to recover some of the enthusiasm of 1948 would be to revive the Sub-Commission.

Something more has to be said, however, regarding the 1948 Conference. Had all the 'plenipotentiaries' representing governments at the Conference had full power to sign the three draft conventions approved by it (as some of them had) the conventions might be in force today. As it was, the Final Act of the Conference with the draft instruments and recommendations contained in it was sent to the General Assembly through the Economic and Social Council for further action. There then began a campaign to amend the draft conventions, which was so successful that the texts became unacceptable to their original sponsors. Today, twenty years later, only one of them, the *Convention on the International Right of Correction*, is in force; agreement on the other two is as remote as it has ever been since the Conference. There remain, however, two important United Nations achievements in the matter of freedom of

⁵ See article 19 of the Universal Declaration of Human Rights.

information: the adoption by the General Assembly in 1948 of Article 19 of the *Universal Declaration of Human Rights*, and in 1966 of Article 19 of the *International Covenant on Civil and Political Rights*.

5. Implementation of Human Rights

A more exhaustive analysis of the work of the United Nations relating to human rights would also deal with such matters as slavery (in respect of which a convention was adopted in 1956 at a conference where the plenipotentiaries did sign the instrument), forced labour, the self-determination of peoples and colonialism, and such specific issues as *apartheid*. Such an analysis cannot be attempted here. Something must be said, however, about three instruments which between them cover the whole field of human rights: the Universal Declaration adopted in 1948, and the two Covenants adopted in 1966.⁶

It is the adoption of the Declaration which the world is celebrating in this International Year for Human Rights. The Declaration is not a treaty, having been voted as a resolution of the General Assembly; but it nevertheless represents a very large degree of international agreement—which is not to say that it is binding on States for this reason alone. There were no votes cast against it and there were only eight abstentions. With the exception of South Africa, all of the abstaining States⁷ have by their subsequent conduct and statements in the United Nations made it clear that they recognize the status of the Declaration as embodying the standards to be pursued by the Organization and Member States. From the wealth of evidence that could be produced in support of this assertion, reference need only be made to two facts. Article 7 of the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, which was adopted by the General Assembly in 1960 and for which all the Member States which abstained on the Declaration with the exception of South Africa voted, says that ‘all States shall observe faithfully and strictly the provisions of the Universal Declaration of Human Rights’;⁸ and, in 1963, the Assembly used similar language when it adopted the *Declaration on the Elimination of All Forms of Racial Discrimination*.

The Declaration has, in the twenty years since its adoption, acquired a moral and political authority which is second only to

⁶ See above: p. 6, note 4.

⁷ Byelorussian S.S.R., Czechoslovakia, Poland, Saudi Arabia, Ukrainian S.S.R., Union of South Africa, U.S.S.R. and Yugoslavia.

⁸ This was confirmed by the Security Council in its resolution on Portuguese overseas territories in 1963.

that of the Charter itself. It has had a catalytic effect not only on the thinking of our time but on events. As a legal catalyst, its impact may be partly measured by the international conventions which it has inspired, the national constitutions which incorporate its provisions, the legislation implementing it in national systems, and the influence which it has had on courts. Indeed, its impact and the universal acceptance of its standards have been so great that international lawyers are beginning to say that it has now become part of customary international law and is therefore binding on all States. Small wonder that it has been called the greatest achievement of the United Nations! ⁹

The Declaration however, and this is its weakness, contains no provisions for its implementation. This was not the only reason why the Human Rights Commission decided to draft an international convention or conventions on the matter, because at that time the Declaration was not meant to be a binding instrument. To make its norms binding on States, it would be necessary to incorporate them in a treaty or treaties. But the chief *raison d'être* of the Covenants, as they came to be called, was to provide some international machinery for implementation, the third element in the International Bill of Rights contemplated by the Commission.

This strategy may have been bad. A more imaginative approach might have been to concentrate on the Declaration, using every means to increase its authority and to exploit inherent powers under the Charter to provide machinery for its implementation. It should perhaps have been foreseen that the work on the Covenants would be a long drawn-out process and so fraught with difficulties that the result would be substantively weaker instruments, which might even have undermined the authority of the Declaration.

In any event, as things have turned out, and having regard to the authority which the Declaration has acquired over twenty years, the chief justification and value of the Covenants, as adopted by the General Assembly in 1966, must be measured by the provisions which they make for implementation. From an analysis of these provisions ¹⁰ it would appear that they are relatively weak. Indeed they come as an anticlimax to so many years of endeavour. Neither Covenant contains any mention of the International Court of Justice or of any other form of judicial settlement or indeed of arbitration. The Covenant on Civil and Political Rights depends for

⁹ For a study on the status of the Declaration in international law, see, Louis B. Sohn: *The Universal Declaration of Human Rights*, in *Journal of the International Commission of Jurists*, Vol. VIII, No. 2, Special issue for Human Rights Year, 1968, part one, p. 17.

¹⁰ I have made such an analysis in a report to be delivered at the Fifty-Third Conference of the International Law Association.

its implementation on reporting and conciliation, the Covenant on Economic, Social and Cultural Rights on reporting alone; and, as devised by the instruments, even these procedures are weak. They are weaker even than those provided for by the 1965 *Convention on the Elimination of All Forms of Racial Discrimination* and considerably weaker than those contemplated by the Commission on Human Rights in 1954.

The crux of the implementation problem in the matter of human rights is, obviously, the status of the individual and of groups. If States alone have a right of access to the implementation body—and this is true irrespective of the powers of that body—little use will be made of the machinery; and even when it is used, the tendency will be to politicize issues. Governments, particularly in a bi-polarized world, are unlikely to hale friendly governments before an international tribunal on a human rights issue, although they are only too likely to do this if they can embarrass an unfriendly government. The fact is borne out by the experience of the International Labour Organization and the Council of Europe. What is needed is some machinery to which individuals will have access. Under the Racial Discrimination Convention the conciliation machinery can be made available to individuals at the option of the States Parties in respect of persons within their jurisdiction; but the Covenant on Civil and Political Rights (the point does not arise in respect to the other Covenant which depends only on reporting) relegates the matter of individual access to an Optional Protocol.

The implementation procedures established by the Covenants would appear even weaker were one to compare them with those of the European Convention on Human Rights. Enough has probably been said, however, to make the point that if the Covenants are to be judged by their provisions for implementation, they fall below the expectations of 1948.

Fortunately, this is not the last word that can be said on the matter. For there are a number of other ways in which the norms established by the Declaration and the Covenants can be implemented internationally. One of these is the system for periodic reporting in the matter of human rights, first set up by the Economic and Social Council in 1956 and which, although not on a treaty basis, applies to all Member States of the United Nations. The system has not worked too well, but it has potentialities; and if the Council were to create an independent committee of experts, organized possibly along the lines of the I.L.O. Committee of Experts (appointed by the Governing Body to examine and report on the annual reports made by governments under article 22 of the I.L.O. Constitution), it could become a very effective instrument of implementation. Secondly, the Human Rights Commission and its

Sub-Commission on the Prevention of Discrimination have for a number of years been conducting studies, which are really global surveys, of specific rights and groups of rights. The studies have suffered by their excessively official character and the fact that the information in them reflects the *de jure* rather than the *de facto* situation in the various countries. These studies would be more useful, and indeed become an important factor in implementation, if means could be found (possibly by enlarging the role of non-governmental organizations in their preparation) for increasing their factual and critical content.

Finally there is the proposal, recently approved by the Commission on Human Rights and the Economic and Social Council and now on the agenda of the General Assembly, that the latter appoint a High Commissioner for Human Rights. Such an official, if a person of the proper stature, wisdom and impartiality, could become a very important factor indeed in the effective implementation of human rights. His primary function would be to advise various United Nations bodies and governments in their efforts to promote respect for human rights, but through the instrumentality of his annual report to the General Assembly he could also bring pressure to bear on governments to observe the standards set by the Declaration and other instruments. Finally, he would have access to all communications concerning human rights addressed to the United Nations, including those containing complaints by individuals and groups against governments, and could bring them to the attention of those governments.

There are still other ways in which, under powers already provided by the Charter, the United Nations can promote the enforcement of agreed standards in the matter of human rights. One of these is, of course, the ventilation of issues in the General Assembly, as in the matter of the racial situation in Southern Africa, and the adoption by the Assembly on an *ad hoc* basis, of resolutions which may or may not contribute to a solution. Another is to dispatch fact-finding missions to specific areas, as in the case of the mission which went to Vietnam in 1963 to inquire into allegations that the Diem Government was persecuting the Buddhist community. Still another is the education of public opinion, in the final analysis perhaps the most important of all.

There may be methods other than those described above still untried. Eventually, however, the United Nations should aim to establish an implementation system at least as strong as the one operating in the Council of Europe for the European Convention on Human Rights. The aim should be to give to every individual a right of direct access to an International Court of Human Rights with universal jurisdiction.

THE INTERNATIONAL SOCIAL ORDER AND HUMAN RIGHTS

by

FELIPE HERRERA *

The Universal Declaration of Human Rights of 10 December 1948 was a solemn protest against the brutality, the oppression and the terrible consequences of extremism during the Second World War. It drew its inspiration, however, from deeper historical sources and is, in its own right, a particularly important milestone in man's long, slow progress towards the fulfilment of his dignity and the general acceptance of essential values. It recognizes that respect for national and individual rights is a vital prerequisite for attaining lasting peace and justice.

The Declaration expands and clarifies the philosophical principles on which the Charter of the United Nations is based, and which justify its existence. These principles presuppose a fundamental truth, that the preservation of peace between nations and the stability of an international organization capable of maintaining peace can ultimately only be attained if all human beings in every part of the world are able to exercise their fundamental freedoms and are guaranteed their inalienable rights. All too often in history the systematic suppression of human rights and freedoms has been accompanied by explosions of fanaticism in foreign policy. It is well-known that governments which show no respect for the rights of their own citizens care little for those of other peoples or nations and usually aim to achieve their international objectives by threats or by force.

The Declaration reflects the prevailing ideas of Man in the mid-twentieth century, and enlarges the scope of earlier declarations whose object was the complete and spontaneous realization of his age-old aspirations and destiny. Protection must therefore be accorded not only to civil and political rights, but to economic, social and cultural rights also. According to Article 22 of the Declaration, every member of society, as such, is entitled, 'in accordance with the organisation and resources of each state to such rights as are indispensable for his dignity and the free development of his personality'. This goal is to be attained through national effort and international co-operation. Thus, conditions of work and

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the universal right to leisure and family security, the right of parents to choose their children's education, the right to participate in cultural life and to share the benefits from national scientific advancement are all considered to be essential threads in the delicate fabric of world peace.

Twenty years have passed - twenty years in which events have followed each other in rapid succession; twenty years, in which the domain of nuclear physics has been conquered and discoveries made on our planet which had hitherto not been imagined; the other side of the moon has been photographed and the mysteries of outer space penetrated; cybernetics have transformed technology and revealed unexpected possibilities for benefiting mankind through the advancement of science; the old balance of power has been readjusted and scores of new communities have been founded with their future in their own hands. These twenty years represent more than a century of achievement. Now, as they draw to a close, a new era is beginning. An era in which we are witnessing the birth of a multitude of new ideas from which the world can draw inspiration, an era of magnanimity and ruthlessness, of hopes and fears, of faith and doubt; an era which will inevitably bring with it prospects of noble and challenging adventure.

There is nothing in this era that detracts from the validity of the Universal Declaration of Human Rights. It will remain a changeless creed of brotherhood and understanding for the human race.

However, there is a great contrast between the Declaration's high ideals and the realities of power politics. The interdependence of mankind's freedom and well-being with international peace and security is fully recognized; nonetheless, the principle that guides relations between states is national sovereignty. Article 2 (7) of the Charter provides that, when matters essentially within its domestic jurisdiction are involved, each state is entitled to take action free from outside intervention and to control its own affairs in absolute independence.

It was for this reason that, when the Declaration was being drafted, such great care was taken to emphasize its purely declaratory nature and to avoid mentioning any compulsory obligations. Consequently, it does not call upon Member States of the United Nations to give effect to the list of rights by enacting laws or adopting other appropriate measures, but merely holds these rights up as standard objectives to guide peoples and governments, recommending them 'to publicize the text of the Declaration and to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions'.

Nevertheless, the Declaration's position as the rallying point for international effort towards the ultimate goal of the brotherhood of

man is not weakened. In fact, it is reinforced; for the Declaration now represents a consensus of opinion in as a complex a forum of deliberation and resolution as the United Nations General Assembly, the meeting place of so many ideologies and cultures, where even the definition of human rights is subject to political considerations.

Equally, it is difficult to imagine a state being prepared, of its own accord, to submit to the decision of an international tribunal with jurisdiction to inquire into the safeguards that the state affords its own citizens, when it could rely on the old and safe reply that the matter lay within its domestic jurisdiction. Clearly though, a world community which is really concerned with respect for human rights and fundamental freedoms must be able to help man in his fight against oppression and play its part in the readjustment of the fine balance between liberty and individual values on the one hand and the state's authority and interests on the other.

One of the outstanding merits of the Declaration is that such a conflict ceases to be insoluble. Once human rights and fundamental freedoms are set out in everyday language to form a comprehensive body of philosophical statements with tremendous instructive potential, their international realization and protection can be brought about by means of treaties containing reciprocal undertakings and providing adequate implementation machinery.

That was precisely the view of the United Nations' Commission on Human Rights, which immediately undertook the preparation of the *International Covenants on Economic, Social and Cultural Rights*, and on *Civil and Political Rights* with an Optional Protocol. The countless problems and difficulties which faced the Commission in its task can be imagined from the fact that it was not until the twenty-first Session of the United Nations General Assembly, after eighteen years of hard work, thorough consultation and debates without number, that the Covenants were finally approved. It should be added that so far only twenty-seven countries have signed the Covenants and fourteen the Optional Protocol.

Nevertheless, it would not be right to belittle what has already been achieved. It should be placed on record that the purely theoretical stage has been passed, that enunciation has become realization. A state which ratifies the Covenants is not necessarily prepared to allow an international authority to examine the entirety of its relations with its own citizens; but it is willing to agree with other states on a common policy towards individuals, and to consider the establishment of collective procedures for safeguarding the policy, which might even imply an interference in its internal affairs. All the elements for an efficient co-ordination in the field of

human rights between international and national authorities are thus now present.

It would seem likely that progress towards multinational protection of human rights will be more rapid on the economic, social and cultural front than on the civil and political front. Civil and political rights depend entirely on the will of individual states; the Covenant on Civil and Political Rights therefore calls on the contracting parties to grant such rights immediately and unconditionally, thereby accentuating difficulties in the transitional period and creating greater reluctance and resistance to the idea of surrendering state sovereignty.

Economic, social and cultural rights depend not only on decisions by the individual state, but also on outside factors, many of which are beyond the control of governments and even of nations themselves. Consequently, in the Covenant on Economic, Social and Cultural Rights, states agree that their policies will be directed towards the eventual enjoyment of such rights by the people living within their jurisdiction. For these rights to be universally recognized, therefore, states must take collective action to this end; this in turn will lead ultimately to the establishment of an international community based on justice with the vitality necessary to secure lasting peace.

Current events provide constant evidence, of an often negative and usually violent kind, that a vast, complex and well-established socio-economic system transcending national boundaries is a vital factor in achieving international stability. This implies a further derogation from the classical doctrine of sovereignty. In the world of today, however, this doctrine, under which each state is the sole judge of its own acts, is becoming increasingly unrealistic.

It is for this reason that, in line with present needs and prevailing thought, constitutions which have been promulgated or amended since the Second World War have subjected national sovereignty to limitations under international law and morals, for the sake of securing universal well-being and justice.

The Italian Constitution expressly declares¹ that Italy 'accepts, subject to reciprocity from other states, such limitations of its sovereignty as are necessary for the establishment of a system securing peace and justice among Nations'. In the same way, 'subject to reciprocity, France accepts such limitations of its sovereignty as are necessary for establishing and maintaining peace'.² Under the terms of its Basic Law,³ the Federal Republic of Germany, 'in order to

¹ Article 11.

² Para. 15 of Preamble (still in force) of 1946 Constitution.

³ Article 24(2).

preserve peace, ... may join a system of mutual collective security; in doing so it will consent to those limitations of its sovereign powers which will bring about and secure a peaceful and lasting order in Europe and among the nations of the world'. Under the Netherlands' Constitution, 'by or in virtue of an agreement, certain legislative, administrative and judicial powers may be conferred on organizations based on international law'.¹

There can be no doubt that a new era is dawning in which the law of interdependence will be supreme. It is already difficult enough for governments — if peace is to be preserved and a new lasting world order established — to look after the vital interests of their people without taking into account and respecting international interests. It can therefore be assumed that ratification of the *International Covenant on Economic, Social and Cultural Rights* will be a shorter and less arduous process than its negotiation. Nor should one be pessimistic about the general progress of human rights; indeed, it should be noted that the Universal Declaration is expressly recognized in the constitutions of some twenty new African countries.

Certainly, it will be of paramount importance also to undertake the extremely difficult and delicate task of streamlining the international machinery for implementing the Covenants, either by strengthening the United Nations Commission on Human Rights or, as has been suggested, by creating the office of High Commissioner for Human Rights.

It is hoped that on the twentieth anniversary of the Universal Declaration, the Peoples of the World will resolve to devote a further twenty years of effort and hope to the brotherhood of Man. Such a great movement will, no doubt, be — in Goethe's words — 'unhurried but unceasing, like the stars'.

¹ Article 60 g (as amended).

THE RIGHT TO AN EFFECTIVE REMEDY AND A FAIR TRIAL UNDER COMMON LAW

by

WALTER RAEBURN*

EFFECTIVE REMEDY

I. Prerequisites

1. *The Law Itself.* Unless the principles of the law are just, oppression by the favoured is certain. Recognising this inevitability, the common law stands firmly upon two familiar maxims, both of which are fundamental to every legal system which pretends to justice. The first, *pacta sunt servanda*, recognises the sanctity of agreements. No man shall have a right to go back on his word, to repudiate unilaterally what he has undertaken. The other, *restitutio in integrum*, provides the measure for making good the wrong which one man may have suffered at the hands of another. What he has lost is to be restored to him in equivalent value, no less and no more.

Such are the principles. How far effect is given to them in practice, how far indeed it is even possible to accord them full effect, it is one of the objects of this study to examine.

What follows relates to the practice in England, the cradle of the common law, alone. Scattered throughout the world are many common law states, some great, some small. In matters of detail there are numerous variations which cannot here be noticed. In broad principle, however, the law as it stands in England (Scotland is not a common law country) is characteristic of them all.

2. Machinery for giving effect to the Law

a) *Public Hearing.* With justice in general and the two fundamental maxims in particular always in mind, the experience of generations (as opposed to the mind of any particular lawgiver) has evolved a system of practice and procedure designed, so far as possible, to overcome the obstacles in the way of making the law work as it should do. Justice, it is repeatedly said, must not only be done; it

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must openly be seen to be done. The common law accordingly frowns on proceedings of more than incidental consequence (such as fixing dates for a hearing or determining how and when one party must show his hand to the other) which take place behind closed doors. The general public, and especially the press, are free to attend every trial or hearing. This is at once the most elementary and the most effective safeguard against abuse of judicial authority. No one perpetrating injustice can long survive the scandal of public exposure in the press. The conduct of a judge must indeed be beyond even suspicion. He risks castigation if what he does could possibly be unfair, whether or not it is so in fact. Should he be seen, for example, looking at a document which has not been made public, he could give the impression of allowing himself to be secretly prejudiced, even though that were far from the truth.

b) *The Judge*. Judges, therefore, under the common law, must be men (or women) of positively notorious integrity. It must be unthinkable that they could be influenced by personal considerations, still less by any form of bribery or corruption. On taking office, every judge and every magistrate publicly swears a solemn oath to do justice 'without fear or favour, affection or ill-will', that is, impartially, regardless of risk or advantage to himself, and whether or not he personally likes or dislikes any of the parties before him. But this oath is not the only precaution which is taken. Before he is selected for appointment, his personal character as well as his outstanding ability will be confidentially scrutinised by the Lord Chancellor. For this purpose, inquiries will be made into his acceptability to the heads of the existing judiciary; and if his professional behaviour in the past has been in any way blemished, this will weigh heavily against him. His professional success, as well as his conduct, will be an important factor. Judges under the common law system are not, as under other systems, a separate profession from the Bar. They are all men (or women) who have themselves practised in the courts for many years, and have attained eminence in that capacity. This is assumed to be some guarantee, not only of their experience and competence, but also of their sense of their judicial vocation; for the financial rewards of a large practice at the Bar will inevitably exceed even the relatively high salary which is paid to a High Court judge. At the same time, that salary will be substantial enough to place men, although they were of frailer will, beyond the temptation of corruption.

To mark the high regard in which such a judge is held, the dignity of a knighthood is always conferred on him. His absolute independence from pressure of any kind is assured by his being irremovable from office, short of unthinkably scandalous misconduct, until he reaches the extreme age limit. He is also expected

to hold himself very much aloof socially. To mix with all and sundry as he may feel inclined is looked upon as exposing him to influences and prejudices which might affect his impartiality. Somewhat ingenuously, it is apparently assumed that the select social circle in which it is respectable for him to move is above all prejudices! As a further outward demonstration of his untainted open-mindedness, he must also, on taking up his appointment, sever completely any political affiliations which he may have had before, whether or not he was already well-known as an ardent party politician. Justice must at all costs be seen to be done!

c) *The Jury*. For all these guarantees, there are cases in which it is still thought necessary to provide further safeguards for justice. An important one of these is the jury. Opinion as to the merits of that institution is by no means as enthusiastic as it was when judges, appointed by royal or political patronage irrespective of personal merit, were at times open to pressure and corruption.

The function of the jury is simply to find the facts to which the provisions of the law are to be applied. They have no right to be concerned with the consequences of their verdict. For centuries it was moreover considered just that unless their conclusion was unanimous, the law could not operate. As a shield against the scepticism of case-hardened judges, this was an admirable protection for the innocent. As a protection for the public against the plausible guilty and against the flouting of unpopular laws, it often broke down; so often, in fact, that trial by jury has for many years been limited to cases of major criminal offences and those in which personal reputation is at stake. The very requirement of unanimity has fallen into discredit.¹ It is considered to operate as an impediment to justice more often than as a factor in its promotion.

Quite evidently juries do repeatedly concern themselves with the consequences of their verdict, and in so doing, often substitute uninstructed and improvident sentiment for impartial ascertainment of truth. Yet, for all that, to abolish the jury altogether would be to leave the liberty and the reputation of persons wrongly accused at the mercy of judges whose very training tends to blunt their understanding of the odd and inconsequent ways of behaviour. In a modified form and in appropriate cases, the jury still has an important function to fulfil.

d) *The Rules of Evidence*. Jury or none, the true facts have to be ascertained before it is possible to apply the law. For this purpose, two main sources of information are sought: the word of witnesses

¹ It has, since this article was written, been abolished. A majority verdict of 10-2 may now be accepted if unanimity appears impossible.

and the production of documents. Under the latter heading, it may be convenient, if not strictly accurate, to include such 'real' evidence as fingerprints, weapons, stained garments and the like 'exhibits'. But the value of what witnesses say varies greatly, both with the truthfulness of the witness himself and with his source of knowledge. He can, if he is honest and his memory is accurate, speak definitely about what he has actually seen and experienced. He might also correctly repeat what someone else has told him, but which he does not personally know. Yet, however much he may believe it, he cannot guarantee that it is true. His own knowledge may be tested by questioning him. Not so, in the absence of his informant, what someone else has told him. Documents again, unless they are forged, speak for themselves. But if the original document is not produced, who is to know that what purports to be a copy is indeed a true copy or to check whether the original was genuine or a forgery?

There can be no effective remedy through the courts if, through slipshod methods of taking evidence, facts can be distorted. The common law has therefore evolved some strict rules, excluding everything from being even mentioned which is less than the best available evidence. These rules were developed at a time when all cases at common law were tried by jury, and on the assumption that juries could not be expected to distinguish between first-hand evidence and mere *hearsay*. As is the way with rules, they have in time become encrusted in technicalities. In the result, witnesses, to whom the information on which they acted is the very essence of their story, are bewildered when they are not allowed to say what it was. The suspicions of juries are also aroused that some part of the truth is being withheld from them. This may lead them to act on guess-work, which could be much worse than their being misled by *hearsay*; or in sheer indignation, they may react quite unreasonably against the party which, in observing the rules, seemed to them to be deliberately stifling the truth.

So here again, what was evolved to ensure justice may have grown into an instrument of injustice. Now especially, when most cases other than criminal are tried by professional judges, capable of weighing the relative value of evidence of different kinds, it could well be that the rules of evidence, for all the protection they are designed to afford, could be relaxed. In principle, however, they remain sound. To discard them altogether would be to throw away one of the most precious and typical safeguards provided by the common law.

e) *The Accusatorial Method*. Equally with excluding evidence which could be misleading, it is necessary to test the reliability of the evidence which has been admitted. Under the common law system

this is a function of the Bar. The demonstrable impartiality of the judge is considered to be compromised if he permits himself to descend into the arena and perhaps appear to be taking sides by challenging the truthfulness of the witnesses. As a former skilled practitioner himself, he could easily become involved in that way if he did not rein himself in and confine himself at that stage to watching and listening in silence.

Counsel (that is, the barrister) who offers the evidence of his client or any supporting witness, will guide the witness through what he has to tell. He will not, however, put any words into his mouth. Were he to do so, no one could know how much was the witness' own recollection and how much was really what he was being prompted to say. It is then the turn of counsel for the other party to 'cross-examine'. This consists of putting questions designed to test the accuracy of what the witness has said, perhaps because it can be shown to be inconsistent with some document or with what the same witness has already said or with the opportunity he had of noticing what he says he saw or heard. Counsel may also try and elicit from the witness, without necessarily attacking his truthfulness, further facts which may help his own client's case. After this, counsel who called the witness may again guide him towards amplifying anything extracted from him which, unexplained, could be misleading, and correcting any other misunderstandings. Lastly, the judge himself may have questions which he wishes to ask, preferably only to clear his mind (or the minds of the jury, if there is one) on any points which have been left in the air. He will generally be wise to wait until that juncture, although he has a right to put questions of his own at any stage.

Having sifted the evidence and made up his mind as to what in fact happened, it is then for the judge to draw his conclusions as to who, as the law stands, is entitled to what. Under common law, as under most other civilised systems, it is the party who asserts a right that must prove his case. In the absence of evidence, nothing is presumed to the prejudice of the party who is accused of a wrong, whether a breach of contract, a civil injury or a crime. In any case other than a crime, where the accusation has to be proved to the point of certainty before guilt can be established, a doubt must be resolved on a balance of probabilities. This rule of procedure assures, so far as is humanly possible, an effective remedy for every genuine grievance, while shielding the blameless from false claims.

f) *Stare Decisis*. Ultimately, of course, the dividing line between right and wrong is one of law. The facts merely determine on which side of the line the respective parties stand. The common law is subject to no code. While it is not therefore shapeless, it is flexible.

It is adaptable to every change in the social structure and the consequent re-orientation of human relationships which is always in progress. In such an apparent lack of system there lurks the danger of uncertainty, the greatest of all dangers to any peaceful social order. Where the citizen cannot know whether what he proposes to do will be lawful or not, he will please himself so far as he dare, and the rule of law will break down. The safeguard against this under the common law is the rule of *stare decisis*. Every new decision establishes a precedent which becomes a part of the law itself unless and until corrected by higher authority. It is true that a court of co-ordinate jurisdiction is not bound to follow it. But in the interests of uniformity, it will sooner do so, while encouraging an appeal, rather than introduce confusion into the law. This freedom to expand and develop in step with changing circumstances is perhaps the most significant of all the contributions which the common law is able to make towards assuring to an aggrieved party an effective remedy in the courts, however novel the situation in which he has suffered a grievance.

II. Shortcomings of the Common Law

I. *Economic Pressure.* In theory, every wrong has its remedy, and there is machinery for giving effect to it. In practice, the gibe that the law, like the Ritz Hotel, is open to all, has in it a touch of cynical truth. The very affluent and the absolutely impecunious alike enjoy an advantage over everyone else. The former can, and sometimes do, afford to litigate from court to court until the hitherto victorious but less monied opponent is forced to surrender his rights from sheer financial exhaustion. The latter can similarly wear down the resources of an opponent by throwing on him the burden of all the costs involved in establishing his legal rights. Where the loser can be shown to be without assets within reach, the court will curb this last-mentioned abuse beyond the first instance by ordering a sum to be deposited as 'security for costs' as a condition of permitting an appeal.

But this gives only a partial protection. The sum which the court will fix will never be so large as to make it quite impossible for the would-be appellant to find it, and will seldom be enough to cover what it will really cost the other party to contest an appeal. To even out some of these inequalities, provision has been made for what is called 'legal aid'. This amounts, in effect, to a subsidy out of public funds to supplement what a litigant of small means or none at all can reasonably afford to spend in pursuing or defending his rights in the courts. But even this does little more than alter the

level at which justice is inhibited by economic considerations. It does, it is true, give an effective remedy in the courts to great numbers who would otherwise have been debarred from one by want of means. At the same time, however, it places at an almost prohibitive disadvantage anyone with just sufficient means to exclude him from its benefits. Such a person, finding himself sued by an adventurous litigant with a plausible case and no assets of his own, will have to defend himself out of his meagre resources against an opponent formidably represented, thanks to the support of a public subsidy. Thus, even if he wins his case, he will have poor prospects of recovering more than at best a modest proportion of what he will have had to spend in costs.

Many business men, too, find it less unprofitable to submit to injustice and let wrongs go unchallenged, than to disrupt the routine of their business while they and often their key executives have to take what may be days away from duty attending court while their case is in the list for hearing. An alternative is occasionally to submit a dispute to arbitration, when sittings can usually be arranged to meet the convenience of the parties. But even that advantage is frustrated where the losing party, dissatisfied with the award, insists on attacking it in court. Once there, it may again go up on appeal and even further appeal.

2. *Dilemma, where the Innocent suffer while the Guilty escape.* These difficulties are not, of course, peculiar to the common law. They are familiar under any known system. All that must be said is that, with its many merits, the common law can claim no special advantage in this regard. The same applies to the dilemma in which the court is so often placed where its decision, whichever way it goes, must cause undeserved hardship, where one or other of two innocent parties has to bear the loss consequent on the fraud of some rogue who has vanished out of reach or who has dissipated his ill-gotten gains. The law again is helpless under any system to make effective restitution to a family which has lost its breadwinner through the negligence or the crime of another, more especially if want of means or failure to insure on the part of the wrongdoer makes even monetary compensation unobtainable. Nor can it do much more than merely shelter from further harm children whose home has been broken up through the selfish waywardness of a parent, and too often of both parents, or a child born out of wedlock whose father cannot be identified or has chosen to decamp. The perversion, too, of the course of justice by the intimidation of essential witnesses, whether by blackmail or by threat of violence, is a social evil, where it occurs, which of its very nature defeats any law.

3. *Private Remedy postponed to Prosecution.* Some weaknesses there are nevertheless which are peculiar to the common law itself. One of these is the rule, founded on public policy, that, with minor exceptions, the victim of a wrongful act which is also a serious crime, must wait for his private remedy until the wrongdoer has stood his trial in a criminal court. The reason for this policy is the fear that the recovery of damages in respect of the civil wrong might operate as hush-money, and so frustrate a successful prosecution for the crime. Equally, the threat to the wrongdoer of exposure in the course of a civil action could be a means of extorting a sum in settlement out of court far in excess of what should justly be payable. Granted unscrupulousness on the part of the victim or even great weakness in the face of temptation, all this could doubtless happen. But were the common law to relax the rigid distinction which it makes between criminal and civil proceedings, this danger might be avoided. A criminal court, as is done elsewhere, could award full damages in favour of the victim when passing sentence on the wrongdoer. True, the latter may not have the means to pay. But in such case, neither could he meet his liability under a civil judgment. The victim would have at least been saved the costs of suing him.

4. *The Doctrine of Consideration.* Among other weaknesses in the common law in assuring an effective remedy is the occasional effect of the doctrine of *consideration* and perhaps also the absence of such doctrines as those of *acquired rights*, *undue enrichment* and *fraud on the law*. These raise issues so controversial that a full discussion of their merits would not here be appropriate. All that can conveniently be said is that a doctrine which discards as unenforceable, unless supported by some *quid pro quo*, undertakings given in apparent good faith does not always accord with the maxim *pacta sunt servanda*. It involves in effect a restricted meaning of the word, *pacta*, which in some cases might not be consistent with human rights.

As regards the civil law doctrines which have been mentioned, while the common law knows no precise equivalent of any of them, much of their beneficial effect is secured by the doctrines of equity, to which for about a century the common law has been expressly subject. These doctrines, in fact, apply with such subtle flexibility that they often provide a remedy in the courts more effective even than would those doctrines which are missing from the common law.

FAIR TRIAL

I. What is fair?

1. *Finding the Truth.* From the view-point of human rights, there is a natural tendency to think in terms of an innocent person, falsely accused, who is denied the opportunity of clearing himself because of prejudice or cynicism or ruthlessness or a policy of deliberate victimisation or even personal spite. Brought, however, into proper focus, the purpose of a trial in a civilised community is not to make a public demonstration of communal solidarity against persons who have incurred official disfavour. Nor, on the other hand, should it be assumed that everyone who is prosecuted has been wrongly accused. A trial is only fair if it ensures both that no one who is wrongly accused will be convicted and that no one who is justly accused will be acquitted. It is to this end that the machinery of criminal justice should ideally be adjusted. Neither sympathy, nor cold detachment, nor preference, nor prejudice is to the point. What alone matters is to arrive at the simple truth.

2. *Evolution of a Method.* Very slowly, the common law has devised the methods which are practised today. Many cruder methods have been tried. In early times, the parties would produce their 'oath helpers', and those who could muster the greatest number to support their cause were held to have proved what was the truth. Then the test was by ordeal or by combat, leaving it to divine demonstration to reveal who was in the right. Trial by jury, in its primitive form, was intended to establish innocence or guilt according to the reputation which the accused had acquired amongst his respected neighbours. Torture was for a long time favoured as a sure way of extracting information which (to use an anachronistic euphemism) would 'assist the police in their inquiries'. Even within living memory, an accused person was not permitted to give sworn evidence on his own behalf. The original reason for this was that the temptation to commit perjury in such circumstances was so overwhelming that his soul should not be exposed to such certain damnation. In later and more cynical times, it was felt that sworn evidence given under such pressure would be of little value. It would only tend to mislead a jury where the man was really guilty, and to make them unfairly sceptical when he was not. The theory was that he was far better off in a position in which he could neither say what might be disbelieved nor be asked embarrassing questions in cross-examination, from which, not having taken an oath, he was also protected.

3. *The Presumption of Innocence.* These historic experiments in fact-finding having, one by one, been superseded the common law has evolved certain principles on which to proceed, in seeking the truth with the minimum risk of abuse of authority. The first is, of course, the familiar principle of the presumption of innocence. Not only has guilt to be strictly proved by independent evidence before there can be a conviction, but no man can be made to answer any question which would convict himself of a criminal offence, unless and until he has voluntarily tendered himself as a witness at his own trial and has taken an oath to speak the truth. He may, if he does so absolutely of his own free will, and without any threat, promise or other inducement from anyone in authority, incriminate himself in a statement he may choose to make, and he may, if he thinks fit, convict himself at his trial by 'pleading guilty'. But guilty or not, if there is any indication that he has incriminated himself under official pressure of any sort, his conviction will be quashed.

4. *Urgency.* Another characteristic feature of a trial at common law is urgency. 'The liberty of the subject' takes precedence over every other business of the courts. No one is kept in custody awaiting trial a day longer than the minimum period necessary for preparation of the case against him and of his defence. He will then be brought before the first available court with jurisdiction to try the case. Unless the crime charged is of the utmost gravity or there is good reason to suppose that he may escape or be a danger to the public or may interfere with the witnesses, he will almost certainly be released on bail pending his trial. When and so long as he is detained, every facility is given to his legal representatives and advisors to see him.

5. *Restrictions on Interrogation and the Burden of Proof.* Strict rules control the circumstances in which he may be questioned by the police while under suspicion and the very restricted limits to which they may go. The rules of evidence (already noticed) are even more meticulously observed in a criminal trial than in other proceedings. Furthermore, before he need say a word in his own defence, the case against an accused man must be proved by the prosecution so thoroughly that, unless he can dispel the impression, his guilt seems evident. The judge must indeed make it perfectly plain to the jury that an acquittal must follow, whatever they may suspect, unless the evidence has left them absolutely convinced of guilt. Otherwise a conviction will not be allowed to stand.

6. *Concealment of Bad Character.* What to observers unfamiliar with the common law sometimes seems an almost quixotic rule is the provision which protects a criminal past from being so much as

hinted at to a jury, until they have made up their minds, on the evidence relating to the immediate charge, whether the accused is guilty or not. If, however, he has never before been convicted of an offence, his so-called 'good' character (which may often mean no more than that he has never before been caught and charged) may be exploited in his favour to the utmost! Common sense does, however, lurk behind this apparent illogicality. The prejudice which the knowledge of a previous bad record could create against a man who might happen to be innocent on this occasion is out of all proportion to any undeserved advantage that another might gain by making the most of an officially unblemished past. If, however, the accused tries to claim a good character when in fact he has a criminal record, then, at the discretion of the judge, he will forfeit his immunity and the jury may be told all the facts.

7. *The Right of Challenge.* A further privilege which is enjoyed by an accused man on trial is the right (which the prosecution may also exercise) to challenge seven out of twelve jurors without giving any reason, and thereafter as many more as he can give good reasons for challenging.

8. *The Right of Silence.* The accused may also make his own choice between the risk of giving sworn evidence and then being cross-questioned on it, and on the other hand declining to take the oath and securing (as was the former practice) immunity from being questioned. By choosing the latter course he may be risking the inference that he has something to hide which he dare not chance being brought to light; or he may very wisely, without saying a word, simply leave the case for the prosecution to fail on its own weakness.

9. *The Right to the Last Word.* In addition, the accused has the advantage, by himself or through his counsel, of being the last to address the jury before the judge, in what is called his 'summing up', directs them on what the law requires the prosecution to prove and how far the evidence given may tend to establish or to negative that.

10. *Separation of Verdict from Sentence.* An important feature of a trial at common law is the complete separation of the verdict from the sentence. Even in what is called a 'summary' trial, that is to say, a trial in a magistrates' court on a minor charge, where there is no jury, a finding of guilt must be publicly declared before a question of sentence arises. Where graver offences are tried, the verdict of the jury concludes their function. The sentence is a matter solely for the judge. Only in what used to be capital offences is a life sentence obligatory. In every other case, a maximum

sentence is prescribed, up to the limit of which the judge has theoretically a complete discretion in fitting punishment to crime. With very few special exceptions (such as certain traffic offences and revenue frauds), the judge may be lenient to the point of discharging the offender altogether. In practice, the gross inequalities to which this can lead, according to the punitive or indulgent attitudes of individual judges, are to some extent curbed by the appellate court's decisions on whether or not a specific sentence erred 'in principle'. In no circumstances has the prosecution any right even to suggest what should be the proper sentence. The only outside hint which is tolerated is a tactful 'recommendation to mercy' by the jury. But no more. The jury may not say what degree of clemency they have in mind. Nor need the judge heed their recommendation. Nevertheless, if a jury should disapprove of the punitive policy of the courts (or even of the law itself) in respect of certain offences, no one can hinder their acquitting, by way of protest, quite obviously guilty people. An acquittal by a jury is absolutely unappealable; and despite the oath they will have taken, a jury cannot be assailed for such a verdict, however perverse. That acts as a strong disincentive to over-severity by any judge.

II. Weaknesses in the System

1. *Uneven Scales of Justice.* A hackneyed principle of English justice is the saying that it is better that ten guilty men should escape punishment, than that one innocent man should be wrongly convicted. As a pure choice of evils, this may be sound. But no such choice ought ever to be postulated. Of course no one should be wrongly convicted. But equally, no guilty person should escape justice. If the protection of the innocent can only be secured at the expense of releasing the guilty, there is something amiss with the system.

The accused has so much in his favour: the presumption of his innocence until proved guilty, the restrictions on interrogation by the police, the right to challenge individual jurors, the concealment of past bad character, the right to choose whether or not to give evidence, the right to the last word. Even the requirement that the judge must direct the jury impartially, reviewing for them as fairly the evidence for the one side as for the other, and always reminding them that they must acquit unless the prosecution has left them without a reasonable doubt, can (if so strictly carried out that the jury cannot guess which way the evidence has impressed the judge) sometimes raise in their minds the very doubt as to the guilt of the accused which they never felt before.

2. *Risks in Identification Cases.* On the other hand, it is not easy to see which of these possible obstacles to justice it would be right to remove. Very often, indeed, when the facts of a serious crime are not in dispute at all, the only issue is whether or not the accused has been rightly identified as the man who committed it. Care is always taken, wherever possible, to check the evidence of witnesses who profess to be able to recognise the man. The accused is paraded with some eight or nine men of roughly similar appearance, in order to see if the witness can pick him out. Elaborate precautions are taken to make this test a reality, and it is sometimes very convincing. Yet even so, it is open to error or abuse; and without the other safeguards already noticed, there is a serious risk that innocent men might be convicted.

3. *Unrepresented Accused.* Another somewhat surprising respect in which the common law seems to be actually less protective to a man on trial than do other systems is the fact that it quite frequently happens that the accused is left throughout the proceedings without legal representation of any kind. In practice, this sometimes works to his actual advantage. Prosecuting counsel in such cases regards it as his duty to be most meticulously fair in everything he says and does, to avoid even the appearance of taking advantage of an unrepresented man. It is indeed the tradition that counsel for the prosecution, whether the accused is represented or not, should never strain for a conviction or seek to 'win' the case. His task is simply to present the case for 'the crown' dispassionately to the court. Moreover, where the accused is not represented, the judge himself will tend to help him to put his defence properly before the jury. It is also in the discretion of the judge to allot counsel to the accused at public expense, wherever he feels there might be a risk of justice miscarrying. This is in fact more and more commonly done. But it is still not the universal right of the accused. Such last minute assistance, too, improvised as it must necessarily be, is not always a boon.

4. *Questionable Benefit of Publicity.* Lastly, it remains debatable how far the publicity given to criminal proceedings from the very start is of advantage either to the accused himself or to the cause of justice in general. The protection against secret brow-beating and other irregularities, which it is designed to give by justice being thus seen to be done, may well be outweighed by the prejudice that is engendered. Sometimes every reader of the national press is given the sensational, and even gruesome, details of what the prosecution are proposing to establish, often without as much as a hint before

the actual trial of what the defence can be.¹ It is then thought that jurors, when the time comes, will approach their task with their minds already made up. That may be so. But anyone with experience of listening right through to criminal proceedings, knows how differently evidence strikes the mind which has to hear both sides. The impact of realising that there is another aspect to the story often comes with the greater force for the mind's having previously shut out the very possibility of there being any such aspect.

CONCLUSION

The common law cannot be and does not claim to be flawless where human rights are concerned, either as regards an effective remedy or in respect of a fair trial. Its great merit is that it has not only evolved in step with current conceptions of justice in each age, but is still continuing to do so. Codified systems are also, of course, subject to periodical amendment. But especial care has then to be taken not to put them out of gear. The common law has the advantage of having no rigid form. It is therefore more easily adaptable. That this is so, can be seen by the many adaptations which it has undergone in the different countries in which, in one form or another, it has taken root and continues to grow and flourish in conformity with the genius of the people who respectively apply it. The common law is not a machine. It is a living organism.

¹ Since 1st April 1968, the proceedings at the preliminary investigation into a case cannot be reported in the press unless the accused requests otherwise. This new rule is designed to minimize the danger referred to, but it has been criticised as being discriminatory against the press.

THE RIGHT TO EDUCATION AND CULTURE

by

MOHAMMED EL FASI *

The wars in the world today, the destitution of hundreds of millions of people, the ignorance and illiteracy prevailing in most of the developing countries and the countless injustices still to be found everywhere must justify a feeling of despair as to the fate of humanity.

However, man has lived with these conditions since his creation; and in spite of them, he has made considerable intellectual progress, on which great optimism for his future should be based. The fact that representatives of nearly all the nations of the world are parties to the *Universal Declaration of Human Rights*, proclaimed almost twenty years ago, provides striking evidence of this progress.

There is still, it is true, often a wide gap between adherence to the Declaration's principles and their application. However, the Preamble itself states: 'The General Assembly proclaims this Universal Declaration of Human Rights as a *common standard of achievement* (my italics) for all peoples and all nations...' It is already an encouraging sign that leaders of the different governments in the world, with their various ideologies and religions, should have accepted that their recognition 'of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

I think that this first premise of the Universal Declaration of Human Rights is the essence of that great deed, in which man has put his seal upon the attainment of his future happiness. The rights which everyone without distinction should enjoy derive from the recognition of the dignity inherent in all the members of the human family. The rest of the Preamble and the thirty articles of the Declaration merely develop this basic principle and outline the various rights essential to the dignity of man.

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In *The United Nations and Human Rights* (a United Nations publication), these rights have been classified under four headings: The Family, Work and Leisure, Education and Social Life. Clearly, none of these takes priority; they are all equally necessary. Man cannot forgo one or two of them and continue to enjoy the others. Each, however, has its own importance and makes its peculiar contribution to man's dignity and therefore to his happiness. While freedom is the essential condition for the enjoyment of the other rights, it is education that plays the greatest part—to use the words of the Declaration — in the 'full development of the human personality'. It is the key to all development, allowing man to see the rights that are his and showing him how to make use of them.

The right to education is defined in Article 26 of the Declaration:

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

This Article requires governments to give every individual the opportunity to acquire knowledge and to provide the necessary facilities. Education shall, moreover, be free. Unfortunately, this requirement is limited to elementary and basic education; in this respect, the Declaration falls short of the practice in many countries—even some of the least developed, where secondary and sometimes higher education are free. For instance, in my own country, Morocco, education is absolutely free—from the primary school to the University.

However, the great problem concerning education, especially in developing countries, is the lack of means—especially of government grants. There is not so much a shortage of men, as is generally thought, but of funds. With money all the teachers necessary can be trained, though there is a time factor to be taken into account as far as the higher staff are concerned. This is not a handicap, however; long term planning can ensure training of professors for young universities which at present engage foreign staff, provided that there are sufficient funds. It is here that can be seen the duty the privileged and developed countries owe to the human community. This is the central theme of our time. It is not enough

to proclaim lofty principles if they are to remain a dead letter because the means of implementing them are absent. There is however a ray of hope: the great Powers are beginning to realize the dangers confronting humanity that result from the disproportionate development of the rich and the poor countries. The economic and social development of the poorer countries has thus been put on the agenda of all governments. This is an immense undertaking demanding courage, understanding and effort.

Article 26 of the Universal Declaration provides that elementary education shall be compulsory. It is difficult to see the force of this provision since, in all developing countries, the one desire of parents is to send their children to school, while in the others, every child is given an adequate education. It is a survival from the attitude prevailing in Europe at a time when the wealthy refused to help finance free elementary education for all. There, legislation requiring compulsory and free elementary education was only obtained after a long struggle. In mohammedan countries this obligation is meaningless; for education is not only a right but a duty deriving from the tradition of the Prophet Mohammed: 'It is the duty of each moslem man and woman to seek knowledge.' Islam was the only community to proclaim this concept. It is of the utmost importance in societies where government effort in the realm of education sometimes fails to arouse sufficient response, especially amongst rural populations with outdated manners of life. The appeal to this moral duty, often invoked by leaders in moslem countries to encourage illiterate adults for example to follow the special courses organized for them, is a great help in their literacy campaigns. This tradition of the Prophet was even inscribed in gold letters over the entrance-hall to the World Conference of Ministers of Education in Teheran, organized under the auspices of UNESCO in September 1965, at the invitation of His Majesty the Shah of Iran.

One of the reasons behind the obligation to provide elementary education was to encourage the ruling nations to open schools in the countries under their domination. Unfortunately, it remained inoperative in the colonized countries. This explains the backwardness of peoples who have only come to independence in the course of the last ten years. The marked progress that some of these have made is due to the fact of independence; examples of their laudable efforts are numerous. I am familiar with one of these, since I was personally involved. As the head of the first Ministry of Education after Morocco became independent, I had to deal with the major problem of schooling. At the time of the French Protectorate, the number of school-going children in Morocco was fifteen thousand a year. This figure was of particular relevance in

the last ten years of the Protectorate (from 1945 to 1955). During that period, the Protectorate authorities decided to accelerate their educational policy to combat the movement of the Istiqlal (Independence) Party, which, aided and encouraged by the hero of the Moroccan nation, Mohammed V, was building private schools of its own. These were naturally regarded by the authorities as incubators of nationalism. Their inauguration by the late Mohammed V was always an occasion for great celebrations, which the Protectorate authorities viewed with a disapproving eye. They believed that by opening free schools they could win the population's favour and draw it away from the private and paying institutions. But such was the thirst for education that every school was full. This was what prompted the educational department of the authorities to increase the number of schoolchildren from 3 to 4,000 a year to 15,000.

After independence, the efforts of Mohammed V in favour of education for all, which he considered to be the source of all progress, were as strong as before; and the population's response was enthusiastic. In the space of two years, I was able to provide schooling for half a million children. Education developed similarly in all the countries that were free to manage their affairs themselves, for themselves, after independence. As I have already said then, the condition precedent to the enjoyment of all human rights is freedom, and above all national freedom—independence.

Further comment is necessary on the provision of Article 26 which states that 'technical and professional education shall be made generally available'. What is the reason for this provision? It supposes perhaps that everyone must have an elementary technical knowledge in view of the technical nature of modern civilization. This does not seem a valid assumption. Some children have not the slightest aptitude for this kind of education. For others, a superficial understanding in this field would be useless. Still others, preparing for careers for which a knowledge of the human sciences alone is required, would lose valuable time in technical and professional courses, when they could be acquiring necessary and useful knowledge for their future occupations. The Article could mean that no one should be deprived of technical and professional education if, for various reasons, he cannot follow scientific and literary courses. However, this would overlap with paragraph 3 of the Article: 'Parents have a prior right to choose the kind of education that shall be given to their children.'

The interpretation of this provision given by the United Nations' publication referred to earlier is that professional schools should be open to those desiring to learn a trade. Apart from the fact that this simple explanation is not warranted by the words

used, it adds nothing to the basic principle of this Article that: 'Everyone has the right to education.'

Article 26 clearly establishes that higher education shall be equally accessible to all, but qualifies this right by adding 'on the basis of merit'. Since it provides no criterion for judging merit, it opens the door to arbitrary decision. In fact, universities and higher education institutions the world over already have definite rules for the admission of students on the basis of certain standards. The words 'on the basis of merit' are therefore superfluous.

Paragraph 2 of Article 26 sets out the function and objectives of education. It emphasizes the role of education in the maintenance of peace and the promotion of understanding among all nations. This is a natural and necessary provision in the Declaration of an Organization whose aim is to build a common future for humanity. Since this future lies in the hands of the rising generation, children must be taught to be tolerant and to appreciate the cultural values, civilizations and habits of other peoples, although they differ from their own. The aim of education must be to instil these ideas in children and to train them to respect and understand others, with a view to promoting friendship 'among all nations, racial and religious groups'. Since the United Nations Organisation is the guarantor of these principles, education must also seek to bring about an understanding and appreciation of its work for the maintenance of peace. It is encouraging to see that in many countries schools have courses relating to these principles.

Nevertheless, this paragraph fails to lay sufficient emphasis on the many advantages that education offers to the individual and the various facilities that it provides to improve his existence and develop his intellect. It merely states that 'education shall be directed to the full development of the human personality'. However, the statement of this general principle does explain the great potential that education has for the furtherance of man's well-being. Education, as has been said, is the key to all development. It is satisfactory to note that this is now recognized by all who are responsible for financing development, thanks to UNESCO. Development is, fortunately, no longer considered to be purely a matter of investment in different economic sectors, industry, agriculture, public works and similar activities. It is first and foremost the development of man; and this can only be realized through education.

This was ably stressed by His Holiness Pope Paul VI in his Encyclical of 19th April 1967, *Populorum Progressio*. He stated: 'Development cannot be expressed merely in terms of economic growth. If it is genuine, it must be integral: it must enhance every

man and the whole of man.' Commenting on this statement, Mr. René Maheu, the Director General of UNESCO, said:

The moment that it is realized that development has no meaning outside man, that it is by him and for him, it can be seen that education, science and culture are the beginning and end, the driving force and *raison d'être* of development in its essence... Education, which is preparation, Science, which is discovery and explanation, Culture, which is criticism, and assimilation, describe the phases and decisive aspects of the intellectual process. They are therefore to be found at the source of the on-flowing course of development. Everything begins with education, for neither nature nor society can be made to serve their useful purpose without it. This is the reason for the priority which it is universally accorded.

A great effort has been made since the adoption of the Universal Declaration, both on the national level and on that of the United Nations, to implement the great principles it proclaims. Conferences have been held, study sessions organized, special committees set up in the United Nations Organisation and conventions adopted. Action in favour of education has included the survey of discriminatory measures in education submitted to the Sub-Committee on Prevention of Discrimination and Protection of Minorities, various studies on the access of women to education undertaken by the Commission on the Status of Women, in collaboration with UNESCO and the ILO, and the Convention and Recommendation of UNESCO on discrimination in education.

If the principles and recommendations in the Universal Declaration are to be effectively applied, it is becoming urgent for the privileged nations to study the expansion of education in the world more seriously. In his address to the World Congress of Ministers of Education on the Eradication of Illiteracy referred to above, His Majesty the Shah of Iran suggested that every country should assign one day's expenditure on its military budget to a world fund to finance the literacy campaigns sponsored by UNESCO. Iran itself transferred a sum which, for a developing country, was considerable, to UNESCO towards the establishment of such a fund.

It is regrettable that, two years after this proposal by the Shah, only four countries, Mali, Morocco, Tunisia and Senegal, should have followed Iran's example. It is hoped that the appeal launched on the 7th September 1967, the eve of World Literacy Day, by the Committee set up by the Director-General of UNESCO to advise him on this essential activity—the World Campaign for the Eradication of Illiteracy—will be heeded by all governments and international organizations, and that they will take an active part in this work, on which world peace and the well-being of humanity depend.

The world has recognized the right to education and has attempted to make it a reality, although far greater resources must still be devoted to it. The right to culture, on the other hand, has encountered reticence, especially in relation to the right of minorities to use their language.

Article 27 of the Universal Declaration states: 'Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.' It adds: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

Article 22 also refers to the cultural rights of everyone which are 'indispensable for his dignity and the free development of his personality'.

No mention, however, is made of the right of everyone to enjoy his national language and to use it for his education and cultural development. This omission is to be regretted, since the tension in certain areas of the world is due to linguistic differences. The claims to official recognition of their language by large minorities in countries such as India, Canada, Belgium and the Swiss Jura (where the question is at its most alarming, infecting relations between citizens of the same country) illustrate the urgency for United Nations' action in this field. It cannot be contended that to discuss such matters would be to interfere in the domestic affairs of sovereign states. The task of the United Nations is not to consider specific cases, but simply to lay down the principle of this natural right, which is as essential for the free development of the human personality as is the right to education. It would thus help opponents who are often blinded by the emotions that these virulent conflicts engender to resolve their differences.

Apart from this aspect, the right to culture is recognized and indeed given priority in most countries. The development of cultural relations among the countries of the world is a sign of our times. This is, I think, due to the efforts of the United Nations, especially of UNESCO. This Organization promotes cultural exchanges by various means. Its major project for cultural intercourse between East and West has substantially contributed to an understanding between peoples of different cultures and civilizations. Its publication of oriental classics and their translation into widely-spoken languages has certainly helped to consolidate world peace, the essential purpose of UNESCO's work.

While much remains to be done to give the universal right to education its pre-eminent place in the world, undeniable progress has been made in the dissemination of culture.

It is hoped that the twentieth anniversary of the Universal Declaration of Human Rights will encourage all who are responsible for the destiny of mankind to renew their efforts in the cause of freedom, justice and social well-being for everyone, so that the world may benefit from a lasting peace.

THE RIGHT TO SOCIAL SERVICES

by

TERJE WOLD*

I. Introduction

Social Rights compared with Civil and Political Rights

A distinction is usually made between the civil and political rights of the individual as a citizen and the economic, social and cultural rights of the individual as a member of his community. When, almost two hundred years ago, the great new ideas of freedom broke through in Europe and North America, it was personal freedom and security, equality before the law and civil and political rights for all which were in the minds of the peoples and nations. Today, the fundamental character of these rights is universally acknowledged. Of course, opinions may differ as to their nature, origin and scope; and their content is not static, for they are subject to the law of a changing society and must meet the needs of a free community at every stage of its development.

Our concept of freedom has a wider and deeper content than that of our forefathers, but the basic principles, which form the foundation of our civilization, are the same. It is now generally accepted that we have reached the stage where civil and political rights can be defined and set out in legal provisions binding upon all the members of the United Nations. The next and final step is the implementation of those rights in the world community as a whole and the establishment of international organs to control and secure the observance of these basic human rights and punish violations—whenever and wherever they take place.

Progress has not advanced so far in the field of economic, social and cultural rights—especially in that of social rights. There is, it is true, at the root of every organized society a feeling of common social responsibility. The members of each community live together, subject to the same geographical and climatic conditions, sharing the same culture and experiencing by and large the same joys and misfortunes, the same hopes and disappointments. As a result, there has throughout the ages been a feeling of solidarity among all the

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members of a community; but the idea of social services as a human *right* is of very recent origin—it dates, for the most part, from the end of the Second World War.

Social Services compared with Public Services

Social services must not be confused with public services. In every community certain services are made available to the public: railways, roads, postal and telephone services, electricity, gas, lighthouses and harbours, to mention only a few. Some are gratuitous, others require payment; some are more advanced than others, depending on the stage of development in a particular country. Their aim is to ensure the best possible functioning of the community and to make the day to day work and leisure of the inhabitants as easy as possible. They are most necessary for maintaining and increasing the production of the community.

Social services—the provision of medical help and treatment, an adequate standard of living during unemployment and old age pensions, for example—incidentally often serve the same purposes as the public services, but their foundation and immediate aims are different, for they are based upon the solidarity of all the members of the community.

Social Services at the National Level

The extent of the social services provided depends not only upon the degree of development, the social solidarity and the resources in a particular country, but also upon the economic and social policy which the country adopts as to how it will use its national resources. In democratic countries, social solidarity has, throughout the generations, steadily grown stronger and the social services have increased more and more rapidly.

In my own country, Norway, from a very modest beginning one hundred and fifty years ago—when the individual was left almost entirely to himself and his situation and needs were only to a very small extent considered to be the community's concern—the social services have developed on such a scale that every citizen can now be said not only to have personal freedom and security but also to be safeguarded against fear and want and to be guaranteed a standard of living sufficient to ensure his health and well being and that of his family; and he has these services as of right. Of course, this situation was only brought about by hard work and planning over a considerable number of years, and its real momentum has only been realized since the end of the last World War in a period of full employment.

It is not possible to lay down hard and fast rules as to what proportion of a country's national income should be at the free disposal of the citizens and what proportion should be devoted to social ends. This must be decided by a democratic government at each changing stage of the country's development. The luxury of today may in a few years' time be considered a need which the social services have the duty to provide. The aim of social justice is to see that social services are recognized as a human right. This means that governments are bound to secure for everyone the highest standard of living that a country's resources can afford at any given stage of its development. Today, it can probably be said that this human right is recognized and realized in many modern welfare states.

So far I have only dealt with social services within the separate countries. Every state today considers itself to have absolute jurisdiction over how much of its resources are devoted to the social wellbeing of its own citizens. In the interval between the two wars, the International Labour Organisation made what are now regarded as social rights an international issue. Social services were built up throughout Europe and to a substantial extent on other continents, very largely as a result of the stimulus from the I.L.O. and on the basis of its standards. Until the last World War, however, the solidarity in the field of social rights did not go much further than the national boundaries, and even there the provision of adequate social services was often not considered a human right. The situation is different today, so much so that many countries allow the right to social services to be the subject of a legal claim.

International Recognition of the Right to Social Services

Before the last World War, few countries recognized social services as a national right; still fewer, if any at all, considered them to be a *universal* human right. It was a great achievement when in 1948 the General Assembly included social rights in its Universal Declaration (in Articles 22 and 25). Article 25 provides for social services in the following terms:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and social services, and the right to medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

This right belongs to all irrespective of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2).

The fact that these social rights were proclaimed 'as a common standard of achievement for all peoples and all nations' has had a powerful influence upon public opinion and general thinking throughout the world. Today, it may be said that the principle of social rights has been universally accepted.

II. The Development from a Declaration to a Treaty Provision

The principles of social justice were recognized in the Universal Declaration. Since these principles were not legally binding, the United Nations had the arduous task of transforming them into binding treaty provisions; finally on December 16, 1966 the General Assembly by unanimous vote adopted two separate covenants (or treaties) on human rights—the one on economic, social and cultural rights, the other on civil and political rights.¹ These covenants will enter into force three months after 35 states have ratified them.

It was found necessary to adopt two covenants, since civil and political rights could be secured immediately, whereas adequate economic, social and cultural rights could only be universally achieved *progressively*, depending on the available resources of each state. The United Nations were thus aware of the important distinction between civil and political rights and social rights.

Among the many social rights which the Covenant on Economic, Social and Cultural Rights accords are the following: the right to social security, including social insurance (Article 9), the right to an adequate standard of living for oneself and one's family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11), and the right to the enjoyment of the highest attainable standard of physical and mental health (Article 12). In short, the Covenant has adopted and elaborated the principles in the Universal Declaration; this is of enormous value. However, these recognized social 'rights' are not immediately binding: they are rights which states undertake to realize progressively 'by all appropriate means, including particularly the adoption of legislative measures' (Article 2).

The Covenant can be said to bind member states to pursue *the same ultimate aims* in the social field—to realize social rights as universal human rights; but it acknowledges that this can only be achieved by work and planning and in different stages. This seems to be a realistic attitude to have adopted, and the Social Covenant provides a reasonably good basis on which to work.

Even the European Social Charter (adopted in 1961, in force in

¹ For the texts of these covenants see *Journal of the International Commission of Jurists*, Vol. VIII, No.1. p.p. 53 *et seq.*

1965) has not achieved much more than the Covenant. Indeed, this regional Charter, to which only 18 states are parties, after several years of continuous discussion has been limited in the main to the same structure as the Covenant. In its 19 provisions, the Charter sets out the aims to be followed in the social field, and like the Covenant it recognizes that these common social aims can only be realized in the future; however, because the standard of living is substantially similar in the European countries, unlike the Covenant, the Charter contains a number of immediately binding concrete provisions.¹ The aim of both treaties, however, is the same: to achieve a greater unity among member states in the pursuit of a common goal—social justice for all.

III. Implementation

Clearly, the immediate task of the United Nations is to see that the two Covenants on human rights are ratified as soon as possible by the greatest possible number of member states.² If Human Rights Year 1968 were to witness the fulfilment of this task—as it is sincerely to be hoped—a milestone would have been reached along man's road towards the full attainment of respect for Human Rights; and, whatever may be the deficiencies in the Social Covenant, the ratifying states would at least be bound in international law to pursue a common purpose in the social field. Their progress may at first be slow, but through the procedures for implementation and control it will, as time passes, gain momentum and scope.

The Covenant on Economic, Social and Cultural Rights does not establish any new international organs to ensure the enforcement of its provisions. The only actual obligation in regard to implementation which the Covenant contains is for each State to submit *reports* on the measures that it has adopted and the progress it has made in achieving the observance of the rights that it has recognized in the Covenant (Articles 16 to 23). These reports will be provided in stages in accordance with a programme established by the Economic and Social Council within one year of the entry into force of the Covenant. The reports will then be studied by different organs and specialized agencies of the United Nations including especially the Commission on Human Rights. There is a provision

¹ For a study of the Charter, see *Journal of the International Commission of Jurists*, Vol. VII, No.2, p. 214. *The European Social Charter* by Peter Papadatos.

² By 30th April 1968, 27 states had signed both covenants, but none had ratified either of them. For a study on Ratifications and a Ratification Table, See *Bulletin of the International Commission of Jurists*, No.32: *Ratification and Implementation of International Conventions on Human Rights*.

specifying the kind of international action that may be taken for the achievement of the rights recognized in the Covenant (such as the conclusion of conventions and the adoption of recommendations). In spite of the lack of any special enforcement procedure and provided that the obligations of the Covenant are carried out in good faith, the United Nations will have an extensive and potentially fruitful task in the field of implementation. For this reason, the necessity for the Organization to have sufficient staff at its disposal must be emphasized. This is particularly true in the case of the implementation of social rights.

It is to be hoped that the birth of the two Covenants will spur the United Nations on to a fresh initiative in the field of implementation. The question of the establishment of new institutions might be raised. One such institution is the office of a United Nations High Commissioner for Human Rights, which is now to be discussed by the General Assembly. The appointment of a High Commissioner for Human Rights would, I feel, represent an important step forward in the international promotion of human rights.

Again, strong emphasis should be placed on collaboration with the specialized agencies, which have had vast experience in procedural problems concerning social justice and which would be of invaluable assistance in interpreting the specific content of the many different social standards in the Covenant. Special mention should be made of the importance of close collaboration with the International Labour Organisation, for which, incidentally, the European Social Charter expressly provides.

Moreover, non-governmental organizations would be especially able to render great help in the implementation of the Covenant. Many of these organizations have shown a keen interest and devotion in the work for human rights. As an example may I mention the work of the International Commission of Jurists. Through its objective and fearless reports, its unceasing protests against violations of human rights wherever they have taken place, regardless of political system or country, and its efforts to formulate the essential elements of a system based upon the Rule of Law, the ICJ has rendered a considerable service to the promotion of human rights. The experience and skill of non-governmental international organizations should be employed in implementing the Human Rights Covenants.

However, this is not the place to go into details. What is important is that the United Nations exploit the opportunity to increase the interest and devotion to the realization of human rights which have manifested themselves in the world today.

A criticism of the Social Covenant has been that the legal standards that it has set are too wide, thus opening the door to different interpretations and disputes. This is a difficult problem, but it must be remembered that the standards used in the Covenant will be binding rules of international law, and as such they will be defined and delimited by international organs, just as domestic laws are interpreted and applied by the national administrations. This will be a challenging task for the United Nations' specialized agencies.

Above all, attention should be given to the development of world public opinion. It is remarkable, for instance, that the United Nations Commission on Human Rights, after twenty years of continuous work, is almost unknown to the general public in the world. The speedy and effective implementation of the Covenants is to a very large extent dependent upon people's appreciation of the great achievement which the Covenants represent and the challenging opportunity that they have given to mankind. This applies, *a fortiori*, to economic, social and cultural rights, which directly affect the majority of the world's inhabitants today.

IV. National, Regional or World Solution

There are, as has already been mentioned, three methods of approaching social services: at the national level, at the regional level and at the universal level. The principle has been accepted that everyone everywhere is entitled to enjoy all human rights to the full extent; but when each state which signed the Social Covenant and the European Social Charter undertook to work for the full realization of social rights, it intended that its work should be limited to its own country. This can be clearly seen in Article 1 of the Social Covenant:

All peoples, may for their own ends, freely dispose of their natural wealth and resources... In no case may a people be deprived of its own means of subsistence.

State Parties are under no obligation to yield any portion of their national output or resources to help other peoples to realize the social rights recognized in the Covenant. Indeed, it seems unlikely that any country today is willing to reduce its social services or to stop the national development in this field for the benefit of social services in other countries.

Social and economic development is bound up with the self-determination of every people. For all practical purposes it must be admitted that international solidarity goes no further; but at the same time the growing feeling of solidarity among all peoples should not be overlooked. In recent years states, with strong

support from public opinion, have spent an increasing portion of their national income for the benefit of under-developed countries—but the efforts of separate states in this field are uncoordinated and often unorganized. Clearly, the best solution would be for a world community, based upon freedom and democracy, to determine how the resources of the world could best be spent for the realization of social rights in the world as a whole. This, today, is a utopian dream; and yet the problem of international co-ordination is pressing and intriguing. Could the implementation of the Economic, Social and Cultural Covenant provide the opportunity for the United Nations to take a much-needed lead in this field? In my opinion, it could, and might thereby open far-reaching perspectives for the future of the world.

Such a fresh initiative by the United Nations would, I believe, fall well in line with world public opinion. The work of the International Congresses and Conferences of Jurists has shown that there exists among lawyers from all parts of the world a remarkable degree of agreement as to the fundamental elements upon which a world system, characterized by the Rule of Law, should be built. Such a system must include both economic freedom and social justice.

The objection has often been made, especially by many new states, that it is useless to speak about civil and political rights to people who are suffering from starvation and disease. Nevertheless, at a Conference in Dakar—held under the auspices of the International Commission of Jurists in January 1967—a representative cross-section of lawyers from French-speaking African countries accepted the following thesis: that the ultimate goal of economic freedom, social justice and happiness can only be reached on the basis of the Rule of Law, requiring from the very beginning an unqualified respect for fundamental civil and political freedoms. Experience has shown that this road forward is long and hard to follow; but it is the only road.

By adopting the two covenants, the United Nations has recognized the clear distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other. By doing so it has clearly indicated man's path towards a world community. Let this be the message of the United Nations for Human Rights Year 1968.

WORK, LEISURE AND SOCIAL SECURITY as HUMAN RIGHTS IN THE WORLD COMMUNITY

by

C. WILFRED JENKS*

'The States Parties to the present Covenant recognise the right to work . . .'
Article 6 (International Covenant on Economic, Social and Cultural Rights).

'The States Parties to the Present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work' including 'rest, leisure and reasonable limitation of working hours.' *Article 7*.

'The States Parties to the present Covenant recognise the right of everyone to social security . . .'
Article 9.

I

That the right to work, the right to just and favourable conditions of work, the right to leisure and the right to social security have achieved international recognition is now beyond debate. They have been enunciated in the Universal Declaration of Human Rights. The United Nations Covenant on Economic, Social and Cultural Rights gives them, for the parties thereto, the force of treaty obligations. They have been incorporated in the European Social Charter and are reflected in the Charter of the Organization of American States as amended in 1967. They form the subject-matter of an imposing body of international labour conventions¹ many of which have been widely ratified.

What remains debatable is the sense in which these rights are rights and the sense in which they are international. Thus far we have merely identified them with names. How much substance have they? Are they a living creation of political realism or a mere plaything of intellectual nominalism? Only as we seek to give them a defined content by more disciplined thought and to invoke them

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¹ Cf. Jenks, 'Human Rights, Social Justice and Peace', in volume being published for the International Year for Human Rights by the Norwegian Nobel Institute.

as the basis of practical action do the complexities concealed by the enthusiasm of eloquent general language become apparent. The objection is sometimes raised that the whole concept of economic and social rights fails to distinguish rights from ideals, that a human right by definition is 'a universal moral right', and that accordingly nothing passes the necessary tests for the authenticity of a human right unless it is practicable everywhere and always of paramount importance.² That the economic and social 'rights' are justified social claims which political and economic systems must satisfy is no longer open to question; an overwhelming weight of responsible opinion has settled the matter decisively. What does need further analysis, and the jurist is both entitled and called upon to analyse, is, on the one hand, the sense in which these 'rights' have the juristic quality of rights and the measures and procedures required to make them a reality, and, on the other hand, the sense in which these 'rights' are international and the measures and procedures required to make them effectively so. It has been said of the concept of natural rights in general that 'only the inherent potency of the concept could have enabled it to withstand' the onslaught of the diverse forces which have so constantly assailed it;³ we may perhaps reach the same conclusion concerning the status of economic and social rights as human rights in the world community. It is sometimes assumed that these rights were essentially the contribution of the socialist countries to the contemporary international formulation of human rights. They were in fact first introduced into the discussions preceding the Charter of the United Nations and Universal Declaration of Human Rights by the Statement of Essential Human Rights prepared on the initiative of the American Law Institute in 1943.⁴

II

The right to work, the right to just and favourable conditions of work, the right to leisure and the right to social security are not rights in the sense of having an enforceable content defined by the nature of the right; they are rights in the sense of being a convenient general description of the guiding purpose of specific entitlements which give them a tangible content. They are an

² See, for instance, Maurice Cranston, *What Are Human Rights?* (New York, Basic Books, 1962), especially at pp. 34-42.

³ Gaius Ezejiiofor, *Protection of Human Rights under the Law* (London, Butterworths, 1964), p.11.

⁴ 'Essential Human Rights' in *The Annals of the American Academy of Political and Social Science*, Vol. 243, January 1946.

identification rather than a detailed specification; they are not, like the civil liberties enunciated in the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights, self-executory where an appropriate remedy is available. They are not, like the civil liberties and the economic and social rights cognate thereto,⁵ such as freedom from forced labour, freedom of association and freedom from discrimination in respect of occupation and employment, directly related to personal freedom in the primary sense of freedom from arbitrary restraint upon the action and opportunities of the individual; they are concerned in an altogether broader way with freedom from fear, freedom from want, and fuller opportunity. They are essentially programmatic rather than self-executory; the specific entitlements necessary to give them tangible content remain to be determined by laws and legislations, collective agreements, arbitral awards, the common practice of industry, the terms of employment of the person concerned, or the benefits offered by the social security scheme of which he is a member.

It is implicit in the programmatic character of these rights that they are relative rather than absolute. As the United Nations Covenant on Economic, Social and Cultural Rights explicitly recognises, their realisation must be expected to be progressive rather than immediate; only as they are progressively expressed in specific entitlements does the entitlement become enforceable at law. It is equally implicit in their programmatic character that the entitlements required to implement them may change with changes in current economic circumstances and social conditions.

As the economy becomes more complex and dynamic the right to work presupposes more comprehensive, complex and adaptable measures to secure full employment in a free society. The measures required include both measures of economic policy and measures of social organisation, not all of which can be translated into individual rights enforceable by the person asserting his right to work. The measures of social organisation include, however, a bundle of rights which can be invoked by an aggrieved seeker after work: the right to free use of an effective and impartial placement service when seeking employment, the right of admission to training and retraining courses and facilities, the right to benefit from transfer grants and other arrangements designed to facilitate changes of employment and residence, and in the last resort the right to compensation for unemployment. All of these rights presuppose the fulfilment of prescribed conditions, but can and should be

⁵ Cf. Jenks, *Human Rights and International Labour Standards* (London, Stevens and Sons, 1960), pp.8-9.

formulated and administered as rights which can be claimed as such when the prescribed conditions are fulfilled.

As society becomes more prosperous the expectations which measure whether conditions of work are 'just and favourable' rise. A higher age of admission to employment, shorter hours of work, improved working conditions, and increased remuneration come to be regarded as the standard of what is just and favourable. The standard becomes an enforceable right only as it is made specific by or in accordance with law or the recognised usage of industrial life, but labour legislation and collective agreements are continually converting the broad concept into specific entitlements.

As leisure increases, the emphasis of the entitlements necessary to the enjoyment of the right to leisure shifts from regulating hours of work and rest pauses, providing weekly rest days and public holidays, and ensuring annual paid vacations, to the availability of the cultural and recreational facilities without which the new leisure cannot be fully enjoyed. Labour legislation and collective agreements become less important as means of implementing the right to leisure than the provision of social services, but all of these give the right to leisure a tangible content in specific entitlements which, at different stages of development, grant different amounts of leisure and different opportunities for its enjoyment.

The concept of social security has expanded as social habits have changed, new needs have arisen from the changed social habits, and the economic and administrative possibilities of meeting these new needs have increased. The whole concept may now be in one of its periodical revaluations. Social security as it has operated hitherto has been primarily a protection for the individual and his family against the mischances of life in an industrial society in which mutual protection against misfortune has ceased to be the recognised responsibility of the family or the locality. As the rhythm of economic and social change accelerates, the income security element of social security is acquiring a further function, that of facilitating a process of continuous adjustment to the changing needs of society by converting the costs of such adjustment from a personal burden into a social charge. This may prove to be as far-reaching a development as the substitution, a generation ago, of the concept of comprehensive social security protection for that of the coverage of specified risks. While the underlying principles evolve constantly and may at times be radically recast, their implementation is secured through the specific entitlements provided for by the benefits of social security systems.

We have therefore in all these cases rights which have no measurable content as such, but which materialize through recognised procedures into specific and enforceable entitlements.

Why then should we deny the sources of these entitlements the quality of rights and, if their importance in contemporary society warrants it, the quality of fundamental rights? In recognising their quality as rights we are not breaking altogether new ground. Neither the Declaration of Independence of the United States nor the Declaration of the Rights of Man and the Citizen has ever been enforceable as such by legal process. They are nevertheless the classical landmarks of the history of the rights of man.

This analysis may be regarded as having merely forced the question a stage further back rather than having answered it. Specific entitlements, which become enforceable only when they are spelled out as such, cannot, it may be argued, reasonably be identified with or assimilated to fundamental human rights of universal validity; they are merely modalities of the right to which they are designed to give effect. The real question at issue therefore continues to be whether the right itself is fundamental and, more particularly, whether a right can be fundamental if by its nature it cannot be self-executory and the modalities of its application are necessarily variable?

No right is wholly self-executory. If it is enforceable by self-help, its effectiveness presupposes the will-power and strong right arm of the person enforcing it. If it is enforceable by judicial process, its effectiveness presupposes both the integrity of the judiciary and the effectiveness of the procedure by which the judicial will is enforced. If it requires legislation or collective agreement for its enforcement, a further stage is interpolated; the effectiveness of the right presupposes the action necessary to define its content in specific entitlements. The concept of a right is more important than the modalities of its implementation or the number of stages necessary to make it effective; it is broad enough to include rights the intrinsic nature of which presupposes different modalities of application and may interpolate new stages of implementation. Whether a right becomes enforceable by a judicial decision that it covers a particular case or by procedures for determining the entitlements to which it gives rise in the particular case is a significant question of method and an important question of degree, but not such a question of principle that the answer should determine whether or not an alleged right qualifies as a fundamental human right. Whether a right is to be regarded as a fundamental human right is to be determined by the evaluation of its importance by society, not by the nature of the legal procedures and techniques necessary for its implementation. Society, without regard to differences of ideology or economic and social structure, has accepted the broad position that human rights, in the traditional sense of the civil liberties, must be sought and can only be achieved

in the context of social justice. The function of law is to give effect to rights; they are born in the social conscience of mankind and legitimized by the recognition of society. The great world of public affairs has long accepted this position; it need do no violence to the professional conscience of the jurist. Neither Bentham's objection that proclamations of natural rights distract attention from the need for ordinary and effective legislation,⁶ nor Burke's objection that they inspire 'false ideas and vain expectations into men destined to travel in the obscure walk of laborious life'⁷ is a valid reason for denying the quality of fundamental human rights to the economic and social rights now recognised by society. Work, leisure and social security have established their status among the fundamental rights of man; we must respect their spurs and deduce their legal content and consequences. If in so doing we find that we must measure the right to social security by the provisions of social security legislation, we may perhaps recall that the right to freedom of speech is circumscribed, in the freest societies, by the law relating to public order, blasphemy, obscenity and defamation and that part of this law is to be found in municipal ordinances rather than in eternal and self-executory principle. A fundamental human right does not cease to be fundamental because modalities of its application must come to terms with practicalities.

III

Our concern is with work, leisure and social security not merely as human rights but as human rights in the world community. We cannot therefore content ourselves with discussing the sense in which there can be 'rights' to these goods, the manner in which the content of these rights and their relationship to matters of policy and administration is determined, and the procedures whereby they can be made effective in practice. We must also consider the sense in which the rights are international in character, the wisdom, appropriateness and effect of regarding them as international in character, and the forms of international action which are available or can be evolved to promote and protect them.

In what sense, then, are these rights international?

They are international, firstly, in status; they are recognised by international instruments; this gives them an increment of authority of substantial political weight which leaves them less at the mercy

⁶ *Anarchical Fallacies, Works* (Bowring, ed., 1843), Vol. II, p.502.

⁷ *Reflections on the Revolution in France, Select Works*, ed. E.J. Payne (Oxford, Clarendon Press, 1877), Vol. II, p.43.

of successive shifts of opinion, influence and power; it takes them above the battle of everyday politics. They may not, as international rights, have as yet any clearly acknowledged primacy in law over conflicting national dispositions, but they have elements of status and authority out of which such a primacy may in due course develop.

They may also, by virtue of such recognition, be international in scope; they become applicable, through the principle of equality of treatment, to the lawfully resident foreigner; and some of them, notably in relation to transport and other itinerant workers and more generally in matters of social security, apply to periods of employment, insurance or benefit not completed within any one State.

They become in any case, by virtue of such recognition, a bond of wider community. The recognition of common rights with an international status does more than stimulate and stabilize national policies and action and confer such rights beyond one's own country; it cements the growing community with a sense of common purpose. Such recognition may also have more tangible and immediate effects as a bond of wider community. It provides a common language for the discussion of the social consequences and repercussions of trade negotiations and concessions, and for the discussion of matters affecting working conditions between multinational and foreign corporations and other employers and local labour.

The bond of wider community becomes closer in the degree in which such recognition promotes uniformity in application. This is the most formidable of all our problems. Uniformity of application is a difficult matter when the right to be applied has a reasonably precise content; it becomes very much more difficult when the content of the right remains to be defined in enforceable terms; it becomes infinitely more difficult when the translation of the right into enforceable terms involves matters of policy and administration, issues, choices and priorities, which arise in widely different forms determined by differences in political and industrial tradition, economic resources, social habit and cultural upbringing. We cannot hope for world standards in these matters which go beyond a commitment to broad principles, but the commitment to broad principles can be of vital importance in four distinct ways: it defines the social ethos of the world community as a whole; it provides a framework within which national action can seek to give expression to that ethos; it provides a framework for both international negotiations in which matters of social policy are relevant and industrial negotiations which are international in character or have an international aspect; and it likewise provides a framework within

which greater uniformity in the application of these rights can be secured in the areas of economic integration which are becoming increasingly important in all parts of the world, from the European Economic Community to the Central American Economic Community in one direction and the East African Economic Community in another.

Work, leisure and social security have therefore won their spurs, not merely as human rights but as human rights in the world community, but having established this we must return to our original question. How much substance have they? They retain in their international character their essential nature as directives of policy from which specific entitlements are derived rather than tests of legality or immediately enforceable specific entitlements. What is the nature and value of international rights of this kind? How do they materialize from statements of purpose and intent into specific entitlements clothed with enforceability?

They have not been so materialized by their enunciation as principles in the Universal Declaration of Human Rights and the United Nations Covenant on Economic, Social and Cultural Rights.

In the International Labour Code evolved by the International Labour Organisation,⁸ which as of 1 February 1968 comprised 128 conventions with a total of 3340 ratifications and 131 recommendations, we do have a body of detailed prescriptions designed when implemented by ratification in the case of the conventions and appropriate legislation, industrial practice and administrative action to translate these statements of purpose and intent into specific entitlements. The application of these prescriptions is, moreover, continually reviewed by arrangements for international supervision of a uniquely thorough character designed to test and disclose how far they are effectively observed in practice.⁹ The I.L.O. procedures define rights with the precision necessary to found specific entitlements upon them and provide important opportunities for hearing and investigating grievances. The result is that the I.L.O. becomes in practice, and is envisaged by the United Nations Covenant as being, the executing agency of these provisions of the Covenant. This places their practical value in an altogether new perspective. The I.L.O. standards and procedures impart to the right to work, the right to just and favourable conditions of work, the right to leisure and the right to social security the substantial

⁸ International Labour Office, *The International Labour Code*, 1951, 2 vols, 1952, supplement for the more recent period by International Labour Office, *Conventions and Recommendations, 1919-1966*.

⁹ E.A. Landy, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience* (London, Stevens and Sons, 1966).

and tangible character as human rights in the world community expressed in specific entitlements of an enforceable nature which they would otherwise lack and which some of the other economic and social rights still lack.

IV

What general conclusions can we deduce from this analysis and experience concerning the measures which remain necessary to give the right to work, the right to just and favourable conditions of work, the right to leisure, and the right to social security, and indeed the economic and social rights generally, as human rights in the world community, a worthwhile substance and a real enforceability? Five are of salient importance.

A clear and authoritative enunciation of basic principles is the necessary starting point; this we now have. We have a glimpse of it in the Charter of the United Nations; we have it in the Constitution of the International Labour Organisation, which now binds 117 States; we have it in the Universal Declaration of Human Rights; and we have it in the United Nations Covenant on Economic, Social and Cultural Rights now before States for ratification.

These principles, being general by their nature, have to be translated into an elaborate *corpus juris* of international obligations and standards to give us a basis on which, and method by which, to apply them in practice. This we now have in the International Labour Code evolved by the International Labour Organisation. Such a Code in the nature of the case can never be complete and requires constant revision; we must continue to amend and elaborate it as circumstances may require; but it already represents the decisive step¹ in materializing the principles enunciated in the Universal Declaration and the United Nations Covenant into specific entitlements susceptible of legislative enactment, acceptance as industrial practice, and judicial and administrative enforcement.

The *corpus juris* of social justice which we have evolved internationally will become practically effective only as national policy honours international obligations by translating them into effective national legislation. In matters of human rights, policy remains a jellyfish if it lacks backbone in the form of legislation; only if it is given effective expression in legislation does it acquire the evolutionary potential of the vertebrate.

No *corpus juris* of social justice or national legislation designed to give effect thereto can be successfully imposed on a recalcitrant

¹ Jenks, 'The *Corpus Juris* of Social Justice' in *Law, Freedom and Welfare* (London, Stevens and Sons, 1963), pp. 101-136.

social *milieu*. Of no branch of the law is it more true that the law must be attuned to the social context in which it is designed to operate. The effective implementation of economic and social rights presupposes the partnership of organised economic and social forces in the elaboration and administration of the necessary measures in the manner in which they participate in the International Labour Organisation.

While legislation is the necessary backbone of policy and organised social forces are the necessary motive power of action and counsellors on practical matters, neither policy, nor law, nor the organisation of social forces affords any guarantee that economic and social rights will be a reality without effectiveness of administration. The more complex the problem and more sophisticated the right, the more essential does effective administration become. The number of States in the world has doubled in a generation; the complexity of problems and rate at which they require attention have increased manifold; one of the results has been a devolution of the responsibility to lower levels of administration at a time when the widening range of administrative discretion calls for a higher degree of responsibility; the average and adequacy of administrative experience and resources have inevitably been gravely affected by all these factors. It follows that no international action for the promotion of economic and social rights can hope to be effective unless it includes generous provision for assistance in practical administration to all who seek or are prepared to accept such assistance. Labour and social security administration, management development, and workers' education all have a direct relationship to the economic and social rights because without them the social *milieu* cannot provide fruitful soil in which these rights can grow and flower.

DUTIES AND LIMITATIONS UPON RIGHTS

by

RENÉ MARCIC*

A study of Articles 29 and 30 of the Universal Declaration of Human Rights

- Article 29* (1) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (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.
- (3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.
- Article 30* 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.

The philosopher, Rudolf Pannwitz, once said 'More important than any human right is human duty'. For Hans Kelsen, one of the greatest legal scholars today, it is the legal duty—and not the individual's right—which serves as the central point of his theory of law.

Jurists, however, are reluctant to give too dominating a position to the concept of duty in a system of law. They consider that the primary role of the law is to protect individual rights, even if logically duties should have priority. The difference between law and morality is that morality is conceived as a system solely composed of duties.

Jurists are equally afraid of limitations upon the exercise of human rights and fundamental freedoms (Article 29 (2) of the Universal Declaration). To the objection that, not only power but also freedom may be subject to abuse,¹ jurists immediately answer

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¹ *Erich Kaufmann: Gesammelte Schriften*, Vol. 1. Autorität und Freiheit. Gottingen 1960, p. 592.

that according to experience the dangers of abuse of power are incomparably more threatening than those of the abuse of freedom: the former are more permanent, they can easily take concrete shape and grow into an institutionalized omnipotence of the state, becoming totalitarianism, despotism, dictatorship and tyranny, of which man can only rid himself with difficulty. The dangers and duration of anarchy have been overrated: man is, as Aristotle said, by nature a political animal endowed with reason and intellect; if his community is broken up, he will quickly build himself another.²

Ever since the Roman authors, there has been a rule, deducible from the nature and experience of man, that requires a preliminary presumption in favour of freedom and against its limitation. This rule, also laid down in Article 29 (2) of the Universal Declaration, was written into the Austrian Civil Code as early as 1811: 'Every man has inherent rights discoverable by Reason, and by virtue of which he is to be considered a person' (Article 16). 'What is part of man's inherent natural rights is binding, so long as these rights have not been shown to be subject to a lawful limitation' (Article 17).

The norms governing human duties and limitations upon human rights are expressed in the two final articles of the Declaration. Article 29 (1) sets out the concept of human duty: Article 29 (2) recognizes limitations on rights in accordance with law: Article 29 (3) sets out the norm governing the exercise of rights: Article 30, the universally applicable norm governing interpretation.

The entire scope of human duties and the problems which arise from them are bound together in the three paragraphs of Article 29 and in Article 30. These Articles hold the key to the realization of fundamental human rights and duties. They are in general terms; for instance, no inherent duty is specified, nor the conditions under which a man who exercises fundamental rights in order to destroy the same rights or freedoms forfeits these rights. A workable demarcation between rights and duties, and between rights and the limitations on them is a strenuous undertaking which even a constituent assembly and a parliament are incapable of fulfilling. A statute cannot foresee the details of a rule nor its permissible exceptions. Society is compelled to place this burden upon the independent judge who must apply the statute to the case that is before him. With this reservation, this article will examine some of the fundamental duties of man and some of the limitations on human rights.

² For the relative inequality of the danger from abuse of power and that from abuse of freedom, see Marcic: *Skizze einer Magna Charta der Presse*, *Juristische Blätter*, Vienna 1955, pp. 192 *et seq.*

A. DUTIES

I. The Individual and the Community

1. Alfred Verdross, one of today's great authorities on international law and jurisprudence, has shown how the human rights and fundamental freedoms, set out in the Universal Declaration and in the two Covenants of December 16, 1966, have their roots in natural law. Being of the same opinion as Professor Verdross, I shall begin by examining the relationship between the individual and his community in the light of the classical doctrine of natural law.

2. Man has the highest rank in the world. He is the only creature existing for its own sake. This is what is meant by human freedom. This is the dignity with which man is endowed by nature. According to Kant's categorical imperative, man must never be treated as a means, but always as an end in himself. In a recent decision (October 23, 1952), the Federal Constitutional Court of West Germany stated that 'the individual has his own independent worth as such, and his freedom and equality are an essential and permanent part of the political order'.

3. Man can assert and realize the meaning of his existence only in a community (Article 29 (3) of the Universal Declaration). In a decision of the West German Federal Court, it was stated:

The concept which the Basic Law ['Constitution' of the Federal Republic of Germany] holds of man is not that of an isolated and sovereign being: rather, in its balancing of interests, the Basic Law has eliminated the tension between the individual and the community by treating the individual as identifying himself with his community and linked with it, in such a way that his individuality is not prejudiced.

(a) *The Duty towards the Community in General*

From the nature of man, identifying himself and linked with his community, can be deduced his duty to observe and respect the general welfare — which is something quite different from 'reasons of State': the latter concept subjects the law to its requirements, whereas the general welfare is a constituent part of every legal order.

Because man depends for his existence on the community, he must yield priority to the general welfare, in so far as this is compatible with his human dignity. The general welfare by itself has no meaning; its purpose is to enhance man's dignity. Man is an end in himself: the community is a means of achieving this end. Where

the general welfare makes a demand that is immoral or otherwise incompatible with human nature, it need no longer be taken into consideration; the duty of man to act in accordance with it would be transformed into a duty to resist what is claimed to be the general welfare. Man must identify himself with the community but not lose his identity in it. The nature of man, then, places limitations upon his fundamental duties; from the viewpoint of natural law, Article 29 (1) of the Declaration can be read thus: 'Everyone has limited duties to the community.'

(b) *Subsidiary Duties to the Community*

(i) The duty of honesty and loyalty

A community depends for its cohesion on the honesty and loyalty of its members. From this primary human duty are derived the legal rules of *pacta sunt servanda* and good faith.

(ii) The duty to respect and keep oneself informed about the law

Unless the individual is constantly and sincerely prepared to respect the law, it will not be accepted or have its intended effect on the social order. Although it may apply in theory without such acceptance, it will in practice fall into disuse if it is constantly disregarded. Respect of the legal norm, whether it be a statute, a constitution, international law or the general principles of law, is by natural law a fundamental duty of man. The fact that a law must be promulgated or published before it enters into force is the corollary of man's duty to make himself acquainted with it: from this the rule *ignorantia legis haud excusat* is derived.

(iii) The duty of obedience

There is a duty to obey the law even in the absence of any instinctive disposition to do so, provided that the law is legitimate.³ From this proviso is derived the following duty (iv).

(iv) The duty to review and to resist

Every subject of law is, in principle, bound to review the legality of any orders addressed to him. In practice, this responsibility devolves upon the judge—this ensures that there is certainty in the law. If, for any reason, the Rule of Law should fail, the responsibility reverts to the individual, who has the right to review and reject; if the injustice becomes unlimited or intolerable, whether in respect of oneself, of other members of the community or of the

³ I.e. in conformity with a norm of higher rank. See below, p. 65, Note 6.

entire community the right to resist *may* become a duty.⁴ However, resistance both as a duty and as a right must always be in effect an application of the general law: an important duty (v) is derived from this principle.

(v) The duty to abstain from using force or other illegal means

Resistance to an unlawful measure must not overstep the limits of the legal order which that measure has contravened. In no circumstances is it permissible to enforce the higher legal order by unlawful means (*i.e.* means which offend that order).

(vi) The duty not to abuse one's rights

The individual must exercise his rights with reasonable regard to the interests of others, and not in a vexatious manner, (*e.g.* simply in order to cause harm to another person).

(vii) The duty of equality

No man should arbitrarily set himself above another. It is only the principle of division of labour which compels society to call upon some of its members to govern.

(viii) The duty of democracy

There is a duty to cooperate in the establishment of order. 'It is the duty of everyone... to take an interest in public affairs...' (Article 117 of the 1946 Constitution of Bavaria).

Of the many duties derived from this is the duty to vote.

(ix) The duty of mutual help

This duty has been constantly repeated over thousands of years. It is seen in Article 1 of the Universal Declaration. It is a primary duty of the law: to protect the weaker against the stronger, the well-behaved against the reckless and oppressive. In this way, aid to developing countries begins to take the shape of a legal duty, and not only a moral, rational, human and social duty.

II. The Individual and other Individuals

1. The duty to respect the fundamental rights and freedoms in the Universal Declaration is placed not only upon the public authorities, but upon all individuals as well. When Articles 2 to 6 of the Declaration give to the individual the fundamental right to be

⁴ The constitution of the State of Hesse for instance imposes on everyone a duty to resist the public authority, when it is acting unconstitutionally.

accorded the dignity of a human being, they lay upon him the fundamental duty to treat others in like manner. Here the right and duty correspond exactly and require a spirit of mutual tolerance.

2. The Romans summarized this rich bundle of duties in three maxims: *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.*⁵ Human duty in its entirety can be summed up in the last '*suum cuique*' phrase. It is not, as appears at first sight, an empty formula: it entails an attitude of tolerance and of acting and forbearing to act, it does not permit indifference. It is a positive duty requiring the individual's interest in his fellow men; the individual must help others to develop their personality, without compelling them to do so. From it is derived the legal obligation not to act against the customs, public order and morals of the community. It is the basis of the criminal and civil law.

B. LIMITATIONS

There have been many legal studies on the possibility of drawing up a code of permissible limitations to human rights and duties. Since a duty entails a limitation upon a right, it is an important field of research. It is, however, difficult to lay down hard and fast rules governing limitations. In practice, these are made by the judge or other authority called upon to administer the law. They do not normally arise from theoretical reflection—although it must not be forgotten that they are essentially based upon logic: when human rights are defined and 'determined', a *term* is put to them. This notion of delimiting the scope of a human right—of stating what is inside the definition and what is left outside—would involve a lengthy discussion of the nature of the right itself, which space does not permit.

I. Limitation—not Abrogation

Article 29 (2) of the Universal Declaration provides for the possibility and necessity of *limitations* upon the rights and freedoms. It does not permit their *abrogation* either temporarily or permanently. No constitution or legislation may in any circumstances invalidate the rights and freedoms set out in the Declaration. This is a remarkable break-through, which is not self-evident. A few constitutions (such as the Austrian and Federal German constitu-

⁵ 'The principles of Law are these: live honestly, harm no man, give your neighbour his due.'

tions and those of the German *Länder*) impose an absolute prohibition, even in times of national emergency, against any derogation from the hard core of rights and freedoms written into them—or a prohibition that can only be surmounted with the consent of the people.

There are unfortunately a considerable number of constitutions which do not provide such a guarantee. If, at the time of writing these lines, the International Covenants of 16 December 1966, together with the Universal Declaration, were already generally accepted as binding rules of international law, states would have the legal duty never in any circumstances to abrogate the substance of the fundamental rights and freedoms.

Articles 29 and 30 of the Declaration contain an absolute limitation upon the kinds of permissible limitations to rights and freedoms.

II. Presumptions and Principles

1. As has been mentioned above, when examining the extent of a human right or freedom in the context of duties and limitations, one must begin by according a primary presumption of freedom. This presumption may only be rebutted by unambiguous proof of a conflicting duty (arising from the corresponding right of another individual) or by proof of a *legitimate* limitation *by law*⁶ duly promulgated. The burden of proof is upon him who asserts a duty or a limitation. In this connection the freedom of the individual takes precedence over that of the community.

2. It follows from the presumption of freedom that any duty or limitation that is asserted must receive a restrictive interpretation.

3. A most important criterion for evaluating the legitimacy and the legality of a limitation derived from Article 29 (2) of the Declaration is the principle of proportionality: the extent of any limitation should be strictly proportionate to the need of the higher interest which the limitation is protecting. If, for example, as a result of a natural catastrophe there is an acute housing shortage in a district, the local authority should not immediately resort to expropriation; the lesser measure of compulsory letting of premises

⁶ The use of the words 'legitimate' and 'by law' is not a pleonasm. The terms, 'by law' and 'legality' refer to positive law: the law which is binding upon the executive and the judiciary. The criterion for what is 'legitimate' is to be found beyond the law that is being examined. Thus a law that is contrary to international law or to general principles of law, and a constitution that is contrary to international law may be *legal* but they are not *legitimate*.

may be all that the situation of proportionality requires. This principle is of vital importance in connection with the freedom of an accused person: no infringement of the individual's physical or mental integrity should exceed the seriousness of the crime of which he is accused. The German Federal Constitutional Court has developed a consistent and instructive practice in this field.

4. The principles in the three preceding paragraphs have been outlined because they are not stated expressly in Articles 29 and 30. Mention is however made of the principle of the Rule of Law, which can be found in the two phrases (in my italics) of Article 29 (2): 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are *determined by law*' (i.e. *legal limitations*) 'solely for the purpose of meeting... the *just requirements*' (i.e. the *legitimate interests*) 'of morality etc.'

Other principles expressed are those of the rights and freedoms of others, public order, democracy, morality (an independent set of norms incorporated into the legal order) and the general welfare (not necessarily reasons of state). Indirect mention is made (in Articles 29 (3) and 30) of the principles of peace, self-determination, tolerance, solidarity, equality, good faith and, above all, humanity — the dignity of the individual as part of mankind and the dignity of the human species as an entity.

III. Outline of a System of Limitations

1. The Declaration does not set out and define the limitations upon each right and freedom, but contains in articles 29 and 30 a general statement of legal and legally relevant limitations. Legally relevant limitations are those values incorporated into the Declaration which have an extralegal independent existence. They are not legally binding until they have been adopted by the positive law; examples of such limitations are morality, public order and the general welfare.

2. Limitations may be classified as *natural* or *positive*.

(a) Natural limitations arise from the very nature or logic of a situation. They may be real or personal. It would be meaningless, for instance, to talk about a baby's right to receive information, or for a state to grant political asylum to its own citizens. A Greek cannot demand a right to follow lectures or take examinations in Greek at Vienna University. In the same way it was futile for the Austrian legislature to decree that a certain law did not violate equality, when its inequality was manifest, or for another legislature to decree that Einstein's theory of relativity was not valid for the science of that country.

Natural limitations are valid in themselves and need not be embodied in a legal text; they are inherent in fundamental rights and freedoms. However, just as fundamental rights may be incorporated into positive law by national constitutions or legislation or by international declarations and conventions, so natural limitations can and should be transformed into positive law. This is to be desired, since, although the rights and the limitations on them are not created by the legal instrument, they are ascertained, guaranteed and made effective thereby. In view of the *a priori* assumption in favour of freedom and the principle of restrictive interpretation, any unwritten and ambiguous natural limitation upon freedom would thus be regarded with suspicion.

There are natural limitations which do not arise *a priori* from nature, but from the unwritten positive law—especially the customary law of a civilization, the *ius gentium* and the general concept of law. If, for example, Article 21 of the Declaration had been formulated ambiguously so as to give an unqualified right to vote, no practising or academic lawyer would doubt that the right to vote depends on citizenship and need not be made available to those who have been granted asylum, for instance.

(b) Positive limitations are those which arise out of the very nature of the right or freedom itself (internal limitations) and those to which the freedom is made subject (external limitations).

(i) Internal limitations are an integral part of the right that is being guaranteed. They may be real or personal. Most of them have to be discovered through the laborious process of interpretation—although they are sometimes specified by the legislature.

(ii) External limitations are those which are distinct from the right or freedom, but which are made to apply to it. In this case there are two parallel norms, the one creating the right, the other derogating from it. Fundamental rights and freedoms protect the dignity of the individual and enable him to realize his full potential as a human being freely and in equality with others. They may however be limited in order to provide equivalent protection to the rights and freedoms of others, or for the protection of other legal interests which are essential if man is to continue to enjoy his rights and freedoms: morality, public order, the general welfare or democracy.

However, it must be emphasized once again that the starting point is the presumption in favour of the individual's freedom. A distinction is made between the right, which is absolute and fundamental, and the limitation, which constitutes an exception.

The power of the public authority to impose limitations is itself limited. It is restricted to clearly defined circumstances and is subject to judicial review.

The primary responsibility for specifying the necessary and permissible limitations to rights and freedoms is upon the authority which creates and formulates those rights and freedoms. Such a direct limitation is to be found in article 29 (3) of the Universal Declaration itself which provides: 'These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations', (which may be found in the preamble and articles 1 and 2 of the UN Charter). A second direct limitation is found in Article 30 (although it is worded as a fundamental rule of interpretation), which provides that nobody may invoke the rights and freedoms in support of an activity aimed at the destruction of any of the declared rights and freedoms. In short: no freedom for the enemies of freedom. This is not a very convincing solution, but it should be seen as an act of self-defence on the part of the Rule of Law.

The application of both these limitations, however, is entrusted to the person actually called upon to administer the law—the judge. If the circumstances envisaged in Article 30 arise in the Federal Republic of Germany, the Basic Law delegates to the Federal Constitutional Court the power to declare that a person has forfeited a specific fundamental right, and the power to ban a political party.

If one keeps in mind the fundamental idea behind Articles 29 (3) and 30, it is clear that the power to declare forfeited a fundamental right can be put in no better hands than those of an independent judge. The executive, whose structure is essentially political and which is headed by the government, is as little suited for this task as is the legislature, whose function is to create general norms and not specific 'laws' aimed at individual cases. Speaking about legislation, Léon Duguit said:

A Statute may be bad and unjust, but its general and abstract form reduces this danger to the minimum. The protective force of legislation, and even its *raison d'être*, lies in its general character.

Limitations may be direct as was seen above—in that they are provided for directly by an international instrument or national constitution—or they may be indirect. In the latter case, the power to impose limitations is delegated to a body subordinate to the authority of the constitution, and still more so to that of an international instrument, i.e. to the legislature. In this case, a freedom is provided for at one level and its limitations at a lower

level. This is dangerous, since an inferior authority is more likely to misuse its powers and subordinate the primary presumption of freedom to the 'Divine Right' of the state or of the exchequer. However, an alternative to this delegation of the limiting power has yet to be found.

Article 29 (2) of the Declaration shows an awareness of the danger of a lower authority's abusing its powers, and while it defines the human rights and freedoms in unlimited terms, it limits the powers of restriction to clearly defined circumstances. It does not give the national legislature *carte blanche* to modify the rights and freedoms in an arbitrary or excessive fashion. In the result, the rights and freedoms are legally binding on the legislature, just as the laws of the legislature legally bind the executive and judiciary. The limiting statute always takes the character of a specific, isolated and clearly-defined exception—although of general application, since it is in the form of legislation.

It is not permissible for either the executive or the judiciary directly and independently to tamper with a particular right or its limitations. However, there are two exceptions to this rule in favour of the judiciary: if there is an instrument higher in rank than the statute, such as a constitution or international convention which lays down a *self-executing* limitation, the judge may apply it directly (without the mediation of the law) to a specific right or freedom; similarly, a constitution may establish a constitutional court empowered to order the forfeiture of a right. The second exception is where a judge, in the exercise of constitutional jurisdiction, decides on the 'legality' (legitimacy) of a law *vis-à-vis* some higher instrument, such as the constitution or an international convention; in this case the judge is not tampering with a right or freedom, he is intervening against the legislature on behalf of a right or freedom protected by the constitution or other higher instrument.

There are many formulae of varying scope which are used in the technique of subordinating 'indirect limitations' to the Rule of Law. They are all various ways of subjecting the acts of the executive to the law enacted by the legislature. One formula is that limitations may only be imposed 'on the basis of laws' or '... of a law'. Under this, the legislature is empowered to lay down the general conditions for the imposition of limitations, which the executive then applies to individual cases. This general subordination of the executive to the legislature is an essential guarantee against abuse. A second formula provides that limitations may only be imposed 'by law'. In this case the legislature alone may specify, clearly and concretely, the actual limitations: the function of the executive is limited to mechanical application.

The power to impose limitations may be looked at from another angle, which presents two possibilities. The first is that the legislature is given general, unrestricted power to limit rights and freedoms: they are simply made subject to the laws. Such a formula deprives the rights and freedoms of any higher safeguard, and renders them valueless.

The second possibility is that the legislature is empowered to limit the rights and freedoms only for certain clearly defined purposes: they are made subject to the laws in certain specified respects only. The Universal Declaration uses this formula; it permits limitations on rights and freedoms for the protection of four community interests: (article 29 (2)). These interests are:

1. Due recognition and respect for the rights and freedoms of others.
2. Meeting the just requirements of
 - (a) morality
 - (b) public order and
 - (c) the general welfare in a democratic society.

Article 29 (2) is completely deprived of any value, however, if it is not applied with due respect for the Rule of Law. This involves a constitutional democracy, in which the principles of legality and legitimacy are respected. By the principle of legality the executive and judiciary are bound to give effect to the Acts of the legislature: by the principle of legitimacy, the legislature is bound by higher norms which are enforced by a judiciary with constitutional powers. Both these principles are valid in all fields of public order, especially in that of public security.

This is what is implied in Article 29 (2) by the word 'just' in 'the just requirements of morality etc.'. It introduces an essential norm—that every rule of lower rank, every action of a public authority must in all cases conform to the objective law of higher rank; if it does not, it is invalid.

Similarly, the words 'in a democratic society' in Article 29 (2) introduce a further normative element. It is impossible here to enlarge upon the principle of democracy. I can only refer to an earlier study in which I dealt with the basic identification of democracy with a state under the Rule of Law.⁷

⁷ *Die Sache und der Name des Rechtsstaats. Demokratie und Rechtsstaat sind an der Wurzel eins.* Published in *Gedanke und Gestalt des demokratischen Rechtsstaates*, ed. by Max Imboden, pp. 54 *et seq.*

C. INTERPRETATION

1. There are many kinds of legal norm: some govern individual rights and freedoms; others regulate actual situations and the corresponding behaviour of individuals and organizations; a third group regulates the procedure for creating laws, the competence of the organs who are to apply the laws and the actual conformity of laws of an inferior category with the higher laws on the basis of which they are created. Finally there are norms which direct the administrator as to how he must interpret the law which he is applying. These norms are binding upon all who are creating new law on the basis of a higher norm—the individual making a legal transaction, the judge, the administrative officer, the minister and the legislature.

2. Article 30 of the Declaration is by its terms a norm of interpretation. It indicates the general purpose which should direct the acts of the person or organ applying the law. The constituent assembly and the legislature, the prison warder no less than the judge, must apply the provisions of the Declaration within the discretion left to them by the norm from which their authority derives. This rule of interpretation is addressed to the individual, as the beneficiary of the rights and freedoms, and to the public authorities, who must on principle respect the rights and freedoms and who under Article 30, however, may come under the duty to limit their exercise.

3. Article 29 (3) is not by its terms a rule of interpretation, but the main emphasis of the principles that it contains is directed towards indicating to the beneficiaries of the rights and freedoms, and to those on whom the corresponding duties are laid, the manner in which no person, in whatever capacity, is entitled to exercise the rights and freedoms.

4. If Articles 29 (3) and 30 are taken together, it is seen that they form a single system of prohibitions in which Article 30 specifies more precisely what is meant by the general provision of Article 29 (3): 'These rights... may *in no case* be exercised contrary to the purposes and principles of the United Nations.' The specific provisions of Article 30 in fact fall within the 'purposes and principles of the United Nations'.

CONCLUSION

1. Rights and freedoms are meaningless unless in all circumstances the final decision as to their existence and scope is entrusted to an independent and impartial judge, whose decision will be executed. No instructions or individual orders, from whatever origin, should bind the judge. He is subject exclusively and immediately to the general norms of statutes, the constitution, international law and the general principles of law, which he applies free from interference and in the spirit of the Universal Declaration and the Charter of the United Nations. He must, moreover, be irremovable.

Whenever an individual alleges the infringement of his rights or freedoms, in the final instance he must have the opportunity of bringing his case before a court. An independent judge must have the power of final decision over any question affecting the individual's freedom, and the responsibility of ensuring the fairness and impartiality of the proceedings to which the individual, as a subject of law, is a party.

The rights and freedoms contained in the Universal Declaration, strengthened by the two new Covenants, will only achieve their full implementation when the individual who alleges that one of his rights or freedoms has been infringed can appeal, as a direct subject of international law, to a World Court of Human Rights, providing him with effective protection against the acts of the authorities. Such a system will be a step towards the achievement of world peace, which denotes not only the absence of war but even more the presence of law.

2. The ultimate burden, however, of ensuring the protection of man's rights and freedoms rests upon man himself. Real protection for human rights can only be assured when the people of the world are concerned about the respect for their own rights and freedoms. The opportunity for the public authority to violate in all tranquillity the individual's rights and freedoms is in inverse proportion to the resistance that it meets.

Rudolf Pannwitz once said: 'What is important is not the article of the law, but the guarantor.' And the guarantor of man's freedom is man.

THE JUDICATURE OF NEW ZEALAND

by

SIR THADDEUS PEARCEY MCCARTHY *

and PETER A. CORNFORD †

Introduction

New Zealand is an independent sovereign state. Established in 1840 as a British Colony, in course of time it became one of the original members of the British Commonwealth. It was given responsible government and very considerable independence in 1856, but some vestigial controls remained with the Parliament of the United Kingdom. These, however, gradually disappeared. They were finally abolished by New Zealand's adoption of the Statute of Westminster in 1947.

As a consequence of this historical development, the judicial system and the jurisdiction of the courts of New Zealand bear close resemblance to those of England. The basic law is the Common Law and the statute law of England as it existed and so far as it was applicable to the circumstances of the colony in 1840. This basic law, has, however, been extensively modified and enlarged by statute law enacted since that time, for the most part by the Legislature of New Zealand. New Zealand has been prominent for nearly a century in experimental law reform, and has pioneered much legislation of a legal and social character which has been followed later by other countries in the English speaking world.

Courts of Justice

Apart from courts of special jurisdiction set up to deal with particular problems, such as the Maori Land Court and the Maori Appellate Court, whose jurisdiction touches matters relating to land ownership by the indigenous population of New Zealand, and the Court of Arbitration which has mainly a wage fixing function, a three tier system of courts of record has evolved. These in

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ascending order of authority are the Magistrates' Courts,¹ the Supreme Court² and the Court of Appeal.³ All these three have both civil and criminal jurisdiction, but only the Supreme Court and the Court of Appeal may adjudicate authoritatively on issues of a constitutional character. It is convenient to deal with these three courts in this ascending order, though it is intended to say little concerning the Magistrates' Court, the main purpose of this article being to cover the two superior courts.

Magistrates' Courts

These are the courts which deal with the less substantial, and therefore the great mass, of the litigation, criminal and civil, of the country. By way of comparison one could state that they discharge the function of the Magistrates' Courts and the County Courts of Great Britain. On the criminal side they can deal with most crimes, although some of the most serious are reserved for the higher courts. A Magistrate's powers of punishment extend up to the imposition of a term of three years' imprisonment. On the civil side the courts have jurisdiction to determine any action founded on contract or tort and in relation to chattels, where the matter involved has a value of not more than NZ\$2,000. Magistrates are generally appointed from the two branches of the legal profession (barristers or solicitors), though appointment can and has been made from officers who have spent their careers in the service of the Department of Justice. They are employed on a full time stipendiary basis, and are removable for inability or misbehaviour. They retire at 68 years of age.

The Supreme Court

This was until recently, as its name would imply, the highest court in New Zealand. It was first established in 1841 by an ordinance of the Legislature of the then colony of New Zealand. Its constitution as a high court of justice is now contained in the Judicature Act 1908. The court consists of the Chief Justice and 12 judges (plus three judges of the Court of Appeal, who are also judges of the Supreme Court but who take practically no part in the exercise of the jurisdiction of the Supreme Court). Any one or more of the judges may exercise all the powers of the court.

Appointments to the Supreme Court Bench are made solely

¹ Magistrates' Courts Act, 1948, Part 1.

² Judicature Act 1908, Parts 1 and 2.

³ *Ibidem*.

from members of either branch of the legal profession who have a standing of not less than seven years' practice. All appointments are made by the Governor-General in the name of Her Majesty the Queen and upon recommendation by the Government of the day. Tenure is secured by statute.⁴ A judge may be removed only upon an address of the House of Representatives. There has been no instance in our history of such a removal. Judges must retire at 72 years of age. Seniority amongst the judges, other than the Chief Justice, is determined (except in the case of those who have been made members of the Court of Appeal) according to the dates of their appointment. During the absence from New Zealand of the Chief Justice, or whilst his office is vacant the senior judge, not being a judge of the Court of Appeal, acts in his place. During the absence from New Zealand of the Queen's representative in New Zealand (the Governor-General), the Chief Justice acts in that capacity and is called the Administrator, a name which is somewhat misleading as the administration of New Zealand is really wholly in the hands of the elected government and not in those of the Queen's representative.

Jurisdiction

The Supreme Court has all the jurisdiction necessary to administer the laws of New Zealand. By its constitution it is expressly given all the jurisdictions of the High Court of Justice of England, including jurisdiction over companies, persons and estates of infants, persons of unsound mind or other limited mental capacity, in matrimonial proceedings, in bankruptcy and in the administration of the estates of deceased persons. Indeed in its jurisdiction and the writs and other processes it uses, it is strikingly similar to the English High Court; and therefore it is not proposed to describe that jurisdiction and those processes in detail. It is assumed that those of England are reasonably well known. It should be added, however, that the court has also an appellate jurisdiction in both civil and criminal matters in appeals from a number of courts of inferior jurisdiction.

Mode of Trial

In criminal trials the court sits with a jury of 12 citizens, the judge directing the jury as to the law applicable, the jury applying that law to the facts and determining ultimately the guilt or innocence of the accused. The penalty is ultimately assessed by the judge⁵ and is not a matter for the jury. In civil actions claims for

⁴ Judicature Act, 1908, ss.7 and 8.

⁵ Crimes Act, 1961.

damages for personal injuries and defamation are as a rule heard by juries, while other actions are normally heard by a judge sitting alone.

The normal mode of trial is according to the adversary system upon written pleadings of the facts and *viva voce* evidence of witnesses. The parties appear either in person or by counsel. The court, except in very special circumstances, is open to members of the public. Appeals from inferior courts are generally decided on the notes of evidence taken in the court appealed from and on the record of the judgment given.

Court of Appeal

The ultimate court in New Zealand is the Court of Appeal not, as one would expect from its name, the Supreme Court. This nomenclature causes confusion outside New Zealand as does the somewhat similar situation in the State of New York, U.S.A.

The Court of Appeal was first established in 1862 and until 1957 was made up of panels or divisions of Supreme Court judges appointed *ad hoc*. In 1957 the court was reconstituted to provide for a permanent bench of judges.

Constitution

The court now consists of the Chief Justice (*ex officio*, though in fact he does not often sit in the Court of Appeal) and three other judges, the latter three being also judges of the Supreme Court. The senior of these three is known as the President and usually presides. Appointment to the Bench of the court of Appeal is, as a rule, made from the Supreme Court judges, but there is provision for appointment direct from the bar, and this has been done once. The appointed members have seniority over the judges of the Supreme Court, except the Chief Justice. The court normally sits as a bench of three, and, if the Chief Justice is present, he presides. The judgment of the majority is the judgment of the court. If the court is equally divided in opinion, the judgment appealed from is considered affirmed. This court, like the Supreme Court, is open to the public, and though there is power to close it in suitable circumstances, that power has never been exercised.

Civil Jurisdiction

In civil matters the court has power to hear and determine appeals from any judgment, decree or order of the Supreme Court, save when that court has decided a matter in its own appellate

capacity.⁶ In this last case no further appeal lies to the Court of Appeal without leave from the Supreme Court, but a refusal by that court to grant leave is itself usually subject to appeal to the Court of Appeal.

The court may draw inferences of fact as well as decide questions of law. It may give any judgment or make any order which the court below ought to have given or made.

All appeals are directed to be by way of rehearing. This has been interpreted to mean a hearing on the written record of the proceedings in the court below. But the Court of Appeal has power, if it wishes, to receive further evidence on questions of fact by oral examination in court, by *affidavit*, or by depositions taken by examiners. This power is exercised sparingly. In addition to its appellate jurisdiction in civil matters, the court exercises an original jurisdiction when the Supreme Court removes a case directly into the Court of Appeal.⁷ This is quite frequently done with special cases stated by other tribunals for an authoritative statement of the law on a particular point, or when a piece of litigation between citizens turns on a question which is wholly one of law. In these circumstances, the court has the same power to adjudicate as the Supreme Court has.

Criminal Jurisdiction

The main function of the court in its criminal jurisdiction is to hear appeals from convictions in and sentence imposed by the Supreme Court. An appeal lies⁸

- (a) Against conviction on any ground of appeal which involves a question of law alone; and
- (b) With the leave of the Court of Appeal or upon the certificate of the judge who tried the appellant, or before whom he appeared for sentence, that the case is a fit one for appeal, against conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; and
- (c) With the leave of the Court of Appeal, against the sentence passed on conviction, unless the sentence is one fixed by law.

Furthermore, as a result of a statute passed in 1966, the Solicitor-General may, with the leave of the Court of Appeal, appeal

⁶ Judicature Act 1908, ss.66 and 67.

⁷ Judicature Act 1908, s.64.

⁸ Crimes Act 1961, s.383.

to it against a sentence imposed in the Supreme Court on the ground that the sentence is inadequate. This, of course, does not apply when the sentence is one fixed by law.

The grounds upon which an appeal may be made by a convicted person to the Court of Appeal against conviction are ⁹ (a) that the jury's verdict is unreasonable or cannot be supported on the evidence; (b) that the judgment in the court below is based on error of law; (c) that there has been a miscarriage of justice; or (d) that the trial was a nullity. If it allows an appeal against conviction, the court may direct a new trial or may quash the conviction and direct a judgment and verdict of acquittal to be entered. On an appeal by a prisoner against sentence, the court may quash the sentence and pass such other sentence warranted in law as it thinks fit or may vary the sentence.

Prerogative of Mercy

In addition to their normal functions in criminal matters, the aid of either the Court of Appeal or the Supreme Court may be invoked to assist the Governor-General in Council in his exercise of the Royal Prerogative to pardon or release a prisoner.¹⁰

The Organisation of the Supreme Court and Court of Appeal

The Court of Appeal rarely sits outside the Capital, (Wellington), where it sits monthly from February to December. The Supreme Court is constantly in session in the main cities during those months, while circuit courts are visited by the judges at quarterly intervals. The registrars and other court staff are State servants appointed by the Department of Justice, which is charged with the general administration of Magistrates' Courts, the Supreme Court and the Court of Appeal. Each judge has a personal clerk, or associate, also provided by the Department. An important function of the associate is to record, during a trial, the evidence of the witnesses given *viva voce*.

In all aspects of court business the registrar and other staff are under the control of the judges.

Stare Decisis

New Zealand courts follow the rule of *Stare Decisis*. The hierarchy of authority is the Judicial Committee of the Privy

⁹ Crimes Act 1961, s.385.

¹⁰ *Ibidem*, s.406.

Council, the Court of Appeal and the Supreme Court, the decisions of every tribunal binding the tribunals inferior to it. The Court of Appeal though not absolutely bound by its own decisions has not, since its reconstruction in 1957, found it necessary to formulate positively the circumstances under which it would be prepared to depart from an earlier decision.

Appeals to the Privy Council

Decisions of the Court of Appeal are final so far as New Zealand courts are concerned, but an appeal lies to the Judicial Committee of Her Majesty's Privy Council from all final (as contrasted with interlocutory) judgments of the Court of Appeal of New Zealand in civil matters where the matter in dispute is valued at NZ\$1,000 or more. Appeals may also be taken, with the consent of the Court of Appeal, on other occasions when, by reason of the public importance of the issue involved, it is thought by the Court of Appeal that they should be submitted to the Privy Council. An appeal in a criminal case may be brought only with the leave of the Privy Council itself; and so whereas appeals in civil matters are not infrequent, there have been few criminal appeals in recent years. These rights of appeal to the Privy Council survive from the days when similar rights of appeal existed from all the Dominions of the Crown. Of recent years the practice has developed of inviting senior members of the judiciary of the members of the Commonwealth who have preserved their appellate link with the Privy Council to sit as members of the Council. Two successive Presidents of the Court of Appeal of New Zealand have been invited and have sat.

It is doubtful, however, whether this particular right of appeal will continue long into the future. Most of the member countries of the Commonwealth have already dispensed with it, and the only other member of the original Commonwealth group which has not done so, Australia, is, it seems, now in that process. Older generations of New Zealanders, bound by traditional ties of kinship and loyalty to Great Britain, see the Privy Council not only as a final appellate body of a quality which a small country such as New Zealand is unable to provide of itself, but also, and perhaps more actively, as a traditional link holding New Zealand closer to the British Crown. But as Britain turns more towards the continent of Europe and becomes less of a world power, and as younger generations grow to acquire political force, the situation could well change; for already many take the view that a right of appeal to an overseas court, composed of men relatively unfamiliar with New Zealand's social and legal climate, is a substantial derogation from sovereignty and should be put aside.

Constitutional Issues

The Supreme Court and the Court of Appeal may determine constitutional questions and in so doing may pronounce upon the validity of an act of the Parliament of New Zealand, but the scope of such pronouncements is in practice quite narrow; for our Parliament has power to legislate as it thinks best for the peace, order and good government of New Zealand. This is a very wide authority, and it is only when it can be said that Parliament has gone beyond that, or has failed to follow some procedural requirement, that the court's power to declare legislation invalid can be exercised. But this does not mean that New Zealand courts are in practice never asked to determine the jurisdictional limits of Parliament. Cases arise from time to time in a variety of areas. One can point to a number concerned with the extent of New Zealand's Mandate over Western Samoa, when that Mandate existed; to those testing the competency of Parliament to make divorce laws which have effect upon persons domiciled in other countries; and, especially, to those concerned with the competency of Parliament to legislate in respect of offences committed outside New Zealand's territorial waters.

At the time of writing this article, the Court of Appeal is concerned with the validity of a section of our Crimes Act which gives our courts jurisdiction in respect of crimes committed on board a Commonwealth ship, wherever that ship may happen to be.¹¹

In June 1967 radio stations in New Zealand picked up a 'mayday' call from a vessel in the Tasman Sea about 100 miles out from New Zealand. In due course the ship was located by a passing vessel and its occupants brought to port. It transpired that the ship, an ocean cruiser of small dimensions, had been stolen from Brisbane and was being taken to New Zealand. It was out of fuel and food. Two men and a boy were aboard. The men had quarrelled and, so it was alleged, one, *Fineberg*, had stabbed the other. *Fineberg* was later charged in a New Zealand court with the crime of attempted murder. He was convicted. As the ship was well outside New Zealand territorial waters when the offence was committed, the question of the jurisdiction of New Zealand courts to deal with it has now arisen on appeal. That in turn depends upon the competence of Parliament to confer authority on New Zealand courts to deal with offences committed outside New Zealand and its territorial waters.

But, while constitutional questions thus come before the courts now and again, that does not happen frequently: the more usual constitutional function of the courts is to act as interpreters of the written word of Parliament.

Administrative acts of the executive may be impugned under

¹¹ *R. v. Fineberg*.

the domestic law in any of the courts which exercise civil or criminal jurisdiction. But for obvious reasons the Supreme Court is usually chosen, if such an issue is anticipated, as the court of first instance. Again, the powers of the courts over executive acts should be seen in their true light. As a result of the way these powers have developed under the common law, both in England and New Zealand, an executive act can be set aside, broadly speaking, only if it infringes certain standards which the courts have established as embodying the basic requirements of natural justice, or if it exceeds the authority which, as a matter of law, the executor of the act is given, by statute or otherwise. But despite this limitation, now well established, recourse is nevertheless constantly made to the courts to strike down acts of executive excess. Innumerable instances could be quoted. *New Zealand Dairy Board v. Okitu Co-operative Dairy Co. Ltd.*¹² is a favourite example.

The New Zealand Dairy Board is a statutory body of immense prestige and great power in New Zealand. It acquires compulsorily and sells in New Zealand and overseas all New Zealand dairy products, which are very considerable in quantity and value. One of the functions of the Board is to make zoning orders, the effect of which is to direct dairy farmers in defined areas to deliver their milk or cream to a particular dairy factory or factories for processing. As a result of one such zoning order, the Okitu Dairy Company, while authorised to operate exclusively in a particular area, was excluded from operating in other areas. It objected to this, and complained to the Court that the Board in making the zoning order had determined a question affecting the company's rights as a subject, had thereby directly interfered with its common law rights to deal with whom it chose, and had done all this without enquiring what the company had to say. It conceded that the Board was, at least primarily, an administrative body, but said that when the Board was making a zoning order it was under a duty to act judicially, with the consequences that it was obliged to hear those likely to be affected, to consider the various issues involved, and generally to act in accordance with the principles of natural justice.

The Supreme Court, and later the Court of Appeal in a judgment which has become widely known throughout the English speaking world, upheld the claims of the Okitu Company, deciding that there existed, in fact, a contest between it and other dairy companies which created something in the nature of a *lis*, on which the Dairy Board had to decide; and that that being so, the Board's duties were to that extent judicial and carried an obligation to hear the parties. The zoning order was therefore cancelled.

It is interesting to follow this particular matter further to the case of *Jeffs and Others v. New Zealand Dairy Production and Marketing Board and Others*¹³ decided last year.

¹² [1953] N.Z.L.R. 366.

¹³ [1966] A.C. 551.

In 1965 Jeffs, a dairy farmer living in the northern part of New Zealand, objected to a zoning order made by the Board, the result of which was to require him to transfer the supply of his products to a factory different from that to which he had previously sent them. He challenged the zoning order on the ground that the Board had relied upon the report of a sub-committee, which it had set up to take the evidence of those affected and to report upon the matter generally, instead of itself hearing his evidence.

The New Zealand courts were divided on the matter. The trial Judge held that Jeffs had been given a hearing which was adequate in terms of natural justice. The Court of Appeal was not unanimous, one member taking the view that the hearing was inadequate, the other two accepting the decision of the trial Judge to the contrary. Jeffs finally appealed to the Privy Council, and there his complaint succeeded. The Privy Council said that whilst the Board could in the course of its judicial function delegate to a committee its authority to hear and receive oral evidence, it was still obliged to consider all the evidence offered, and, as in the instant case it had merely considered a summary of the evidence and the conclusions of the sub-committee, it had failed to hear the interested parties sufficiently.

Another case that might be considered of interest is *Reade v. Smith*.¹⁴

The case concerned the right of a parent to send his son to the State school of his choice. The boy had been attending one State school, but under a zoning order purporting to be made by the Auckland Education Board, he was transferred to another, not so very far away. The zoning order had been made by the local Education Board, pursuant to powers conferred on it by a regulation made by the Governor-General in Council, which, in turn, was promulgated pursuant to an Act of Parliament entitling the Governor-General to make regulations 'for any purposes which he thinks necessary to secure the due administration of the [Education] Act'. The father challenged the regulation, contending that the court could examine whether the grant of power to an Education Board to make zoning orders was a matter which the Governor-General could properly think necessary to secure the administration of the particular legislation. The Board argued, *contra*, that the legislation gave the Governor-General a complete and unexaminable discretion.

The father's objection was upheld in the Magistrate's Court and this was confirmed on appeal to the Supreme Court in a judgment which is perhaps the high water mark in the exercise by our courts of control over executive acts. The Judge, Turner J., now a member of the Court of Appeal, stated the power of the courts to protect citizens from excessive administrative acts in these terms:

I emphatically reject the contention that the question whether the condition has been satisfied can be 'conclusively decided by the man who wields the power'. In a time in which the individual citizen is every day confronted

¹⁴ [1959] N.Z.L.R. 996.

with some new legislation by regulation, it is imperatively necessary for the Courts to retain and to exercise the salutary jurisdiction which enables them to protect the liberty of the subject by insisting upon the test proposed by Atkin J.¹⁵ and adopted by Smith J.¹⁶ in the cases which I have quoted. I apply it and hold that the words

'for any purposes which [the Governor-General] thinks necessary to secure the due administration of the Act'

lay upon me the duty of inquiring whether the purposes of the regulation could reasonably as a matter of law have been considered by the Governor-General to be necessary in order to secure the due administration of the Act; and if the regulation cannot pass this test, it will become my duty to declare that it is *ultra vires* and void.

Though all these cases happen to involve zoning orders, they are not of a special class, the same governing principle being applied to executive orders generally. It is in this way, then, that our courts seek to control executive action. Nevertheless, there is at the present point of time much discussion whether that way is sufficient. It is said that there should be a more general right of appeal, both in fact and law, to the courts than the present procedure provides, and that the courts should have power to examine merits as well as the legal power behind the order. The problem is an important one, especially as there are in New Zealand a large number of bodies outside the courts which are charged with the duty of making decisions affecting the rights of citizens; for example, decisions concerning trade practices, shopping hours, transport services and charges, compulsory acquisition of land, land development and town planning, income tax objections, film entertainment and the censorship of indecent literature. It is quite probable that something will be done in this direction before very long as a result of recommendations of the Law Reform Commission established by the Attorney-General, in which both practising and academic lawyers collaborate with government legal men on proposals for reform. Furthermore, the New Zealand Section of the International Commission of Jurists has recently submitted to the Attorney-General a draft of a bill to provide a uniform procedure for appeals from all administrative tribunals.

Human Rights

New Zealand has no written constitution in the sense that the United States of America or some European countries have, and, as a consequence, no single charter of civil liberties. Rights of citizens which in the U.S.A. and in many European countries one

¹⁵ In *Lipton v. Ford* [1917] 2 K.B.647.

¹⁶ In *Herbert v. Allsopp* [1941] N.Z.L.R. 370.

finds declared in a formal constitutional document are to be found in New Zealand interwoven throughout the fabric of the common law, which, as already pointed out, was inherited from England along with all the English concern for personal freedom. An English jurist¹⁷ has said:

In effect we have traditionally considered that civil liberty was adequately safeguarded in this country by the ordinary law of the land, dispensed by independent judges, with a body of public opinion tolerant of dissent; and that where these conditions were absent the value of constitutional guarantee was dubious...

Some illustrations of our courts' concern for personal freedom may be helpful. *Corbett v. Social Security Commission*¹⁸ is a case of some interest. There, our Court of Appeal refused to follow a very well known decision of the House of Lords (*Duncan v. Cammell Laird and Co. Ltd.*).¹⁹ This case ruled, in effect, that if a Minister in charge of a Government Department certifies that any particular documents in the possession of his department should not be made available for production in court, because to do so would be contrary to the interests of the State, the courts cannot go behind that certificate and production of the documents is therefore not compellable. Our court, preferred to adhere to an earlier ruling of the Privy Council²⁰ to the effect that the courts have power to over-rule ministerial objection to the production of such documents if they consider it right to do so, though this is a power not to be lightly exercised. The importance of this ruling is that it prevents the Executive denying availability of State documents to litigants, unless it is truly in the interests of the State that those documents should not be made public. This determination of our Court of Appeal to limit the powers of a Minister of the Crown and to do so in the face of a decision of the House of Lords, the pre-eminent legal body in the British Commonwealth, is now the law in most countries of the Commonwealth.²¹

A more recent, and perhaps more striking example of the maintenance of the citizen's rights is *Blundell v. Attorney-General* [1967].²²

¹⁷ Prof. S.A. de Smith, LXV *The Listener* (April 13, 1961) 639 (a broadcast address).

¹⁸ [1962] N.Z.L.R. 878.

¹⁹ [1942] A.C. 624.

²⁰ *Robinson v. State of South Australia* [1931] A.C. 704.

²¹ Since this article was written, the House of Lords has held that the courts may inspect documents claimed by the State to be privileged and when the interests of justice require, may make an order for their production; the Minister concerned would be able to appeal against such an order — *Conway v. Rimmer*, decided on 28th February 1968.

²² As yet unreported.

In September 1964 a scuffle ensued in a street in Auckland City, between Blundell and an uncle of a girl with whom Blundell was consorting. Two Police officers came upon the scene. They were told by the uncle that a warrant for the arrest of Blundell for failure to support his wife had been issued out of the Magistrate's Court. Blundell denied that that was so, and sought to move on, but the Police officers held him, against his will, while enquiries were made into the existence of such a warrant. Finally it was ascertained that there was no such warrant, and Blundell was allowed to go on his way. In course of time he issued proceedings claiming damages against the Police officers, alleging that the holding of him was an improper restraint amounting to false imprisonment.

His claim, which was heard by a jury, failed after the jury had been directed by the trial Judge that the temporary detention of a person suspected to be the subject of a warrant of arrest so that enquiries could be made was capable of justification as a matter of law. But the Court of Appeal, on appeal from the rejection of the action by the jury, held otherwise; the court said that it is a fundamental rule of the common law, inherited as part of the British system of justice, that any restraint upon the liberty of a citizen against his will, not warranted by law, is a false imprisonment and entitles the person detained to damages. The question then was whether the law did warrant the short and, what many people might think reasonable, restraint in this case. The court was unanimous that that was not so. The attitude of the court may, perhaps, be taken from the words of a member ²³ of the court who after speaking of the power of Police officers to arrest for offences committed and to use force to prevent crime, continued:

But neither the Common Law nor our statute law has conferred upon the Police power to take and hold for questioning nor, in my opinion, to hold while enquiries are being made. The British people have always turned their backs positively on the grant of such powers to Police, no doubt bearing in mind how often history has demonstrated that even in modern and sophisticated communities such powers can be distorted into instruments of oppression and injustice.

The court ordered that the action be retried.

Notwithstanding that New Zealand courts struggle to preserve the independence of the individual in a climate of growing State powers, there are, in New Zealand, many who consider that it would be advantageous if our basic human rights were declared by some formal constitutional document. They fear the modern tendency to identify the supremacy of the government of the day with the Rule of Law and the concurrent failure to accept the concept of the Rule of Law as being the supremacy of law over the government. They believe it is fundamental that there exist some constitutional technique for forcing the government to submit

²³ McCarthy J.

to the law. On the other hand, others claim that the existing system is more flexible, and has preserved in English speaking communities where the common law has been allowed to develop, all essential freedoms, at least equally as well as they have been preserved under other systems of law.

Conclusion

There is, we think we can fairly say, general satisfaction in New Zealand with the performance of its courts. Judicial officers are held in high regard, and the integrity of the courts is unquestioned. Appointment to the Supreme Court or the Court of Appeal of leading barristers frequently brings a reduction in income to the appointees, but this rarely deters acceptance of appointment, which is considered a great honour. New Zealand is firmly committed to the practice of appointing its superior judicial officers from practising members of the legal profession, and does not favour a career system wherein appointment to superior courts is part of the process of promotion. Adherence to the British concept of separation between the executive and the judiciary has also helped, in our view, to preserve the high standards of judicial independence; though there are some who say that this can make the judiciary unaware of the complexities and difficulties of government administration in modern times, when economies are daily becoming more complex and subject to management by government decree. But it seems to us unlikely that there will be any major change in the basic judicial structure of this country for some years to come. The most probable change is the abolition of the final right of appeal to Her Majesty's Privy Council in London, which we have discussed earlier. Even there, it may be that New Zealand, with its small population and its close personal and cultural links with England, will retain the link longer than any other member of the Commonwealth. New Zealand's history has been said to be marked by self-conscious hesitations in its advance towards responsible government, each move in that direction being regarded in some vague way as disloyal to our British descent.²⁴ That attitude still remains, though its strength is being eroded rapidly by time and circumstance.

²⁴ J.F. Northey: *The New Zealand Constitution* in the A.G. Davis Essays in Law — Butterworths, 1965.

THE EFFECTIVE REALIZATION AND PROTECTION OF CIVIL AND POLITICAL RIGHTS

U.N. Seminar held at Kingston, Jamaica
from 25th April to 8th May, 1967

The Seminar was convened pursuant to U.N. General Assembly Resolution 1926 (X) as part of the U.N. Human Rights Advisory Services. It was the first U.N. Seminar on the topic of Civil and Political Rights. The Seminar was confined to the Western Hemisphere and consisted of participants from Argentina, Barbados, Bolivia, Brazil, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, France, Guatemala, Guyana, Honduras, Jamaica, Mexico, Netherlands, Nicaragua, Panama, Trinidad and Tobago, United Kingdom, United States of America and Venezuela (22 Governments), assisted by experts from France, Japan, Roumania and Sweden. Observers represented the Governments of Colombia and Peru. The International Commission of Jurists was represented by Mr. Seán MacBride, S.C., Secretary-General, and Observers from 28 non-governmental organizations participated.

* * *

Because of their importance in the field of Civil and Political Rights, the Conclusions of the Seminar are set forth in full hereunder.

CONCLUSIONS

Part I: Essential Requirements*

In general, the essentials for the effective Realization and Protection of Civil and Political Rights at the national level are:

1. *Guarantee of Rights*

A formulation, preferably in the organic law, but at all events in the jurisprudence of the country, of the civil and political rights of the individual.

2. *Courts*

A court system which

(a) ensures the independence and impartiality of the Judiciary;

(b) acknowledges the right of the Courts of Justice to pronounce on the legality of governmental action and to grant redress for violations of the civil and political rights of the individual;

(c) guarantees to aggrieved individuals a practicably exercisable right of access to the Courts of Justice to secure redress for violations of their civil and political rights.

3. *Supplementary Machinery*

Machinery, supplementary to the Courts of Justice, designed swiftly to investigate and effectively to pronounce upon administrative action violative of the civil and political rights of the individual and to which the individual may have inexpensive recourse.

4. *Emergency Situations*

A system of control of the assumption and exercise of extraordinary powers by the Executive branch of Government designed:

(a) to restrict the circumstances of national emergency in which the Executive branch of Government may be vested with such powers;

(b) to limit the degree to which such powers may be exercised in derogation from the civil and political rights of the individual;

(c) to give the Courts of Justice a supervisory jurisdiction over the observance of these restrictions and limitations

* Note: The paragraph sub-headings did not form part of the Conclusions, but were added for convenience.

including the power to grant effective remedies in cases of their contravention.

5. *Public Opinion*

A citizenry conscious of its civil and political rights, resolute in its support of the institutions and arrangements designed to safeguard them, and vigilant against the erosion of the rights of free expression and of assembly and petition and of civil and political rights in general.

6. *Elections*

A system of periodic and genuine elections by universal and equal suffrage through which the will of the people may form the basis of the authority of government.

Part II: Desirable Measures

In order to ensure the proper and effective application of the general essentials hereinbefore set forth, the following measures are desirable:

1. *Review of Laws*

That Governments and Legislatures should systematically undertake a review of their legislation, laws and procedures to ensure that they conform with the provisions of the Universal Declaration.

2. *Policy Guide Lines*

That in regard to the day to day policy of public authorities, the following guide lines should inspire them:

(a) A desire to strengthen the protection of civil and political rights;

(b) Where complaints against public authorities arise, their consideration by the public authorities should be sympathetic and objective rather than critical and subjective;

(c) Where decisions or indications are given by the Courts either in regard to the need for legislation or for measures to better secure civil or political rights, those decisions or indications should be given due weight;

(d) The need to ensure the easy and ready availability of legal remedies to protect civil and political rights by means of free legal aid or other equivalent methods.

3. *Quasi Judicial Acts*

In regard to quasi judicial or administrative acts affecting or likely to affect the political or civil rights of the individual, the motivation for such acts should be fully stated and the following rules should obtain:

(a) *Executive or administrative orders not involving an individual adjudication.*

Such orders or regulations may not initially amount to an adjudication affecting any particular individual but by reason of their broad scope they may ultimately affect the rights and interests of individuals. In these cases the public authority should consult organizations or groups interested in the contemplated measures and give a reasonable opportunity to interested individuals to present their views.

(b) *Executive or administrative orders amounting to an individual adjudication.*

In these cases the following requirements should be observed:

- i) There should be adequate notice to the interested parties of the contemplated measures and the reasons therefor. (See above).
- ii) An adequate opportunity should be provided to the interested parties to prepare their case, including right of access to all relevant data.
- iii) The interested parties should be given the right to be heard, to present evidence and to meet opposing arguments and evidence.
- iv) The interested parties should be given the right to be represented by counsel or other qualified representative.
- v) Notice of the decisions reached and of the reasons therefor should be communicated within a reasonable delay to the interested parties.

4. *Independence of the Judiciary*

To ensure the proper working of the Courts, it is essential that there should be an adequate number of Judges and that their appointment and working conditions should be such as to ensure their independence.

Part III: Specialized Institutions

The Seminar examined the various specialized institutions existing in some areas of the world to ensure the more effective protection of civil and political rights, such as in France (le Conseil d'Etat), in

Sweden (the Ombudsman), in Japan (Civil Liberties Bureau and Commission), in Roumania (The Procurator General) and in Puerto Rico (Commission on Human Rights).

Ombudsman Recommendations

While appreciating the value of each of these institutions in their national context, it was considered that any additional institutions envisaged should be capable of being grafted upon the political and legal systems which already exist in the area. In the case of countries other than the Latin American countries, the consensus was in favour of the institution of the Ombudsman system such as it prevails in Sweden, Denmark, Norway, New Zealand, Guyana and United Kingdom, suitably adapted to the needs of the country. It was the general view that this system would be of considerable assistance to ensure both more efficient administration and more effective protection of civil and political rights. Such a system would be a valuable complementary adjunct to the existing administration and judicial machinery in most countries in the area.

The Latin American countries represented at the Seminar shared the view that the Ombudsman represents an effective instrument for the defence of human rights. This institution, which has a long and fruitful tradition in European countries, would be new in their countries. Consequently, it would be necessary to prepare the ground beforehand and to ask the assistance of the U.N. so that there might be a methodical approach to publicizing the institution throughout Latin America. This could lead to the progressive implementation of the system in a manner consistent with the conditions prevailing in each country.

Part IV: International Measures

U.N. High Commissioner for Human Rights

The Seminar noted with satisfaction the initiative taken by Costa Rica, now endorsed by the United Nations Commission on Human Rights, for the establishment of a United Nations High Commissioner for Human Rights as a valuable adjunct to any system for the better realization of the principles enunciated in the Universal Declaration of Human Rights.

Reinforcement at National Level of U.N. Measures

The participants were agreed that the international measures instituted by the United Nations for the protection of Human Rights and fundamental freedoms should be reinforced by national institutions for the protection of those rights, such institutions being composed of persons of high integrity and impartiality.

Part V: War and Public Emergencies

The participants were also agreed on the following:

- (a) *i)* That it should be made constitutionally impossible, however grave an emergency might be, to suspend such fundamental rights as the right to life, freedom from slavery, freedom from inhuman or degrading treatment; or the basic principles of equality before the law and no penalty without fair prior trial. The suspension of constitutional guarantees in times of emergency should be strictly controlled by law in all its phases. The circumstances in which an emergency may be declared, the measures to be adopted and powers exercised by competent authorities to deal with the emergency, should all be set out in legislation and all Governments should consider reviewing and refining their legislation on emergencies in times of peace and tranquillity.
 - ii)* That wherever the executive power is legally authorized to declare a state of emergency, the declaration should be compulsorily referred to the Legislature for confirmation within the shortest possible time. The Legislature should retain control over the duration of emergency periods, which should only be extended from time to time when the Legislature is satisfied that extension is needed.
 - iii)* That it should be recognized that emergencies differ in the nature and gravity of the threat which is posed to national existence and in the absence or presence of internal political tension or foreign interference. The powers conferred on competent authorities and the extent of the authorized abrogation or curtailment of rights and freedoms should be limited strictly to the needs of the particular circumstances.
 - iv)* That an obligation should be imposed upon the executive power to submit its programme and procedures to legislative review from time to time during the emergency. Moreover, the courts should not be deprived of the right to examine the legality of any action taken by the executive during the emergency.
 - v)* That all persons who have illegally assumed executive power and abrogated civil and political rights by illegal declarations of emergency should be liable to trial and punishment through the procedures of the court.
- (b) That it is necessary to adopt means which will help to expedite judicial proceedings, since delayed justice is truly a denial of justice.

(c) That steps must be taken to ensure that administrative officials are not entrusted with judicial functions.

(d) That the system of trial by jury should be reviewed in order to be made more efficient.

Part VI: Ratification of U.N. Conventions

The Seminar noted with satisfaction the significant steps taken at the international level, at the twentieth and twenty-first sessions of the General Assembly of the United Nations, by the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination and of the International Covenants on Human Rights, in particular the Covenant on Civil and Political Rights. The Seminar expressed the hope that this advance would be matched at the national level by the ratification of the Convention and the Covenants on the part of all countries of the Hemisphere.

MONTREAL STATEMENT

of the

ASSEMBLY FOR HUMAN RIGHTS

March 22-27, 1968

The United Nations having proclaimed 1968 as the International Year for Human Rights, the members of the Assembly for Human Rights came together, as a group of private individuals from many areas of the world representing different disciplines and ideologies, to express profound concern about the condition of human rights in this year of international crisis and to explore the ways in which mankind's shared aspirations to human dignity can become a reality.

Few tasks facing the international community today are of more vital importance to it than the promotion and protection of human rights. The problems of peace are intimately connected with problems of human rights. A permanent peace cannot be achieved without creating conditions that assure men everywhere the highest stake in building a world in which their lives and their human dignity are safeguarded, and in which freedom from fear is secured.

The world of today is one of great differences in levels of economic development, of different social systems and traditions, and of countries, giving different priorities to their needs. In these circumstances the only alternative to self-extinction is the promotion of peaceful co-existence of nations and States in a spirit of mutual understanding and tolerance, and improvement of international cooperation on a basis of equality, mutual respect and solidarity, regardless of different social systems. Having that view, all nations and governments, private associations and individuals, should encourage and stimulate all initiatives which lead toward the meeting of these aims.

After six days of thorough and frank discussions, the Assembly reached the following general consensus:

I. Areas of Progress

The Charter of the United Nations, the constitutional document of the world community, creates binding obligations for Members of the United Nations with respect to human rights.

The human rights provisions of the Charter, although general in character, have the force of positive international law. As such they

establish basic duties which all Members must fulfill in good faith. The Charter obligates the Member States to cooperate with the United Nations in promoting universal respect for, and observance of, human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion. For this purpose the Member States have pledged themselves to take such joint and separate action as may be necessary to achieve these ends.

The inclusion of human rights provisions in the Charter of the United Nations was a revolutionary break with the past; it established unequivocally that human rights are matters of international concern and that the individual is a subject of international law. While the effective implementation of human rights is always the essential responsibility of States, the international community, pursuant to the Charter, is entitled to protect these rights everywhere.

The provisions of the Charter relating to human rights are flexible enough to permit their adaption to the political, legal, social, economic and cultural demands of any given period. They also supply the legal framework for the human rights efforts by the United Nations and various other international organizations.

The Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law.

The Declaration defines in important detail the 'human rights and fundamental freedoms' which the Members of the United Nations have in the Charter bound themselves to respect and protect. All Members agreed in the Declaration on 'a common standard of achievement', they approved a comprehensive list of basic rights and freedoms, and they accepted the obligation 'to secure their universal and effective recognition and observance'. All the States, including those which in 1948 were not yet Members of the United Nations, have subsequently on many occasions affirmed that the Declaration must be faithfully observed.

The Universal Declaration has also been enshrined in the national constitutions of many States. To the people of these States, the Universal Declaration is an ever-present inspiration and reminder of the rights, aspirations and concerns which they share with men everywhere.

The Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights and various conventions adopted by the United Nations and the specialized agencies further clarify the obligations of the Members of the United Nations. *

* The texts of the various instruments adopted under the auspices of the United Nations and the specialized agencies may be found in the 1968 United Nations document entitled *Human Rights: A Compilation of International Instruments of the United Nations*.

II. Non-Discrimination

Non-discrimination is a basic principle and rule of contemporary international law. By adhering to the Charter of the United Nations the Member States have assumed, as a fundamental legal obligation the duty to promote, respect and protect the human rights of all 'without distinction as to race, sex, language or religion'.

The rule of non-discrimination has in the last twenty years been reaffirmed in numerous international declarations and conventions, notably the International Convention on the Elimination of All Forms of Racial Discrimination, the Discrimination (Employment and Occupation) Convention of the International Labor Organization, the UNESCO Convention against Discrimination in Education, the ILO Convention Concerning Equal Remuneration for Men and Women Workers, and the United Nations Declaration on the Elimination of Discrimination against Women. Non-discrimination in the enjoyment of human rights has thus been firmly established as a basic principle of contemporary international law. It has been also generally recognized that discrimination based on race, sex, language or religion is a cause of international friction and conflict.

And yet discrimination in all its internationally outlawed forms is rampant in all parts of the world. Particular attention must be drawn to southern Africa, where apartheid stands as a shocking reminder to mankind everywhere of the international lawlessness that still remains to be eradicated.

Despite the untold suffering that religious discrimination has visited on mankind in the past, it still remains a serious problem in many parts of the world. This gives particular urgency to the speedy adoption by the United Nations of the International Convention on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

One should not leave unmentioned discrimination against women, which denies them the opportunity to participate in the political affairs of their countries, equality before the law, access to educational facilities, equality in employment opportunities, and a whole range of other social, economic and cultural rights. World public indignation remains, furthermore, to be aroused to the cruelly discriminatory practices to which both children born out of wedlock and unmarried mothers are subjected by virtue of the laws or customs of many countries.

The foregoing examples by no means exhaust the many violations of the rule of non-discrimination that are experienced daily by human beings. The vastness and diversity of the problem of discrimination and the suspicions it breeds indicate that the world community must

make a special effort to put into effect the international rule of non-discrimination against all the proscribed discriminatory practices.

III. Apartheid

The most flagrant violation of human rights today is the abhorrent practice of apartheid enforced as official policy in the Republic of South Africa and in some other parts of southern Africa. Apartheid constitutes a gross denial of the most basic civil and political rights of non-white South Africans, and their most fundamental economic, social and cultural rights.

The Assembly joined in the universal condemnation of this repugnant practice and the daily shocking violations associated with it. The Assembly was particularly concerned that the governments involved have thus far totally ignored and defied all requests and demands on the part of the international community for remedial action in this regard. International efforts to bring about a solution to this problem should continue to receive particular attention by all organs of the United Nations family of organizations in the context of their concern with all human rights. Steps should be taken to increase the effectiveness of the measures required to bring about a prompt and just solution of this vital problem.

IV. Slavery

Slavery and the efforts to abolish this reprehensible practice have a history that long antedates the international recognition of human rights. But this should not delude us into believing that slavery no longer exists. It still persists in some parts of the world, in all of its ingeniously inhuman forms, such as outright slavery, serfdom, the sale of women into marriage without their consent, debt bondage, sham adoptions of children to exploit their labor, and so forth.

These practices deny to a large number of people in the world the right to be considered as human beings, to live and to be treated as persons rather than saleable commodities. A concerted international effort must be made to eradicate the institutions of slavery. Such a concerted international effort must begin with a ratification and compliance by all States with the 1926 Convention on Slavery and the 1956 Supplementary Convention on the Abolition of Slavery. And because of the seriousness of the problem and the surprising lack of reliable data on its various social, political, economic and cultural ramifications, it is vitally important that a permanent body of experts within the United Nations, with special responsibility for slavery, be established to gather information on slavery and to assist in the enforcement of conventions on the subject.

V. Refugees

The Assembly discussed the problems of refugees and recognized the progress made in this area by the adoption, in 1951, of the Convention Relating to the Status of Refugees and the related 1967 Protocol.

Particular attention was given in this connection to the right of asylum and to the reunification of refugee families. The Assembly expressed the hope that the principle of *non-refoulement* (non-return of a refugee to a country where his life and liberty is threatened), which was affirmed in the Declaration on Territorial Asylum, adopted unanimously by the General Assembly in 1967, would be accepted as a binding obligation by all countries. It was also the hope of the Assembly that governments would facilitate the reunion of families, thus recognizing the right to family life affirmed in the Universal Declaration of Human Rights.

VI. Civil and Political Rights

The struggle for human rights began with man's quest to secure his civil and political rights. Unfortunately, this struggle is still far from being won. Indeed, in many areas of the world we see retrogression rather than progress. There is consequently a special urgency to put into effect the Covenant on Civil and Political Rights, and the Optional Protocol thereto, which provides at least some measures of implementation.

The significance of these rights is reflected in other sections of this Statement dealing with a variety of problems regarding their promotion and implementation.

VII. Economic and Social Rights

The Universal Declaration recognizes that economic and social rights are inherently linked with any meaningful enjoyment of civil and political rights. Since the adoption of the Universal Declaration, the promotion and protection of economic and social rights are as much matters of international concern as the promotion and protection of civil and political rights. This is merely the legal recognition of a readily observable fact: the development of civil and political rights depends to a very large extent on the achievement of a minimum standard of economic and social rights.

The Assembly recognized that there is thus a profound relationship between enjoyment of human rights and economic development. The seriousness of the problem is indicated by the ever-widening gap between the economically developed and developing countries. The legal obligations which the international community has, under the Charter

of the United Nations, to promote and protect human rights thus carries with it an obligation to work in concert towards the creation of economic and social conditions in the world at large which will provide the necessary prerequisites for the enjoyment of human rights.

In countries where the great bulk of the population is illiterate, unskilled, where job opportunities are limited, where there is no access to medical or educational facilities, where the stilling of hunger is the one all-pervasive aspiration, it is difficult for any other human right to be enjoyed. This widening gap in felt priorities that divide the rich from the poor nations cannot but destroy the very foundations upon which the international human rights efforts are built. Neither stable peace nor complete protection of human rights is possible as long as the international community refuses to share in a meaningful way in carrying the burden of States which cannot do it alone.

VIII. New Areas of Concern

Civil Disobedience, Rebellion and Revolution

The questions of civil disobedience and conscientious objection and the right to resist oppression were discussed. The Assembly recognized that these questions raise significant and complex issues which ought to receive further study and research.

Rights of Groups

Persons belonging to ethnic, religious or linguistic minorities must not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. At the same time minority groups have a duty to contribute to the development of the State in which they are settled and to join in the mainstream of its life.

The Assembly noted in this connection that it is necessary to give further study to methods of assuring to each person belonging to a group the opportunity to fully exercise his individual rights.

Human Rights in Armed Conflicts

It is only in a world at peace that human rights and dignity can be effectively safeguarded. While war has been unequivocally outlawed by the Charter of the United Nations, warlike violence in defiance of this Charter obligation is still rampant.

The increasing violence and brutality of our times, including massacre, summary execution, tortures, the killing of civilians and the use of chemical means of warfare tend to dull the reaction of horror. Furthermore, this brutality not only tends to erode human and ethical standards, but also spreads in a contagious fashion and engenders

counter-brutality. The gravity of this situation, which threatens to engulf the world in a cataclysm of horror, must be brought to the attention of the United Nations, governments, the leaders of the churches and of public opinion so that they may combine in a joint effort to end this alarming trend.

War and armed conflicts invoke massive destruction of human rights. Having regard to the frequency and increasing horror of armed conflicts, it is essential to protect civilian populations and disarmed combatants from unwarrantable destruction and suffering. Safeguards are also necessary to protect soldiers against illegal or discriminatory acts of their officers. Whatever the circumstances, those involved in armed conflicts must be reminded of the minimum rules of humanitarian conduct which they must respect in every armed conflict, even one which is not of international nature. It is the duty of the States which are parties to one or more of the Geneva Red Cross Conventions of 1949, singly and collectively, to use their best endeavor in armed conflicts of any kind 'to ensure the respect in all circumstances' of the provisions of the Conventions. Each and every one of these States should discharge this solemn obligation by requesting the governments, directly or indirectly involved in any armed conflict, to observe and comply with the provisions of the Geneva Conventions. Likewise it may be hoped that the Secretary-General of the United Nations might find it possible to use his best efforts to the same end. The need for and urgency of such steps is emphasized by a statement issued by the International Committee of the Red Cross (Geneva) on February 9, 1968 in the following terms:

'The International Committee of the Red Cross reminds belligerents that in all circumstances they are bound to observe the elementary and universally recognized rules of humanity. These rules demand that the lives of combatants who have been captured shall be spared, that the wounded, the sick and those giving them medical care shall be respected, that the civilian population shall not be subject to attack from the air and lastly, that summary executions, maltreatment or reprisals shall be prohibited.

'The International Committee of the Red Cross has often made known to those taking part in the hostilities the obligations they must fulfill. It ardently hopes that they will shortly put an end to this blood-stained conflict and meanwhile urgently calls upon them to observe the basic rules of humanity.'

The Assembly drew attention to the fact that the most recent codification of the 'laws of war' dates back to 1907, long before the invention of methods of mass destruction such as nuclear weapons, aerial bombardments, napalm, defolients and other chemical sub-

stances. In the Hague Conventions of 1899 and 1907 relating to the laws and customs of war on land, it is provided, however, that:

'Until a more complete code of the laws of war can be drawn up the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience.'

The more complete code of the laws of war envisaged by the Hague Conventions has not eventuated.

Steps should be taken to convene an international conference forthwith to prepare a convention which would revise the Hague Conventions in order to adapt the rules of modern warfare to the laws of humanity and the dictates of the public conscience. A letter addressed by the International Committee of the Red Cross to all governments on May 19, 1967, drew attention to the need for more up-to-date and comprehensive international safeguards for civilian populations and other victims of armed conflicts. In this letter it was pointed out that 'as a result of technical developments in weapons and warfare, given also the nature of armed conflicts which have arisen in our times, civilian populations are increasingly exposed to the dangers and consequence of hostilities'. This appeal by the Red Cross does not appear to have received the attention which it deserves from governments. While the elaboration of a new convention may take time, the initial preliminary steps should not be further delayed.

Right to Family Planning

The question of the right to family planning is an important new area of concern. Many regard the opportunity for the family itself to determine the number and spacing of children as a basic human right which should be clearly recognized as such. The implementation of such a right requires access to educational information and to proper medical services.

Rights of the Child

No rights cry out for greater recognition and demand more pressing implementation than those of the world's children. The appalling effects of war and violence on children receive ready public attention, but the more hidden wrongs arising from poverty, ignorance, squalor and discrimination very often pass unnoticed. The United Nations Declaration on the Rights of the Child represents a beginning

in recognizing the obligation mankind owes to children. The world of tomorrow rests in the hands of the children of today. If it is to be a world of hope, a broad and immediate program of national and international measures must be undertaken to improve the situation of children everywhere.

Among the steps which should be taken are:

1. The United Nations should strengthen its recommendation that wide-spread recognition be given to the rights set forth in the Declaration of the Rights of the Child.
2. The United Nations, through appropriate Committees, should call to the attention of its Member States the moral obligation which rests on the peoples of the respective nations to create conditions which comply with the text of the Declaration of the Rights of the Child.
3. The United Nations family of organizations should, as a significant part of their program for the International Year for Human Rights, encourage and actively assist programs to improve not only the efforts of governments, but also the resources of the private sector, in providing children with the basic requirements of health and education.

IX. New Dangers caused by Scientific Developments

The Assembly recognized the debt which the peoples of the world owe to the efforts of scientists and technicians. Nevertheless, the Assembly points out that many aspects of technological advance represent positive threats to human rights and to human dignity, and that the world community must be alerted to the nature of these threats.

The Assembly also recognized that protection against such threats cannot be embodied in conventions or other instruments until their nature can be identified, and until there is a general awareness of their implications.

The dangers were considered under four heads:

1. Electronic and other forms of intrusion on the right of privacy.
2. Implications of computer-based technocracy for democratic governments.
3. Protection of traditional cultures against the homogenizing influence of a technological civilization.

4. New developments in medicine and biology and their impact on human rights.

The Assembly was strongly of the opinion that the potential consequences of scientific and technical advances for human rights require the most immediate and continuous interdisciplinary study at both the national and international level, and by governments, universities and non-governmental professional, scientific and civic organizations.

A high-level international committee composed of scientists, doctors, sociologists, lawyers and persons of eminence in other fields should be established to advise on the ethical and moral questions raised by the impact of new technology on human rights.

The following studies of the impact of technological developments on human rights should be made:

1. The United Nations Institute for Training and Research (UNITAR) and UNESCO should undertake studies relating to the implications of technological advances, and in particular of computer-based technocracy, on democratic government, and of centralized data banks on privacy and freedoms of individuals;
2. The ILO should address itself to the danger of the 'human cassette', the computer training of workers for specific, short term functions and their discarding when they have fulfilled their limited usefulness;
3. UNESCO should investigate the problem of protecting traditional cultures against the homogenizing influence of technological civilization, with special reference to broadcasting satellites, and seek to secure conventions dealing with the content of programs which will be beamed directly from such satellites into the homes and with the need to protect the population of each country against the imposition of an alien culture;
4. The World Health Organization (WHO) should examine the profound implications of artificial transplants, of personality changing drugs and of gene-manipulation; and
5. Non-governmental organizations of the legal profession should apprise themselves of the risk of computerized dossiers and the admission of evidence obtained by technological means, e.g. lie-detectors, tape-recordings, pharmacological inducements, concealed cameras, etc.

X. Inducing Compliance on the National Level

The Assembly gave considerable thought to practical means of assuring effective compliance with standards which have been laid down by the United Nations family of organizations for the protection of human rights and fundamental freedoms, and considered both national and international implementation measures. It was recognized that international measures for securing compliance with world standards of protection have their own value and effectiveness. For the ordinary citizen, however, the acid test of the protection of human rights would be how effective are the means established close at hand, in his own country and immediately available to him, in safeguarding the rights which his own laws profess to guarantee. How quickly, cheaply and effectively can he obtain redress when such rights are infringed or denied. In this connection the findings of the United Nations Seminar held in Jamaica in April 1967 * to consider the effective realization of civil and political rights at the national level were endorsed. The need for good administrative procedures was also recognized.

The main means for the protection of the rights of individuals, at the national level, is an independent and impartial judiciary. In every country steps should be taken to create or maintain a court system which ensures independence and impartiality and secures to each individual the right of access to courts.

In every country of the world, no matter how developed or underdeveloped it might be economically, and irrespective of the character of its political system or social organization, some specialized institution needs to be established by law, in addition to the courts, to which a citizen who considers himself deprived of his rights may turn seeking redress and may either have it established that he was mistaken or obtain effective remedies.

Such a specialized institution may take a number of different forms, according to the country's political or social system. It may be of the type of the ombudsman or the procurator general, or an administrative tribunal such as the Conseil d'Etat, or it may be a national human rights committee or commission. It may combine within its competence a number of different functions. The essential and distinguishing feature would be, however, its legal competence to receive an individual's complaint, to investigate it with unimpeded access to official files, and to provide or secure effective redress when his rights are infringed or ignored.

* See page 87 (above).

At the same time no national machinery established for the safeguarding of human rights can be expected to operate satisfactorily for long unless it is supported by an informed and effective indigenous public opinion. The machinery and its functions must have the understanding and support of those who accept the basic principles on which the State is founded.

XI. International Implementation Measures

Effectiveness of national measures is closely related to the existence of international judicial or supervisory institutions. When the individual can invoke the assistance of such international institutions to vindicate his right, he has additional assurance that his rights will be protected.

Virtually no such international implementation exists today. Mutual distrust, outmoded concepts of national sovereignty, and considerations of temporary political advantage have thus far blocked almost all efforts to obtain the acceptance of effective international implementation measures.

Deeply concerned with the lack of substantial progress in this area, the Assembly thoroughly explored a whole range of problems relating to the international enforcement of human rights guarantees, examining and evaluating various proposals for the development of an effective international enforcement machinery and the improvement of existing implementation procedures.

The Assembly was particularly impressed with the implementation achievements of the International Labor Organization and of the Council of Europe which, through the European Convention of Human Rights, has established the most advanced and effective regional machinery for the enforcement of individual human rights. The experience of the International Labor Organization and of the Council of Europe shows that effective international implementation procedures are by no means unattainable.

Right of Petition

While the right of petition is enshrined in many domestic constitutions as a fundamental right, it has not as yet received the international acceptance that it deserves as an important instrument for the implementation of human rights. The valuable experience that the United Nations has gained in the Trusteeship Council and the Special Committee on Apartheid with respect to petitions by individuals, and the extensive experience of the European Commission of Human

Rights, suggest that this procedure might be applied to other human rights areas.

United Nations High Commissioner for Human Rights

The Assembly strongly supported the existing proposal for the establishment of the office of a United Nations High Commissioner for Human Rights, or a United Nations institution with a similar function.

Fact-Finding Mechanisms

Very often even the limited implementation procedures available to the international community cannot be put into operation because of the absence of effective and impartial fact-finding mechanisms. The mere existence of an official and impartial fact-finding body might deter violations of human rights. The establishment of such fact-finding mechanisms within the framework of international organizations should, therefore, be encouraged. As a first step in this direction the United Nations Commission on Human Rights might, for example, establish a committee of experts to which the Commission could refer any communication received by it, in order to determine whether the evidence presented shows a gross violation of human rights or a consistent pattern of violations of such rights.

Improving the Status of the United Nations Commission on Human Rights

The Assembly considered that the Commission on Human Rights, the only institution in the field of human rights which is mentioned in the Charter of the United Nations, has a status within the United Nations family of organizations which is not commensurate with the important responsibilities entrusted to it. It should no longer be merely one of a large number of commissions reporting to the Economic and Social Council and directed as to policy by that Council. It should be raised as soon as possible to the same level as the Economic and Social Council and should report directly to the General Assembly. The Secretariat's Division of Human Rights should also be raised to the level of a Department, headed by an Under-Secretary.

The Assembly discussed a proposal that at some future time the peoples of the United Nations should be directly represented in a permanent world forum, an Assembly on Human Rights, in which they might be able to discuss human rights problems of a general nature and advise the General Assembly on matters of policy in the human rights field. The possible basis of representation in such a world forum and its exact powers would have to be the subject of detailed studies.

Regional Commissions

The success of the European Commission of Human Rights and the achievements of the Inter-American Commission of Human Rights indicate that similar regional institutions could perform useful implementation functions in some other areas of the world.

Judicial Institutions

International implementation measures, like national measures that must be based on the rule of law, require the existence and accessibility of judicial remedies. It is, therefore, important that the international community should move rapidly towards the establishment of judicial institutions to provide such remedies. Experience with the European Court of Human Rights indicates that the functioning of such institutions beyond the national level is feasible. Consideration should, therefore, be given to the establishment of further regional courts of human rights, and possibly, a universal court of human rights.

Impartiality of International Institutions

In order to ensure the effectiveness of the international institutions in the field of human rights and to increase confidence in and cooperation with them, it is indispensable that these institutions perform their activities uninfluenced by political considerations or by any desire to serve merely sectional interests. All assistance should be given to them to achieve this aim.

South West Africa

The Assembly noted a suggestion that the unique status of the Territory of South West Africa which, by virtue of the actions taken by the United Nations General Assembly, is under direct United Nations jurisdiction, provides a special opportunity to experiment with further implementation procedures. Criminal courts and procedures might be established for dealing with gross violations of human rights in that Territory.

Non-Governmental Organizations

Bearing in mind the important consultative role assigned to non-governmental organizations from the very inception of the United Nations at San Francisco, the Assembly recognized the helpful role they have played in informing and sustaining public opinion on both the national and international levels, and expressed the hope that the Commission on Human Rights would give them full encouragement in their work. Because non-governmental organizations having consultative status with the Economic and Social Council of the United

Nations perform an essential function in promoting international human rights, the Economic and Social Council and its subsidiary organs should utilize these organizations to the fullest extent.

XII. Public Opinion, Education and Professional Activities in Support of Human Rights

The achievement and recognition of human rights rest in the final analysis on the people of the world themselves and on their awareness and willingness to support human rights objectives. Only when respect for human rights has become a universal standard of human behavior can the struggle for human rights be said to be truly won. An enlightened public opinion is needed to protect individuals against oppression. To accomplish this purpose a wide-ranging and systematic program of education of private individuals and government officials in human rights matters is essential. In addition, the range of groups and institutions involved in human rights problems should be greatly broadened.

Primary and Secondary Education

It is now known that attitudes and ideas fixed in the formative years are often decisive in adult life. Consequently, effective education in human rights should begin in the primary schools and continue in secondary schools. Curricula and materials should be developed for this purpose as appropriate for each country. Teacher training should include human rights courses. Films, radio and newer methods of education should be widely utilized. The Assembly noted with approval the pioneer work that UNESCO and various national educational authorities are already doing in this connection.

Universities and Research Institutes

Education in human rights at the university level is especially important, since officials, teachers, lawyers and others in particularly strategic positions with respect to the promotion and protection of human rights are largely drawn from the ranks of former university students. Courses should be established in human rights and other relevant topics and there should be more emphasis on human rights in existing courses where appropriate. Study and research with respect to subjects relating to promotion and protection of human rights should be carried out on a much greater scale by universities and research institutes, thus developing a corps of experts and concerned persons who will also contribute significantly to enlightened public opinion.

Professional Associations and Trade Unions

The burden of present operational and educational work in the human rights field has thus far fallen on a comparatively few specialized private groups, such as civil liberties organizations, leagues for the rights of man, and similar non-governmental national or international associations. The work of these organizations should receive greater support and their growth and wider establishment must be fostered. In addition, special efforts should be made to involve in human rights work the considerable resources and talents of the great variety of other private associations, such as professional, civic, scientific and scholarly organizations and labor unions, which have thus far been relatively uninvolved in this area. Such associations should be urged to establish, in connection with their program activities, committees or groups which would especially concern themselves with relevant human rights issues. Such involvement would serve to further enlighten public opinion and add to the pressures for observance of human rights. It was suggested that efforts along the above lines might be furthered through the urging of international professional and scholarly organizations to seek to develop interest and activities in their local components. Moreover, such intergovernmental organizations as the United Nations, UNESCO, ILO and UNITAR should undertake to pursue these objectives as part of their programs to the extent it is not already being done. Some methods need to be developed to provide more adequate liaison among all the interested public and private organizations.

Mass Media and Adult Education

Adult education in human rights principles should be vigorously pursued, utilizing to the full the wide possibilities offered by modern mean of mass communication such as radio, television, films, newspapers and other printed publications. In particular, efforts should be made to provide special training in human rights problems for businessmen, technicians and government officials especially concerned with these problems, such as the police and military personnel.

PROPOSALS FOR ACTION

THE ASSEMBLY FOR HUMAN RIGHTS MAKES THE FOLLOWING RECOMMENDATIONS

With Respect to International Legislation on Human Rights:

1. During this International Year for Human Rights, the Members of the United Nations should reaffirm, by a solemn declaration, their intention to comply in good faith with the human rights provisions of the United Nations Charter.
2. The Members of the United Nations should rededicate themselves to the most complete implementation of the Universal Declaration of Human Rights on both the national and international plane, by legislation and other measures. In particular, as recommended by the United Nations Seminar on Civil and Political Rights held at Kingston, Jamaica, all the governments and legislatures should 'systematically undertake a review of their legislation, laws and procedures to ensure that they conform to the provisions of the Universal Declaration'.
3. All States should make a special effort to ratify the two United Nations Covenants on Human Rights, the Optional Protocol, the nine basic conventions on human rights adopted by the United Nations and the specialized agencies since 1945, the ratification of which was recommended by the General Assembly in 1965, as well as the Convention on Consent to Marriage, Minimum Age to Marriage and Registration of Marriage, the 1951 Convention Relating to the Status of Refugees and the related 1967 Protocol. In particular, the International Convention on the Elimination of all Forms of Racial Discrimination must receive universal ratification.
4. The United Nations should make every effort to adopt an International Convention on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief.
5. The United Nations should bring all the instruments adopted by it together and prepare a United Nations Human Rights Code similar to the International Labor Code developed by the International Labor Organization. Such a code should contain in its first part a systematic and annotated arrangement of all the basic provisions of universal scope, deriving from the Charter of the United Nations, the Universal Declaration of Human Rights, the other declarations adopted by the United Nations and the general clauses contained in various unanimously or nearly unanimously approved resolutions of the General Assembly. The second part should include the texts of the Covenants

and of various conventions on human rights in a systematic and annotated arrangement, specifying in particular, what measures of implementation are available to ensure the enforcement of the relevant provisions.

With Respect to Apartheid:

6. The international community should confirm the legitimacy of the struggle of the peoples of southern Africa toward the achievement of their inalienable right to equality, freedom and independence in accordance with the Purposes and Principles of the United Nations Charter.

7. All States and organizations should provide appropriate moral, political and material assistance to the people of southern Africa in their just struggle for the rights recognized in the Charter of the United Nations and the Universal Declaration of Human Rights.

8. All States should facilitate effective action, under the auspices of the United Nations, to secure self-determination and enjoyment of human rights and fundamental freedoms for all the inhabitants of southern Africa.

With Respect to Inducing Compliance at the National Level:

9. In every country some special institution should be established, if it does not already exist, which is legally competent to receive complaints from individuals when their rights are infringed or denied, and provide them with effective redress.

All authorities and organizations concerned with the protection of human rights, particularly the bar associations, should work towards the establishment in every country of institutions of this character.

10. The government of every country should be encouraged to provide and to develop comprehensive legal aid systems for the protection of the rights of individuals.

11. All governments should be encouraged to establish permanent advisory bodies for the constant adaptation of their laws to the standards of human rights being developed by the United Nations.

12. National and international, governmental and non-governmental organizations concerned with the protection of human rights should work toward the development of informed and effective public opinion for the protection of human rights in all countries. Governments should be invited to undertake to promote the development of indigenous institutions dedicated to the creation of such enlightened

and effective public opinion. In particular, governments should consider giving encouragement to the creation of independent and permanent non-governmental committees for the promotion of human rights in their countries.

13. All States should develop human rights courses for all levels of education. Special courses should be introduced in various university departments, including law, business and technical schools.

14. Proper efforts should be made to broaden the category of organizations concerned with human rights by persuading various professional, civic, scientific, scholarly, business and labor organizations to establish special committees to channel human rights problems into their working programs.

15. Intergovernmental organizations such as the United Nations, UNESCO, ILO and UNITAR should provide assistance to States and non-governmental organizations in their human rights programs to the extent that it has not already been done.

16. All modern means of mass communication, such as radio, television, films, newspapers and other printed publications should make more vigorous efforts to promote human rights.

17. Radio and television programs should not be subject to governmental controls.

With Respect to International Implementation Measures:

18. The strongest support should be given to the existing proposal for the establishment within the United Nations of an Office of the High Commissioner for Human Rights or an institution with a similar function.

19. The status of the United Nations Commission on Human Rights and the Secretariat Division on Human Rights should be improved sufficiently to enable them to discharge the important responsibilities entrusted to them.

20. The United Nations Commission on Human Rights is urged to recommend the establishment of a permanent body of experts on slavery.

21. The United Nations is urged to establish an effective machinery for the implementation of United Nations decisions on human rights questions.

22. The possibility of establishing regional commissions or courts of human rights should be explored.

DIGEST OF JUDICIAL DECISIONS

by

SUPERIOR COURTS OF DIFFERENT COUNTRIES

on

ASPECTS OF THE RULE OF LAW

Compiled and Annotated

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ADMINISTRATIVE INQUIRIES AND ORDERS

High Court of Madras

DUTY OF INQUIRING OFFICERS OR BODIES TO COMPLY WITH PRINCIPLES OF NATURAL JUSTICE

MAYILAMMAL v. COMMISSION OF INQUIRY
ON ANTI-HINDI AGITATION AT CHIDAMBARAM

Commission of Inquiry appointed by Government to enquire into circumstances leading to incident of police shooting and death of a citizen—such Commission of Inquiry not a court—nevertheless its functions not merely administrative but quasi-judicial in character—it was Commission's duty to record evidence and give objective finding on the facts as to whether the firing and force used were justified—principles of natural justice applicable not only to authorities that decide a matter finally but also to those called upon to submit a report for further consideration by some other body—right of petitioner to cross-examine adverse witnesses cannot be denied—petitioner not afforded reasonable opportunity to cross-examine such witnesses—these principles of natural justice had not been followed and Commission of Inquiry had failed to discharge its duty—merits of petitioner's request for furnishing copies of certain documents should also be looked into—if such documents appear necessary for effective cross-examination of adverse witnesses, Commission should direct that copies be furnished to petitioner before cross-examination.

Judgment of Mr. Justice P.S. Kailasam.

Decided on March 24, 1966.

On January 27 1965, during the anti-Hindi agitation at Chidambaram, the police opened fire causing the death of the petitioner's son. The Government appointed a District and Sessions Judge as a Commission of Inquiry into the circumstances which led to the opening of fire and the death of the petitioner's son.

The Commission of Inquiry commenced its work on February 9 and on February 22 the petitioner, the mother of the deceased, presented a petition for certain documents and prayed for an adjournment of the inquiry pending their production. The Commissioner refused the adjournment, and the inquiry was conducted from February 22 to 26.

Meanwhile, the petitioner filed a writ petition in the High Court of Madras seeking permission to cross-examine the witnesses. The petition was dismissed with the observation that it was open to the petitioner to have made a request for permission to cross-examine adverse witnesses at the time when the evidence was recorded.

On March 1, the petitioner applied to the Commission to have the witnesses already examined recalled so that her counsel might be able to cross-examine them and also prayed for copies of certain documents. Her petition was dismissed by the Commission, whereupon she applied to the High Court of Madras for a writ of *mandamus*.

In the course of his judgment, Kailasam J. observed that there could be no doubt that the Commission of Inquiry appointed in this case was 'not a court' and was not exercising judicial functions; but the functions were not merely administrative in character. It was accordingly the duty of the Commission to record evidence of persons concerned and give an objective finding. In arriving at findings as to whether the firing and the force used were justified, the Commission had to come to an objective conclusion and decide on the facts, which might adversely affect the interests of the petitioner. As the rights of parties were involved and as the Commission of Inquiry was to act objectively in submitting the report, its functions were quasi-judicial in nature.

His Lordship also drew attention to the fact that the Supreme Court of India had held that the principles of natural justice were applicable not only to the authorities that would decide the matter finally, but also to the authorities who were called upon to submit a report for further consideration by some other body. It was clear from the nature of the report called for from the Commission, the mode of inquiry prescribed and the position of the petitioner, whose son's reputation was likely to be affected, that the petitioner's right to cross-examine witnesses, whose evidence was likely to affect the reputation of her son, could not be denied.

His Lordship held that it was clear on the facts that the petitioner had no reasonable opportunity of cross-examining the witnesses, who had spoken against the conduct of her son. The principles of natural justice had not been followed by the Commission of Inquiry and the inquiring officer had failed to discharge his duty.

As for the request for copies of certain documents, it was not possible to give any direction without knowing the contents of the documents. It was for the Commission of Inquiry to look into the documents and, if satisfied that copies of any documents should be furnished for effective cross-examination of the witnesses who had given evidence adverse to the petitioner's son, it should direct such copies to be furnished to the petitioner before cross-examination.

The Judicial Committee of the Privy Council
(On Appeal from the Supreme Court of Ceylon)

**DUTY OF INQUIRING OFFICERS OR BODIES
TO COMPLY WITH PRINCIPLES OF NATURAL JUSTICE**

**SHAREEF v. THE COMMISSIONER FOR REGISTRATION
OF INDIAN AND PAKISTANI RESIDENTS**

(LVII—New Law Reports (Ceylon) pp. 433 to 442)

Deputy Commissioner holding inquiry into application for citizenship, made under Indian and Pakistani Residents (Citizenship) Act, acts in a semi-judicial capacity—in this capacity he is bound to observe principles of natural justice—in view of his dual role as member of Executive and inquiring officer he has increased responsibility—he should have appraised applicant of details of case against him and given him a proper opportunity to answer that case—his omission to do so amounts to failure to observe principles of natural justice and vitiates his order.

Before Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce, Lord Wilberforce and Lord Pearson

Judgment delivered by Lord Guest.

Decided on June 30, 1965.

The appellant applied for registration as a citizen of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act of 1949. The Deputy Commissioner, who held the inquiry, heard evidence on various dates and caused investigations to be conducted into matters connected with the application. The appellant had produced his school certificate to prove the fact of his uninterrupted residence in Ceylon between 1936 and 1943, but his application was refused on the ground that the school certificate produced by him was not genuine. In refusing the application, the Deputy Commissioner acted primarily on a report of an Investigation Officer and on a letter written by an Inspector of Schools on the basis of a report made to the inspector by some person. These reports however had not been disclosed to the appellant at the inquiry, nor had he been told the details of the case against the genuineness of the school certificate and given a proper opportunity of answering that case.

The appellant appealed from the order of refusal to the Supreme Court of Ceylon which dismissed his appeal. He then appealed to the Judicial Committee of the Privy Council, which quashed the order of the Deputy Commissioner and remitted the case back to the Supreme Court for the purpose of placing the appellant's application for registration before the respondent for consideration *de novo*.

In delivering the judgment of the Privy Council, Lord Guest observed:

‘ The Deputy Commissioner in fulfilling his duties under the Act occupies an anomalous position. In his position as a member of the Executive he regulates the

investigation of the matters into which he considers it his duty to enquire and as an officer of state he must take such steps as he thinks necessary to ascertain the truth. When conducting an inquiry under sections 10, 13 or 14 he is acting in a semi-judicial capacity. In this capacity he is bound to observe the principles of natural justice. In view of his dual position his responsibility is increased to avoid any conduct which is contrary to the rules of natural justice. These principles have often been defined and it is only necessary to state that they require that the party should be given fair notice of the case made against him and that he should be given adequate opportunity at the proper time to meet the case against him. '

High Court of Justice of England
(Queen's Bench Division)

**DUTY TO GIVE REASONABLE TIME FOR
REPRESENTATIONS AGAINST PROPOSED MEASURE**

**LEE AND OTHERS v. SECRETARY OF STATE
FOR EDUCATION AND SCIENCE**

Government of country, whether local or national, must be conducted in accordance with will of Parliament, that is to say, according to the Rule of Law—duty of courts to be vigilant to ensure this—performance of this duty vital to maintenance of democratic way of life—however, so long as Rule of Law is observed, courts take no part in merits of such controversies as should be properly resolved through discussion, persuasion and ballot box—defendant had allowed less than 5 days time for representations to be made to him on a proposal to alter a school's articles of government—time allowed 'wholly unreasonable' and so a denial of justice amounting to failure to observe Rule of Law.

Before Mr. Justice Donaldson.

Decided on September 16, 1967.

The three plaintiffs, who were a governor, a parent and an assistant master of Enfield Grammar School, filed action against the Secretary of State for Education and Science for a declaration that the time allowed (less than 5 days) for representations to be made to him on a new proposal to alter the school's articles of government was 'wholly unreasonable' and amounted to a denial of statutory rights. The plaintiffs were successful, and His Lordship, in giving judgment for them with costs against the Secretary of State, said that he considered that a month would be reasonable.

It is not proposed to refer to the details of the new proposal or to the nature of the objections to it, as the court was not concerned with the merits but solely with the legality and the reasonableness of what the respondent proposed to do.

The plaintiffs submitted that the Secretary of State was threatening to act unlawfully in not conforming to the rules of natural justice and fair play which the courts had developed over the years and which applied to him in the performance of his duty. It appeared that he had predetermined the case so as to reduce to a farce his duty to act quasi-judicially in hearing representations. The Secretary of State could, of course, consider matters of policy and administration in his review, but he could not predetermine the matter on which representations were to be made so as effectively to close his mind.

To expect the foundation governors to formulate their representations and consider their position within a long weekend was absurd and unrealistic. Many people were concerned with the management and government of the school, but the Secretary of State seemed to have formed the view that only the governors and headmaster were so concerned. This view was hasty and appeared to result from short-sightedness.

His Lordship observed that while it might be correct to say that the time allowed was too short to afford a proper opportunity for representations, it did not follow that the Secretary of State had closed his mind to them or that he had predetermined the issue as to whether there should be a variation of the school's articles.

In giving judgment for the plaintiffs, his Lordship said:

'The duty of the courts—and it is one which they will never shirk—is to be vigilant to ensure that the government of this country, whether it be local or national, is conducted in accordance with the will of Parliament, that is to say according to the rule of law.

'The performance of this duty is vital to the maintenance of a democratic way of life. So long, however, as the rule of law is observed, the courts take no part in controversies of this nature, leaving them to be resolved through discussion, persuasion, and the ballot box. I am told that the Secretary of State will consider extending the time for making representations, if any governor or the headmaster asks him to do so and gives a reasoned explanation of why an extension of time is necessary. I fully accept the assurance that I have been given that, had a reasoned request been made and had the reasons seemed sufficient to the Secretary of State, he would have considered extending the time.

'In my judgment the time so far allowed by the Secretary of State is wholly unreasonable in the circumstances of the case and amounts to a denial to the persons named in the relevant statute of the rights conferred upon them by it.'

EUROPEAN CONVENTION ON HUMAN RIGHTS

Brussels Court of First Instance
(Twelfth Civil Chamber)

FREEDOM TO RECEIVE AND IMPART INFORMATION IN LANGUAGE OF CHOICE WITHOUT INTERFERENCE BY PUBLIC AUTHORITY

IN RE ARTICLES 10 AND 14 OF EUROPEAN CONVENTION ON HUMAN RIGHTS

(Journal des Tribunaux, 1966, pp. 685-687)

Right to freedom of expression defined in Article 10 (1) of the European Convention on Human Rights to include freedom to hold opinions and to receive and impart information and ideas without interference by public authority—Article 14 of Convention states that enjoyment of the rights and freedoms guaranteed shall be secured without discrimination on ground of language or any other ground—Belgian Law of 1963 sought to compel industrial, commercial and financial undertakings to use language of region where their registered office or places of business are situated for official documents or documents addressed to employees—in terms of Convention, business house has right to free choice of language to be used in respect of above-mentioned documents—Belgian Law, to extent that it denies this right therefore void—rights referred to in Articles 10 (1) and 14 of Convention exercisable in Belgium even in absence of special internal measures since they are expressed in terms specific enough for immediate application—Convention constitutes supra-national legal instrument binding upon member States and must prevail in event of conflict between its provisions and municipal law.

Decided on November 8, 1966.

Section 41, paragraph 1 of the Belgian Law of August 2, 1963 provided that for documents required by law or documents addressed to their employees, 'industrial, commercial or financial undertakings shall use the language of the region where their registered office or places of business are situated'.

The use of the words 'the language' and not 'the languages' implied that the Section imposed the use of one language only, namely the language of the region where the business premises were situated, which in this case was Flemish.

The plaintiffs, who carried on business in the region in question, but who also had a place of business in Greater Brussels (where one was entirely free to choose the language he wished to use in respect of official documents), presented

certain required documents to the Registry of the Commercial Court in French. It was contended that, by doing so and by not providing to have them translated into Flemish, they had violated the provisions of Section 41 (1) of the Belgian Law of 1963.

The Court held, however, that the said Section was incompatible with Articles 10 (1) and 14 of the European Convention for the Protection of Human Rights, which read as follows:

Article 10 (1): Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Article 14: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The Court held that inasmuch as the right to freedom of expression was defined to include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority, the Convention secured to the plaintiffs the right to the free choice of the language to be used, and also the right to insist on having the documents in question, which had been drafted in French and had been deposited with the Registrar of the Commercial Court, published in the French language.

The Court also observed: 1) that the Convention sought in principle to safeguard the rights of any individual acting in a private capacity, either alone or in association with others, and that the Convention had established rights of a higher order which individuals, natural persons or corporate bodies were entitled to invoke and exercise; 2) that the rights referred to in Articles 10 (1) and 14 of the Convention could be exercised in Belgium without the necessity for any special internal measures to that end, since they were expressed in terms specific enough to allow of immediate application; 3) if the existing international rules—constituting a supra-national legal instrument which, as a recognized source of law is binding upon States—were not to be deprived of all validity, it must be considered that, in the event of conflict between municipal and international law, international treaties must prevail in cases where (as in the present instance) they had been approved by a municipal Act. The international convention conferred subjective rights on the nationals of the Contracting States and guaranteed their exercise, therein overriding and disregarding any other conflicting rules established, even subsequently, by national legislation.

Supreme Court of Cyprus

LIBERTY AND SECURITY OF THE PERSON

KOKKINOS v. POLICE

(1967—9 Judgments of the Supreme Court
of Cyprus, pp. 1082-1097, Criminal Appeal No. 2929)

Courts of Cyprus do not admit incriminating statements to police tendered as 'confessions' unless satisfied beyond reasonable doubt that such statements originate from a burdened conscience and are 'free and voluntary'—motive of a confession also material to its admissibility—police, in their zeal to detect crime, often overstep limits set by law for protection of individual—voluntariness of confession affects the liberty of the subject and is connected with fundamental human rights internationally recognized and embedded in Cyprus Constitution, particularly right to corporal integrity, right against degrading treatment and right to liberty and security of person—these rights also secured and guaranteed by European Convention on Human Rights to which Cyprus is subscribing party—substance of these rights has been part of laws of Cyprus for years and is deep-rooted in the philosophy of the country's morality and tradition.

Before Vassiliades P., Josephides, Hadjianastassiou JJ.

Decided on September 26, 1967.

The appellant had been convicted of a criminal offence after a 'confession' was, notwithstanding his retraction of it and his denial on oath, held to be admissible in evidence on the ground that it was freely and voluntarily made.

In appeal the conviction was quashed on the ground that the circumstances surrounding the confession were certainly suspicious, inasmuch as it was alleged to have been made more than 18 months after the alleged offence and soon after the appellant's arrest in another case. Besides, there was no other evidence whatsoever to verify the story given in the confession, which indicated that either no investigations had been made for that purpose, or, if they had been made, they had produced no positive result.

In commenting on the admissibility of confessions on the ground of voluntariness, Vassiliades P., who wrote the main judgment, observed:

'The voluntariness of all statements, and particularly those containing a confession, is a matter which affects the liberty of the subject; and is connected with fundamental human rights, internationally recognized and embedded in our Constitution: the right to corporal integrity; the right against degrading treatment; and the right to liberty and security of person with all the incidents thereto in connection with arrest.

' These rights are also secured and guaranteed by the European Convention on Human Rights, to which Cyprus is a subscribing party. But let it be remembered that the substance of these rights is not the fruit of a modern invention. It has been part of our law for years. And it is deep rooted in the philosophy of our morality and tradition. We do not tolerate unfair treatment of the weak by the strong; of the helpless by the powerful; of the ignorant by the cunning.

' We do not admit in our courts as proof of guilt, incriminating statements made by accused persons in the hands of the police, tendered as "confessions", unless we are satisfied beyond reasonable doubt, that such statements originate in a burdened conscience, and are "free and voluntary", as these terms are defined and understood in the courts. The motive of a "confession" should also attract attention, not only in connection with the statement's evidential value, but also in connection with the exercise of the discretion to admit it at all.

' When investigating into a criminal case, especially a grave offence, the Police, in their zeal to detect and bring to justice the criminal, are, naturally, often inclined to overstep the marks set by the law for the protection of the individual in their hands. Especially young policemen full of zeal, or anxious for a promotion. They seem to have an aptitude in attracting confessions. As against so many cases of statements made by persons in custody, I cannot now think of a single case where the accused walked alone to the Police to relieve his conscience by making a confession. '

Constitutional Court of Austria

RIGHT TO PRIVACY

IN RE ARTICLES 8 AND 13 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(Österreichische Juristenzeitung, 1966, p. 409)

Taking of photographs and fingerprints for identification of person suspected of a crime does not violate right to privacy guaranteed by Article 8 of European Convention—nor does it constitute a violation of Austrian Constitution.

Decided on October 12, 1965.

Article 8 of the European Convention on Human Rights runs thus:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In this case the Constitutional Court of Austria held that the taking of photographs and fingerprints for the purpose of identification of a person suspected of having committed a crime did not violate the right to privacy guaranteed by Article 8 of the European Convention on Human Rights. It rejected the applicant's claim for the destruction of photographs, fingerprints and other documents concerning him, on the ground that such a claim could not be based on Article 8 of the Convention. Inasmuch as no right or freedom guaranteed by the Convention had been violated, Article 13 of the Convention, which gave every person a right to an effective remedy before a National Court for violations of the Convention, had no application.

FUNDAMENTAL RIGHTS AND FREEDOMS

Conseil d'Etat of France

FREEDOM OF THE INDIVIDUAL — RIGHT TO STRIKE

**SYNDICAT NATIONAL DES FONCTIONNAIRES ET AGENTS
DES PRÉFECTURES ET SOUS-PRÉFECTURES DE FRANCE ET
D'OUTRE-MER v. MINISTER OF THE INTERIOR**

Right of public servants to strike—right necessary weapon for protection of their professional interests—it could be limited only for purpose of maintaining balance between professional interest and public interest—right could be denied only where presence of particular officer at his post vital to interests of peace, order and good government—regulations denying right in absolute, general and permanent manner to large section of public servants, ultra vires the Constitution and void.

Decided on December 16, 1966.

The Preamble to the Constitution of October 4, 1958, which makes reference to the Preamble to the Constitution of October 27, 1946, recites that the right to strike is a right exercisable within the framework of the laws which regulate it. In view of this Preamble, the Constituent Assembly had called upon the Legislature to work out the balance necessary between the protection of professional interests, for which protection strike constituted a weapon, and the safeguarding of the public interest. The Legislature in fact did not fulfil this task. There were, however, certain laws governing specific aspects of the subject; one of them, a Law of July 31, 1963, regulated certain aspects of the right to strike in the Public

Service. This Law required the Government, which was responsible for the Public Service, to regulate the limitations that should be placed upon the right to strike. These regulations were subject to judicial review, having regard to the proper limitations which could be placed on the right in the interests of peace, order and good government.

The Minister of the Interior, acting under the Law of July 31, 1963, had denied the right to strike to:

- 1) Heads of government departments and Secretaries-in-chief of Sub-Prefectorates;
- 2) Officers of all ranks attached to the Cabinet of the Prefect;
- 3) Officers of all ranks attached to the General Secretariat, to the Office of the Cabinet and to the Postal Department and to the Office for the Co-ordination of Public Services.

The Conseil d'Etat examined these limitations in the light of the Preamble to the Constitution and held, in regard to the first and second categories, that the limitations had been properly imposed since these officers had been given special responsibilities which the public interest required to be carried out without interruption. In regard to the third category of officers mentioned above, it held that the Minister could legally deny the right to strike to those of them whose presence at their posts was vital in the public interest, but that he had exceeded his powers in denying the right to strike to all of them in such absolute, general and permanent terms.

Brussels Court of First Instance
(Twelfth Civil Chamber)

**FREEDOM TO RECEIVE AND IMPART INFORMATION
IN LANGUAGE OF CHOICE WITHOUT INTERFERENCE
BY PUBLIC AUTHORITY**

**IN RE ARTICLES 10 AND 14 OF EUROPEAN CONVENTION
ON HUMAN RIGHTS**

(Journal des Tribunaux, 1966, pp. 685-687)
(See pp. 123-124 above)

Court of Appeal of Zambia

LIBERTY AND SECURITY OF THE PERSON

ATTORNEY-GENERAL v. THIXTON

(Judgment No. 2/1967, Civil Appeal No. 6/1966)

Under Immigration Act, a British subject, domiciled in Northern Rhodesia, had acquired status of non-prohibited immigrant—rights pertaining to this status fundamental to liberty of subject—a later Act purported to amend Immigration Act by deleting provision under which he had acquired his rights—thereafter Government, purporting to act under this amending legislation, sought to deport him on ground that he was undesirable—rights which had already accrued to him could not be removed—they were kept alive by reason of interpretation ordinance which declared that repeals shall not affect rights or privileges already accrued under repealed law—where fundamental rights of liberty are involved Courts should be slow to interpret laws so as to deny such rights to the subject.

Before Mr. Justice Blagden, Chief Justice, Mr. Justice Doyle, Justice of Appeal, and Mr. Justice Evans.

Delivered on January 10, 1967.

The respondent was served by an immigration officer with a notice purporting to be signed by or on behalf of the Minister of Home Affairs deeming him, in the exercise of the Minister's powers in that behalf under the Immigration Act 1954, to be an undesirable inhabitant of the Republic of Zambia on account of his standard or habits of life. He was informed that he had to leave Zambia forthwith, but was at the same time served with a permit to remain in the Republic for the purposes of making arrangements to leave.

The respondent was a British subject and Commonwealth citizen and holder of a British passport. His statutory domicile was however Zambia, where he had been resident for 11 years.

The respondent challenged the validity of the said notice and the deportation proceedings in the High Court, where he prayed for two declarations, first, that any documents issued in respect of him purporting to have the effect of revoking his permission to stay in Zambia, or to restrict his movements, or to detain him therein, were illegal, void and contrary to the Constitution; secondly, that he could not legally be detained or restricted in Zambia or removed therefrom pursuant to these documents or any others purporting to be issued under and by virtue of the Immigration Act.

The Immigration Act, 1954, was originally an enactment of the Federation of Rhodesia and Nyasaland. It later retained its application to Northern Rhodesia when the Federation was dissolved, and finally became applicable to Zambia upon the attainment of independence by the Zambia Independence Act, 1964.

Section 5 (1)(b) of the Immigration Act as amended reads as follows:

5(1) Subject to the provisions of this Act, the following persons are prohibited immigrants and their entry into or presence within Northern Rhodesia is unlawful:

(b) any person deemed by the Minister or class of persons deemed by the Governor on economic grounds, or on account of standard or habits of life to be undesirable inhabitants or to be unsuited to the requirements of Northern Rhodesia.

The relevant portion of Section 13 of the same Act ran thus:

13(1) The following persons or classes of persons shall not be prohibited immigrants for the purposes of this Act —

(e) any person domiciled in Northern Rhodesia who —

(i) is a citizen of Southern Rhodesia or of the United Kingdom and Colonies; and

(ii) is not such a person as is described in paragraph (i) of subsection (1) of Section 5.

The respondent was a citizen of the United Kingdom and was statutorily domiciled in Northern Rhodesia. He was also not a person to whom Section 5(1)(i) of the Immigration Act applied. He had had a crime-free record and his periods of residence in Zambia and Northern Rhodesia were not in dispute. He was thus clearly not a prohibited immigrant. However, on January 15, 1965 the Immigration (Amendment) Act, 1964 came into force and amended Section 13(1) of the Act ' by deletion of paragraph (e) '. The intention of the Legislature in so doing must clearly have been to revoke the non-prohibited immigrant status of United Kingdom citizens domiciled in Zambia or, at any rate, to preclude any such person who had not already got that status from subsequently acquiring it.

The respondent however claimed that his right of being a non-prohibited immigrant, which he had held under the Immigration Act before this Amendment in 1965, was an entrenched right by virtue of Section 14(3)(c) of the ' Interpretation and General Provisions Ordinance, 1964 '. That subsection and paragraph provide that:

(3) where a written law repeals in whole or in part any other written law, the repeal shall not —

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred, under any written law so repealed.

The application of this provision is governed by Section 2(1) of the same Ordinance, which provides that:-

2(1) The provisions of this Ordinance shall apply to every written law passed or made before or after its commencement, unless a contrary intention appears in this Ordinance, or in the written law concerned.

Blagden C. J. held that sometime in 1957, after the respondent had been resident in Northern Rhodesia for two years, he did acquire a statutory domicile in the Federation under the provisions of Section 3 of the Immigration Act; and at the same time he became vested with non-prohibited immigrant status by reason

of the provisions of Section 13(1) (*e*), as they stood at that time. A right had therefore accrued to him which could not be subsequently withdrawn by the purported amending legislation.

In regard to the nature of the right accruing to the respondent affecting such accrual, Chief Justice Blagden observed:

‘ This is the more so, as here, when the rights in question are fundamental to the liberty of the subject. In such a case it does not seem to me it makes much difference whether the subject acquires those rights as an individual or as a member of a class — the rights are still rights and they are still acquired or accrued.

‘ Certainly, when fundamental rights of liberty are concerned, the Courts should be slow to place an interpretation on the relevant provisions which would have the effect of denying those rights to the subject.

‘ In my view when the respondent had lived in this territory for two years there accrued to him a right of non-prohibited immigrant status. There was nothing further he had to do or could do to enjoy that status, and no further event was necessary to secure him this right. It had accrued to him, and it was his. It was not merely a right *in posse*, but a right *in esse*. ’

Court of Appeal of New Zealand

LIBERTY AND SECURITY OF THE PERSON

BLUNDELL v. ATTORNEY-GENERAL

Liberty and security of the individual—British system of justice admits no interference with the subject's liberty which is not authorised by law—such unwarranted restraint would amount to false imprisonment—actual incarceration not necessary to establish false imprisonment—total restraint preventing all movement sufficient—it is open to a police officer imposing restraint to plead reasonable and probable cause—however, such plea available only where an arrest made is based on suspicion of an offence for which person could be arrested without warrant—reasonable and probable cause not an omnipresent defence entitling officer to rely on reasonableness of his actions as an all-embracing justification—police have no power to detain except in process of making an arrest, no power to hold for interrogation, no power to hold whilst enquiries are being made—entire issue of reasonable and probable grounds must not be left to jury—jury should be asked to find the facts on which question depended and judge should determine whether facts found constitute reasonable and probable grounds.

Before Turner, McCarthy and Macarthur JJ. Judgment of the Court delivered by McCarthy J.

Decided on October 25, 1967.

In this case the plaintiff alleged assault and false imprisonment against two police officers, allegations which were denied by the defendant. By the time the case reached the Court of Appeal the only important allegation for consideration was that of false imprisonment.

The facts have already been set out in *The Judicature of New Zealand*, p. 73, at pp. 84-5 (above), and it is proposed to refer only to certain observations made in judgment on the unwarranted interference with the liberty of the subject.

In dealing with the liberty of the citizen, McCarthy J. said:

‘ One fundamental rule of the Common Law which we have inherited as part of the British system of justice is that any restraint upon the liberty of a citizen against his will not warranted by law is a false imprisonment. To establish false imprisonment actual incarceration need not be proved, but the restraint asserted must be total in the sense that it prevented all movement, and not merely in some directions.

‘ Now when it is said in the books that the defence of reasonable and probable cause — or grounds, to employ the word found in our statute — is open to a Police officer, the statement should be confined to the defence based on suspicion of an offence for which the plaintiff could be arrested without warrant. It is not an omnipresent defence; it does not entitle the officer to rely on the reasonableness of his actions as an all embracing justification in all cases no matter what his legal powers might have been. It applies only when the legal justification pleaded is that he had reasonable and probable grounds for believing that the person he was arresting had committed an offence for which the offender could be arrested without warrant.

‘ I believe, as I have said already, that the Police have no power to detain except in the process of making an arrest, no power to hold for interrogation, no power to hold whilst enquiries are being made; I reject the Solicitor-General's submission that there can be some permissible form of custodial restraint falling short of arrest and which is not exercised in pursuance of a decision to arrest. I know of no satisfactory authority for that submission.

Mr. Justice McCarthy went on to say that the Trial Judge had erred in leaving the whole issue of reasonable and probable grounds for making an arrest to the jury, and held that what he should have done was to have asked the jury to find the facts upon which the question depended, and then himself determine whether the facts found did or did not constitute reasonable and probable grounds.

Supreme Court of Cyprus

LIBERTY AND SECURITY OF THE PERSON

KOKKINOS v. POLICE

(See pp. 125-126 above)

In the Tribunal of Grand Instance of Compiègne, France

LIBERTY AND SECURITY OF THE PERSON

LEGAUFRE v. PONTAL

(Gazette du Palais, July 28-30, 1965)

Article 30 of Code of Criminal Procedure enables Prefect to take all steps necessary to detect offences against State security—his power is, however, strictly limited and he cannot act except where specifically authorised by law—he cannot arrest and detain person merely because he feels that person is likely to commit such offence—if person has committed no overt act constituting preparation or attempt to kill the Chief of State or to commit any other offence against State security, he cannot be arrested or detained even temporarily—visit of Chief of State not an exceptional circumstance justifying arrest and detention of individual—order of arrest made in this case amounted to arbitrary violation of personal liberty and freedom.

Decided on June 29, 1965.

On the afternoon of June 12, 1964 the petitioner was arrested by the police at his home in Compiègne, detained at the *Commissariat* and released on the afternoon of June 14. The arrest was effected in the execution of an order of the defendant, the Prefect of Oise, made on June 11. That order particularly mentioned that it was made under Art. 30 of the Code of Criminal Procedure and stated that the petitioner, who was suspected as likely to make an attempt on the life of General de Gaulle, the Chief of State, would be detained for a period of 48 hours, that he had made himself well known for his opposition to the Government, that he had even been given a suspended sentence of 3 months imprisonment by the *Tribunal Correctionnel* of Compiègne on July 19, 1961 for attempting to endanger the security of the State, and that the arrest and detention in question was being effected as a security measure on the occasion of the official visit of the President of the Republic to the region of Oise.

The petitioner contested the legality of the Prefect's order in the Tribunal of Grand Instance of Compiègne. The Tribunal held that the order of arrest and detention was void. The Tribunal observed that a Prefect (head of regional

administration), when exercising his police powers under Article 30 of the Code of Criminal Procedure, can personally take all steps necessary to detect crimes and offences against the security of the State or can obtain the assistance of the police to do so. His power, however, is strictly limited and he cannot act except where he is specifically authorized by law to do so.

In granting the petitioner's prayer, the Tribunal held:

1. The text of Article 30 of the Code of Criminal Procedure, the language of which does not give rise to any difficulty of interpretation, clearly does not mention that the Prefect can arrest and detain a person who he feels is likely to commit a crime or offence against the security of the State.
2. If a person has committed no overt act constituting an attempt to kill the Chief of State and has committed no offence against the security of the State, it not even being alleged that he had at the time of his arrest prepared or attempted to prepare to commit one of the offences mentioned under Article 86 of the Criminal Code, the Prefect, in making an order of arrest which cannot be supported by law or regulation, has committed an absolutely grave and inexcusable error and an arbitrary violation of the freedom of the individual constituting an act of oppression. He must therefore be held personally liable for the damages that result.
3. A visit of the Chief of State does not constitute an exceptional circumstance justifying the arrest and the detention of an individual.
4. The grave wrong committed by the Prefect also amounts to an administrative wrong rendering the public authority liable in damages.

Court of Appeal of Paris

RIGHT OF AN EMPLOYEE NOT TO BE SUBJECTED TO UNFAIR PERPETUAL SURVEILLANCE

S.A.R.L. S.E.T.E.C. v. FINET

(Gazette du Palais, 8-10 March, 1967)

Using of tape-recorder by employer at place of work to secretly record conversations of employee—thus creating permanent state of suspicion and distrust in business establishment—perpetual 'spying' on employee by such means must be rejected as a method of gathering evidence.

Decided on November 9, 1966.

In this case the employer had installed a tape-recorder which secretly registered the conversations of one of his employees at his place of work. The Court of Appeal of Paris held that this method of 'spying' by an employer on an employee, if it were to be permitted, would have the effect of introducing a permanent state of suspicion and distrust between employer and employee in a

business establishment. Thanks to modern electronic devices, the allowing of such practices would have the result of submitting employees to a perpetual and unhealthy form of espionage. Methods such as these used by employers to gather evidence of serious faults on the part of their employees should be condemned. They provide no guarantee of impartiality or faithful reproduction. On this ground the Court of Appeal categorically rejected this mode of obtaining evidence proposed by the employer.

Editor's Note: The Court of Cassation has gone even further. In a case where the position was the reverse, it held that the secret registering by an employee of his conversations with his superiors constituted a grave offence. [See Cass. soc. May 3, 1962 (Gazette du Palais 1962, 2nd Vol. see Louage de services, No. 306)].

Supreme Court of Sierra Leone

RIGHT TO CITIZENSHIP

AKAR v. ATTORNEY-GENERAL

(C.C. 58/67—1967—A.30)

Constitution of independent Sierra Leone (1961) prescribed conditions for Sierra Leone citizenship under which 'every person', born in Sierra Leone and who was citizen of the United Kingdom and Colonies or a British protected person became on April 27, 1961 a citizen of Sierra Leone unless neither of his parents nor any of his grandparents was born in Sierra Leone—Constitution Amendment Act of 1962 purported to amend above conditions by limiting 'every person' to 'every person of Negro African descent'—Amendment Act also provided for acquisition of citizenship by registration by persons either of whose parents was Negro but could not satisfy new test of citizenship—Amendment invalid inasmuch as it sought to deprive plaintiff of citizenship he already had and to leave it to his option to remain stateless or accept status of 'second-class citizen' by registration—under Section 9 (b) of Constitution, Parliament had no power to deprive plaintiff of his citizenship—no substance in argument that as Amendment was retrospective plaintiff never was a citizen although mistakenly he thought he was—retroactive legislation justified only in exceptional cases—however, Amendment in question completely unjustified and contrary to spirit of Constitution and therefore void—Amendment also discriminatory on grounds of race and therefore void as it violates Section 23 of the Constitution.

Before Banja Tejan-Sie, Chief Justice.

Delivered on October 26, 1967.

On April 27, 1961 Sierra Leone, which had been a Colony and Protectorate of Great Britain, became an independent State within the Commonwealth. Section 1(1) of the Constitution of independent Sierra Leone, which prescribed the conditions for Sierra Leone citizenship, provided that:

Every person who, having been born in the former Colony or Protectorate of Sierra Leone, was on the twenty-sixth day of April, 1961, a citizen of the United Kingdom and Colonies or a British protected person shall become a citizen of Sierra Leone on the twenty-seventh day of April, 1961.

Provided that a person shall not become a citizen of Sierra Leone by virtue of this sub-section if neither of his parents nor any of his grandparents was born in the former Colony or Protectorate of Sierra Leone.

By the Constitution Amendment (No. 2) Act of 1962, the Parliament of Sierra Leone purported to amend Section 1 of the Constitution by introducing immediately after the words 'Every person' in the first line of the sub-section the words '*of Negro African descent*'. The Amendment Act defined by Section 2, sub-section (3) 'person of Negro African descent' to mean a person whose father and father's father are or were negroes of African origin. The Amendment Act also provided as follows:

(4) Any person either of whose parents is a Negro of African descent and would, but for the provisions of sub-section (3), have been a Sierra Leone citizen, may, on making application in such manner as may be prescribed, be registered as a citizen of Sierra Leone, but such person shall not be qualified to become a member of the House of Representatives or of any District Council or Local Authority unless he shall have resided continuously in Sierra Leone for 25 years after such registration or shall have served in the civil or regular Armed Services of Sierra Leone for a continuous period of 25 years.

The effect of the new law, if it were valid, would have been to deprive the plaintiff of the citizenship he already had and to leave it to his option to remain stateless, or to accept the status of what might be called 'second-class citizen' by registration. The plaintiff chose the latter course, but later decided to challenge the validity of the amending legislation in court.

In regard to deprivation of citizenship, Section 9(b) of the original Constitution provided that Parliament may make provision:

for depriving of his citizenship of Sierra Leone any person who is a citizen of Sierra Leone otherwise than by virtue of sub-section (1) of section 1 or section 4 of this Constitution.

Section 9(b) therefore clearly indicated that Parliament had no power to deprive persons who had become citizens under Section 1, sub-section (1), as was the plaintiff's case. It was argued, however, that inasmuch as the Constitution Amendment Act of 1962 was retrospective in effect, it must be assumed that Section 1 was from the inception in its altered state, and that although the plaintiff may have thought he was a citizen of Sierra Leone on April 27, 1961, he

was all the time mistaken, because Section 1 of the Constitution was not what it appeared in words to be.

Dealing with the validity of the purported constitutional amendments and with the question of retrospective legislation, the Chief Justice first referred to Chapter II of the Constitution headed 'Protection of Fundamental Rights and Freedoms of the Individual' in which Section 23, sub-sections (1) and (2) read:

(1) Subject to the provisions of sub-sections (4), (5) and (7) of this section, no law shall make any provision which is discriminatory either of itself or in its effect.

(2) Subject to the provisions of sub-sections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

His Lordship then observed as follows:

'The altered section 1 of the Constitution certainly appears to contravene section 23(1) in that it is discriminatory by affording different treatment to persons like the plaintiff attributable to his description by race.'

He added that the purported Amendments were contrary to the spirit of the original Constitution, where the intention appeared to be that anyone born in Sierra Leone irrespective of race and who could show long enough family connection with that country automatically became a citizen of Sierra Leone even if he had no trace of African blood. Parliament, however, having itself had certain doubts as to the validity of this legislation, had passed another Act entitled 'An Act to amend the Constitution in order to effect the Avoidance of Doubts', which purported to enable Parliament to pass legislation for the limitation of Sierra Leone citizenship to persons of Negro African descent. Although Section 43 of the Constitution gave Parliament the power to *amend* the Constitution, it did not permit an *alteration* in the Constitution—were it good, bad or indifferent. Any amendment, whatever form it took had to amount to an improvement of the existing law. He took the view that the time was ripe for nations with written Constitutions and particularly new independent nations within the Commonwealth to bring to life as an active force the following dictum of Coke in *Bonham's* case, a dictum which had considerable history in the United States, to test the validity of legislative actions of Governments:

When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will control it and adjudge such Act as void.

If, therefore, one put a strict interpretation on the meaning of the word 'amend', the legislation in question failed to pass the test because it was clearly not an improvement.

The Chief Justice then distinguished the judgment of the Privy Council in the case of *Pillai v. Mudanayake*¹, where it was held that the impugned legislation was valid *inter alia* because it did not, on the face of it, make the Indian Tamil community liable to any disability to which other communities were not liable.

¹ Judgment of the Privy Council on Appeal from the Supreme Court of Ceylon; [1955] 2 AER 833.

The Chief Justice, however, relied on the observation of the Privy Council in the Ceylon case that there were circumstances in which legislation, though framed so as not to offend directly against constitutional legislation of the power of the legislator, might indirectly achieve the same result, in which case the legislation would be *ultra vires*. In the case before him, it was obvious that the legislator was trying by the so-called Amendment to indirectly take away the plaintiff's right to stand for election to the House of Representatives, a District Council or other local authority for a period of 25 years and, therefore, for that reason alone the legislation in question was void.

Commenting on the retroactive effect of the legislation in question, His Lordship observed:

'In my mind what makes the matter worse was that the so-called amendments were retroactive. One realises that there are occasions where retroactive legislation is necessary, but it should be passed very sparingly and only when fully justified. In my view the making of the Amendments by Act No. 12 of 1962 to section 1 and by Act No. 39 of 1962 to section 23 retroactive was completely unjustified and contrary to the spirit of sections 42 and 43 of the Constitution — in fact, if we bear in mind my quotation earlier from the American case, from where alone, I am afraid, we can in cases of this kind singularly draw our inspiration, we find that what is written there conflicts in large measure to the whole conception of the Constitution as treated by the Legislature in the instant case.

'If, as I hold, it was *ultra vires* for Parliament to make the Amendments retroactive, then section 9 has its full significance and Parliament had no power to deprive the plaintiff of the citizenship he automatically acquired on 27th April, 1961.'

In the result His Lordship held that the purported Amendment by Act 12 of 1962 of Section 1 of the Constitution and the purported Amendment by Act 39 of 1962 of Section 23 of the Constitution were both *ultra vires* the Constitution and therefore null and void.

Supreme Court of the United States of America

RIGHT TO PRIVACY

CAMARA v. MUNICIPAL COURT OF CITY AND COUNTY OF SAN FRANCISCO

(387 U.S., 1967, p. 523)

Fourth Amendment guarantees people's right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures—it also provides that no search warrants shall issue except upon probable cause—it gives expression to a right which is basic to a free society—basic purpose of Amendment is to safeguard privacy and security of individuals against arbitrary

invasion by government officials—subject to carefully defined exceptions, unconsented, warrantless search of private property unreasonable—in non-emergency situations occupant has right to insist that inspectors obtain search warrant before search.

Opinion of the Court delivered by Mr. Justice White.

Decided on June 5, 1967.

The appellant was charged under the San Francisco Housing Code for refusing to permit a warrantless inspection of the quarters which he had leased, and the residential use of which allegedly violated the occupancy permit of the apartment building in which these quarters were situated.

While awaiting his trial, the appellant applied in a State Supreme Court for a writ of prohibition, on the basis that the inspection ordinance was unconstitutional for failure to require a warrant for inspection. His application was refused and the refusal was affirmed in turn by the District Court of Appeal and the State Supreme Court.

The appellant then appealed to the Supreme Court of the United States which annulled the judgment of the lower court and held that the basic purpose of the Fourth Amendment, as recognised in countless decisions of the Supreme Court, was to safeguard the privacy and security of individuals against arbitrary invasions by government officials. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This gave concrete expression to the right of the people which was 'basic to a free society'. Subject to certain carefully defined exceptions, an unconsented, warrantless search of private property was 'unreasonable'.

The Court also observed that warrantless administrative searches could not be justified on the grounds that they made minimal demands on occupants, that warrants in such cases were not feasible, or that area inspection programmes could not function under reasonable search warrant requirements. The issue of a warrant for area inspection under the Housing Code should not depend on the fact that an inspector had cause to believe that a particular dwelling violated the code, but on the reasonableness of the enforcement agency's appraisal of conditions in the area as a whole. The standards which should guide a magistrate in issuing such search warrants would necessarily vary with the nature of the particular municipal programme. In non-emergency situations, such as in the case in point, the occupants had a right to insist that the inspectors obtain a search warrant before entry.

Constitutional Court of Austria**RIGHT TO PRIVACY****IN RE ARTICLES 8 AND 13 OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

(See pp. 126-127 above)

JUDICIARY AND COURTS**Supreme Court of Ireland****COURT NOT RIGIDLY BOUND BY ITS
EARLIER DECISIONS****ATTORNEY-GENERAL AND MINISTER
FOR DEFENCE v. RYAN'S CAR HIRE LTD.**(Vol. CI, No. 5240 (May 20, 1967) Irish Law Times,
pp. 57-70)

Rule of stare decisis—merits and demerits of this rule have been widely canvassed—practice of courts of ultimate resort varies—Supreme Court of the United States and ultimate courts of most European countries and of Canada, South Africa and Australia hold themselves free, where they think proper, to refuse to follow an earlier decision—advantages of doctrine of judicial precedent are many, and courts should ordinarily follow their earlier decisions—where however earlier decision appears clearly wrong or unsupportable, court should be free to consider itself not bound by it—in such circumstances rigid rule of stare decisis must give place to more elastic formula—Irish Supreme Court is a new court set up pursuant to Irish Constitution and therefore not obliged to accept stare decisis as a rule binding on it merely because the House of Lords does so.

Before O'Daly C.J., Lavery, Kingsmill Moore, Haugh and Walsh JJ.

Decided on December 11, 1964.

Sergeant L. was seriously injured in an accident caused by the negligence of the defendant company's servant. In this case the Attorney-General and the Minister of Defence, acting on behalf of the Government of Ireland, sued the

defendant company for the recovery of damages which they claimed accrued to the Government by reason of

- (a) the loss of the sergeant's services,
- (b) hospital and medical treatment afforded to him at Government expense.

As the case raised certain important questions of law and fact, Mr. Seamus Henchy, then Judge of the High Court, stated a case on these points for the decision of the Supreme Court. It is not proposed to refer here to the facts of the case, but only to certain important dicta of the Supreme Court on the doctrine of judicial precedent or *stare decisis*.

It was argued for the plaintiffs, *inter alia*, that there was authority binding on the Court¹ to the effect that a claim of this nature was maintainable under the old cause of action *per quod servitium amisit*. The Court refused to follow its earlier decisions having regard to the circumstances of this case and held that the plaintiffs had no sustainable claim for damages.

In dealing with the doctrine of *stare decisis*, Kingsmill Moore J., who delivered the judgment of the Court, observed:

'The first question, then, is whether this Court is to accept and lay down the principle that it is to be bound irrevocably by an earlier decision, the so called rule of "*stare decisis*". The merits and demerits of this rule have been widely canvassed and there is no consensus of opinion among academic jurists or serving judges. The practice of Courts of ultimate resort varies, the United States Supreme Court and the ultimate Courts of most European countries and of Canada, South Africa and Australia holding themselves free, where they think requisite, to refuse to follow an earlier decision; . . . In *The State (Quinn) v. Ryan* (1965) I.R. 70,² Walsh J. in his judgment, to which the other members of the Court assented, refused to accept "*stare decisis*" as universally binding in constitutional cases, adding at p. 127: "This is not to say, however, that the Court would depart from an earlier decision for any but the most compelling reasons. The advantages of *stare decisis* are many and obvious so long as it is remembered that it is a policy and not a binding, unalterable rule."

'This Court is a new court, set up by the Courts (Establishment and Constitution) Act, 1961, pursuant to the Constitution and it is free to consider whether it should adopt the rule which prevails in the House of Lords or any of the less restrictive rules which have found favour in other jurisdictions. It seems clear that there can be no legal obligation on this Court to accept "*stare decisis*" as a rule binding upon it just because the House of Lords accepted it as a rule binding upon their Lordships' house.

'The law which we have taken over is based on the following of precedents and there can be no question of abandoning the principle of following precedent as the normal, indeed almost universal, procedure. To do so would be to introduce into our law an intolerable uncertainty. But where the Supreme Court is of the opinion that there is a compelling reason why it should not follow an

¹ Particularly, *Minister for Finance and Attorney-General v. O'Brien* (1949), 1 Irish Reports, p. 91. In this and certain earlier cases the Supreme Court had held that the Republic could sue a third party for recovery of damages in circumstances such as those of the case.

² See also *Digest of Judicial Decisions*, Journal of the International Commission of Jurists, Vol. VI, No. 2, pp. 312-313.

earlier decision of its own, or of the Courts of ultimate jurisdiction which preceded it, where it appears to be clearly wrong, is it to be bound to perpetuate the error?

‘ . . . However desirable certainty, stability and predictability of law may be, they cannot in my view justify a Court of ultimate resort in giving a judgment which they are convinced, for compelling reasons, is erroneous. Lord Halsbury himself was forced to make some modification. Faced with the hypothesis that a case might have been decided in ignorance of the existence of some relevant statutory provision or in reliance on some statutory provision which was subsequently discovered to have been repealed, he suggested that it would not be a binding authority because it was founded on a mistake of fact. The same reasoning would be applicable if the decision were given in ignorance of an earlier authority of compelling validity. Where a point has been entirely overlooked, or conceded without argument, the authority of a decision may be weakened to vanishing point. In my opinion the rigid rule of *stare decisis* must in a Court of ultimate resort give place to a more elastic formula. Where such a Court is clearly of opinion that an earlier decision was erroneous it should be at liberty to refuse to follow it, at all events in exceptional cases. ’

Editor's Note: The Lord Chancellor (the Head of the Judiciary in Great Britain) recently announced that the House of Lords would no longer consider itself necessarily bound to follow its own decisions.

Court of Appeal of New Zealand

FUNCTION OF TRIBUNALS TO DRAW CONCLUSIONS OF LAW OR FACT CANNOT BE USURPED BY EXPERTS

THE QUEEN v. McCAY

(1967 New Zealand Law Reports Pt. 2, Feb.,
pp. 139-153)

Appellant charged with murder—his counsel proposed calling evidence of two psychiatrists to express opinion that answers given by appellant when under influence of ‘truth drugs’ were consistent with his innocence and that, on balance of probabilities, he was telling the truth when he denied having committed murder—such evidence held inadmissible—question of accused’s guilt or innocence must be determined by jury on factual evidence presented—to allow admission of evidence of the nature proposed would be to substitute trial by psychiatrists for trial by jury—would amount to modern version of trial by ordeal or inquisition—such evidence would usurp functions of tribunal, whose province alone it was to draw

conclusions of law or fact—use of drugs and instruments to delve into man's unconscious mind could conflict with upholding of human dignity—such use, if uncontrolled, could lead to practices as objectionable as those adopted in more barbarous ages—however, opinion evidence admissible where necessary—for example, where issue comprised subject of which knowledge could only be acquired by special training experience.

Before North (President), Turner and McCarthy JJ.

Decided on October 28, 1966.

The appellant was charged in the Supreme Court of Auckland with the murder of a Mrs. Kievet. In opening the defence, counsel for the appellant told the jury that he intended to call the evidence of two psychiatrists to speak to the results of a test they had conducted on the accused while he was under the influence of certain 'truth drugs', and that the psychiatrists would express the opinion that the answers given by the appellant when under the influence of those drugs were consistent with his innocence and that, on the balance of probabilities, he was telling the truth when he denied that he killed Mrs. Kievet.

The prosecution objected to the admission of the evidence of the psychiatrists and the trial judge, having considered the submissions of counsel, ruled that the evidence was inadmissible. The appellant was finally found guilty of murder and sentenced to life imprisonment.

He appealed to the Court of Appeal of New Zealand urging *inter alia* that the learned trial judge was wrong in having ruled that the evidence of the psychiatrists was inadmissible. The Supreme Court upheld the ruling of the trial judge and dismissed the appeal. In doing so Mr. Justice North, the President of the Court, observed that the question of the accused's guilt or innocence must be determined by the jury on the factual evidence presented to it. To allow the admission of evidence of the nature proposed in this case would be to substitute a trial by psychiatrists for a trial by jury. It really amounted to a modern version of trial by ordeal or inquisition. If the prisoner was resolute enough, then, as one of the psychiatrists himself freely conceded, he could maintain his lie. The general rule was against the admission of opinion evidence, for it tended to usurp the functions of the tribunal whose province alone it was to draw the conclusions of law or fact. It was true that, where necessary, opinion evidence was admitted but only where the issue comprised a subject of which knowledge could only be acquired by special training or experience.

Turner and McCarthy JJ. gave supporting judgments. McCarthy J. observed that the use of drugs and instruments such as the polygraph to delve into man's unconscious mind could conflict with the upholding of human dignity. He added that not all means of arriving at truth could be justified, and the use of drugs and machines, if uncontrolled, could lead to practices as objectionable as those adopted in more barbarous ages. In his view the courts of New Zealand should not permit an expert to give evidence as to the credibility of the testimony given by an accused in his own defence.

LEGISLATION**Supreme Court of Sierra Leone****DISCRIMINATORY RACIAL LEGISLATION****AKAR v. ATTORNEY-GENERAL**(See pp. 135-138 above)

Court of Appeal of Zambia
holden at Lusaka**REPEALING LAWS AFFECTING ACCRUED RIGHTS****ATTORNEY-GENERAL v. THIXTON**(See pp. 129-131 above)

Supreme Court of Sierra Leone**RETROACTIVE LEGISLATION****AKAR v. ATTORNEY-GENERAL**(See pp. 135-138 above)

RULE OF LAW**High Court of Justice of England**
(Queen's Bench Division)**NATIONAL AND LOCAL GOVERNMENT MUST
BE CONDUCTED IN ACCORDANCE WITH RULE OF LAW****LEE AND OTHERS v. SECRETARY OF STATE
FOR EDUCATION AND SCIENCE**(See pp. 121-122 above)

TRIALS AND APPEALS**Supreme Court of Cyprus****ADMISSIBILITY OF CONFESSION****KOKKINOS v. POLICE**

(See pp. 125-126 above)

Supreme Court of the United States of America**INDIGENT APPELLANT'S RIGHT TO ACTIVE COUNSEL
AND NOT TO MERE AMICUS CURIAE****ANDERS v. CALIFORNIA**

(386 U.S. 1967, p. 738)

Indigent appellant seeking review of conviction entitled to services of active advocate—an amicus curiae insufficient—indigent appellant should have same opportunities as appellant with financial means—failure to grant him services of advocate amounted to violation of his rights to fair process and equality under Fourteenth Amendment—obligatory on States to grant him counsel—procedures on first appeal from conviction by which rich appellant enjoyed full benefit of counsel while indigent did not invalid—counsel's bare no-merit conclusion inadequate substitute for appellant's right to full appellate review.

Opinion of the Court delivered by Mr. Justice Clark.

Decided on May 8, 1967.

The accused had appealed to a California appellate court against his conviction for felony. Counsel appointed by court on his motion for legal assistance, having studied the record and consulted with the appellant, advised the court that there were no merits in the appeal. The appellant's request for another attorney was denied, and the appellate court, having examined the record, affirmed his conviction.

The appellant sought to re-open his case six years later by application for *habeas corpus*, on the ground that he had been deprived of the right to counsel on his appeal. The application was refused; the court stated that it had again reviewed the record and found that the appeal was one 'without merit', and also that the California procedure for handling indigenous appeals had been followed. The court, however, failed to say whether the appeal was a frivolous one or not.

The appellant then filed an application for *habeas corpus* in the State Supreme Court claiming, *inter alia*, that the judge and the prosecutor had erroneously commented on his failure to testify at the trial. This application was refused without any reasons being given for the refusal.

The appellant then petitioned by way of *certiorari* to the Supreme Court of the United States, which reversed the judgment challenged and sent the case back for further proceedings not inconsistent with its opinion. The Supreme Court took the view that the failure to grant an indigent appellant seeking initial review of his conviction the services of an active advocate, as contrasted with *amicus curiae*, such as would have been available to an appellant with financial means violated the appellant's rights under the Fourteenth Amendment to fair process and equality. It observed that the right to counsel was made obligatory upon the States by the Fourteenth Amendment, and that the Federal Supreme Court had consistently held invalid those procedures on the first appeal from a conviction, where the rich appellant enjoyed the full benefit of counsel as a right while the indigent 'is forced to shift for himself'. Counsel's bare no merit conclusion was not an adequate substitute for an appellant's right to full appellate review. If counsel had conscientiously decided that the appeal was wholly frivolous, he should so have advised the court and requested permission to withdraw, at the same time furnishing the court and the indigent with a brief of anything in the record which could support the appeal. If after full review the court finds any legal points arguable, it must appoint counsel to argue the appeal; otherwise, it may dismiss the appeal as far as federal requirements are concerned, or decide the case on the merits if state law so requires.

High Court, Malaya

NEW TRIAL WHERE PLAINTIFF NOT RESPONSIBLE FOR ABSENCE AT ORIGINAL TRIAL

BUGA SINGH v. KOH BON KEO

(K.L.—Civil Appeal No. 16 of 1966)

(See also 1967 1 Malayan Law Journal p. 16)

Plaintiff and his counsel absent on date of hearing—plaintiff's claim therefore dismissed—he appeals against dismissal—Full Court finds merits in his claim—also that it was not his mistake that his counsel had failed to appear—further that justice could be done by compensating other side for any costs thrown away—in these circumstances new trial ought to be ordered.

Before Raja Azlan Shah J.

Decided on July 16, 1966.

In this case the plaintiff and his counsel were absent on the date of hearing, and the Magistrate accordingly dismissed the plaintiff's claim. The plaintiff

appealed against the dismissal and prayed for a new trial on the ground that it was not his mistake that his counsel had failed to appear.

The Appeal Court found that the matter in issue in the case contained some merits, and was also satisfied that the plaintiff could not be held responsible for the absence of his counsel on the trial date.

The circumstances of the case were also such that justice could be done by compensating the other side for any costs that it had incurred and by ordering a new trial. The appeal was therefore allowed and a fresh trial ordered, the appellant having to bear all costs thrown away by the respondent.

In his judgment, Raja Azlan Shah J. quoted the following observations of Denning L.J. in *Hayman v. Rowlands*:¹

I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him, but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter.

Supreme Court of the Philippines

PROCEDURE MERELY A MEANS TO AN END

TORRES v. CALUAG

(L-20906)

Procedure merely a means to an end—rules of procedure must be liberally construed so as to afford a just, speedy and inexpensive means of resolving disputes—technicality, when it deserts its proper office as aid to justice, is hindrance to justice and deserves scant consideration—there should be no vested rights in technicalities—Due Process requires that party must be impleaded and given notice of action and opportunity to defend his rights.

Decided on July 30, 1966.

In this case the Supreme Court of the Philippines pointed out that it must be borne in mind that procedure was merely a means to an end and that rules of procedure should be liberally construed so as to afford litigants a just, speedy and inexpensive means of resolving their disputes. The Court observed that:

‘Technicality, when it deserts its proper office as an aid to justice and becomes its great hindrance and chief enemy, deserves scant consideration. There should be no vested rights in technicalities. No litigant should be permitted to challenge a record of a court of these Islands for defect of form when his substantial rights have not been prejudiced thereby.’

¹ [1957] 1 AER 323.

In regard to the principle of due process, the Court stated that that principle simply meant that, before a party could be held bound by court proceedings, he must have been impleaded therein or notified thereof and thus given an opportunity of defending his rights.

Court of Appeal, England

RIGHTS OF THE DEFENCE

THE QUEEN v. HARPER

Accused in criminal case pleads not guilty—adopts defence involving allegations of perjury by prosecution witnesses and improper conduct by police officers—trial judge makes remarks on nature of defence when sentencing accused—his remarks give rise to feeling that he was possibly given higher sentence as he had pleaded not guilty and run his defence in a particular way—quite improper for judge to use language which may convey such feeling—fact that accused pleaded not guilty should not prejudice him in matter of sentence—his right to adopt a particular defence should not be fettered.

Judgment of Lord Parker, Lord Chief Justice.

Delivered on October 6, 1967.

The accused, a shop manager, was charged at the Birmingham Sessions with the offence of receiving jewellery. His defence involved allegations of perjury by prosecution witnesses and of intimidation, threats and improper behaviour by senior police officers.

He was found guilty and sentenced to 5 years imprisonment.

When sentencing him, the Recorder of Birmingham made certain remarks in which he drew attention to the nature of the accused's defence in a manner which could reasonably give rise to the feeling that he was being given a heavier sentence as he had pleaded not guilty and had adopted the sort of defence that he did.

In appeal the accused's sentence was reduced to one of three years. Lord Parker, the Lord Chief Justice, giving the reasons for the reduction of sentence, said: 'This court feels there is a real danger he was being given this severe sentence because he had pleaded not guilty and run his defence in that way.

'It is quite improper to use language which may convey the impression that man is being sentenced because he has pleaded not guilty and run his defence in a particular way.'

Supreme Court of Ireland

RIGHT TO BE HEARD

STATE (O'SULLIVAN) v. DISTRICT JUSTICE
BUCKLEY AND ANOTHER

(Vol. CI, No. 5262 (October 21, 1967)
Irish Law Times, pp. 152-158)

Application made by unsuccessful party after lapse of appealable time for enlargement of time for service and lodgment of notice of appeal—successful party had had no notice of application and not present—order of court enlarging time in these circumstances violated fundamental principle of judicial proceedings which required that other party should be heard—hearing of application and making of ex parte order not a mere matter of procedure—there was substance involved—it was also a judicial determination of a matter involving vested rights of a party without hearing that party in opposition.

Before O'Daly C.J., Lavery, Kingsmill Moore, Haugh and Walsh JJ.

Decided on December 4, 1964.

O. obtained in the District Court a public dance hall licence notwithstanding the objections filed by C. C. failed to appeal against the grant of the licence within 14 days, which was the time allowed for lodging a notice of appeal against the order of the District Justice. However, more than a month after the order was made, O. was served with a notice of appeal bearing the endorsement of the District Judge who had enlarged the time for service and lodgment of the notice of appeal. O. had had no notice of the application for enlargement and was not present when it was made.

O. applied to the High Court for a conditional order of *certiorari*, which was granted, and C. in turn applied to that Court for a discharge of the conditional order.

Lavery J., who delivered the judgment of the Court on the application for discharge, took the view that, when the time for appealing had expired without appeal having been lodged, O. acquired a vested interest in the licence. Although no doubt this interest was liable to be divested, it could be divested only if special circumstances were shown and judicially held to have been shown. Before his vested interest was divested he was certainly entitled to be heard. He added that there was authority for the proposition that a Court would not grant relief where to do so would affect a vested right.

In the course of his judgment, Mr. Justice Lavery made, *inter alia*, the following further observations:

* It is argued that the bringing of an appeal does not divest the interest in the licence, but it does put in danger a right which he has accrued, and exposes that right to the review of the Circuit Judge. When one looks at the circumstances to

be considered in granting a dance licence, as set out in section 2 (2) of the Act, and recognizes that a Circuit Judge might well take a different view to that taken by the Justice on matters which are of opinion on social rather than legal questions, the prosecutor is entitled to say that he should not be exposed to this risk.

‘ In my opinion, the making of this order violates the fundamental principle of judicial proceedings, which requires that the other party should be heard. It is unnecessary to amplify this proposition. In his judgment, the learned President has quoted from a number of cases which I think with respect do not support his conclusion.

. . .

‘ I do not regard the hearing of this application and the making of the Order *ex parte* as a matter of procedure. There is substance involved, and it is not merely a matter of procedure to determine judicially a matter involving the rights of a party without hearing him.

. . .

‘ It is said that in the absence of an express rule, it is for the Justice to lay down the procedure of his Court. He has such jurisdiction in matters of procedure, but he cannot adopt a procedure which denies a hearing to a party affected by an order he is asked to make. I should have thought that this was fundamental, and I think that this Court, with its duty of supervision of inferior tribunals, should lay this down without qualification.’

BIBLIOGRAPHY OF HUMAN RIGHTS

Human Rights and World Order

by Moses Moskowitz

(Oceana Publications, 1958)

Die Rom Konvention für Menschenrechte in der Praxis der Strassburger Menschenrechtskommission

von Hans Wiebringhaus

(Saarbrücken, 1959)

Derechos Humanos en los Estados Americanos

(Organization of American States, Washington, D.C. 1960)

Los Derechos Humanos, preocupacion universal

por Carlos Garcia Bauer

(Editorial Universitaria — Guatemala, 1960)

La protección jurídica de los Derechos Humanos y de la democracia en América. Los Derechos Humanos y el Derecho internacional

por Pedro Pablo Camargo

(Cia Editorial Excelsior, S.C.L., Mexico, 1960)

Les libertés publiques

par Georges Burdeau

(Librairie générale de Droit et de Jurisprudence, Paris 1961)

Les Droits de l'Homme et l'éducation

Actes du congrès du centenaire de l'Alliance Israélite Universelle, maison de l'UNESCO

(Presses Universitaires de France, Paris, 1961)

International Protection of Human Rights

by Manouchehr Ganji

(Librairie E. Droz, Genève, Librairie Minard, Paris, 1962)

Burke, Paine and the Rights of Man

by R. R. Hennessy

(Martinus Nijhoff, The Hague, 1963)

Naissance et signification de la Déclaration Universelle des Droits de l'Homme

par Albert Verdoodt, Préface de R. Cassin

(Editions Nauwelaerts, Louvain-Paris 1963)

Verfassungs- und Menschenrechtsbeschwerde gegen richterliche Entscheidungen

von Dr. Ekkehard Schumann

(Dunker & Humblot, Berlin, 1963)

The Basis of Religious Liberty

by A. F. Carrillo de Albornoz
(SCM Press Limited London, 1963)

The European Convention on Human Rights

by Gordon L. Weil
(A. W. Sythoff, Leyden, 1963)

Handbuch der Grundfreiheiten und der Menschenrechte

von Felix Ermacora
(Manz, Wien, 1963)

Freedom, the Individual and the Law

by Harry Street
(Penguin Books, London, 1964)

Les Droits de l'Homme

Numéro spécial de la revue de l'Action Populaire
(Vanves (Seine), Janvier 1964)

Protection of Human Rights under the Law

by Gaius Ezejiofor
(Butterworths, London, 1964)

La Convention Européenne des Droits de l'Homme

par Karel Vasak
(P. Pichon et R. Durand-Auzias, Paris, 1964)

The Right to Privacy

by Samuel H. Hofstedter and George Horowitz
(Central Book Company, New York, 1964)

Human Rights and the International Community—the Roots and Growth of the Universal Declaration of Human Rights 1948-1963

by Egon Schwelb
(Quadrangle Books, Chicago, 1964)

Protecao Internacional dos Direitos Humanos

por C. A. Dunshee de Abranches
(Livreria Freitas Bastos S.A., Rio de Janeiro 1964)

The Rationing of Justice: Constitutional Rights and the Criminal Process

by Arnold S. Trebach
(Rutgers University Press, New Brunswick, New Jersey, 1964)

La Liberté Religieuse dans les Conventions Internationales et dans le droit public général

par Pierre Lanarès
(Editions Hirvath, Paris, 1964)

- Studien über die Grundrechte*
von Hermann Klenner
(Staatsverlag der DDR, Berlin 1964)
- The European Convention of Human Rights: Based on papers given at a Lecture and Conference held under the auspices of the British Institute of International and Comparative Law in London in November 1964*
(ICLQ Supplementary Publication No. 11, Stevens & Sons, London, 1965)
- Géographie de la Liberté (Les Droits de l'Homme dans le Monde 1953/1964)*
par Louis de Villefosse
(Ed. Robert Laffont, Paris, 1965)
- Legal Aspects of the Civil Rights Movement*
edited by Donald King and Charles W. Quick
(Wayne University Press, Detroit, 1965)
- La Commission Européenne des Droits de l'Homme*
par François Monconduit
(A. W. Sythoff, Leyden, 1965)
- Human Rights as Legal Rights*
by Pieter N. Drost
(A. W. Sythoff, Leyden, 1965)
- Socialist Concept of Human Rights*
by Imere Szabó and Istvan Kovacs
(Akadémiai Kiado, Budapest, 1966)
- La Charte Sociale Européenne*
par G. Janssen, F. Fuks, L. Heuskin, E. Vogel-Polsky et P. Schoetter
(Revue de l'Institut de Sociologie de l'Université Libre de Bruxelles 1966)
- The Foundations of Freedom: The Interrelationship between Democracy and Human Rights*
by Durward V. Sandiper & L. Ronald Scheman
(Frederick A. Prager, New York, Washington and London, 1966)
- Documents Conciliaires, 3: L'Eglise dans le Monde — L'Apostolat des laïcs—Les Moyens de communication sociale—La Liberté religieuse*
(Editions du Centurion, Paris, 1966)
- La Proteccion Internacional de los Derechos Esenciales del Hombre*
report prepared by Dr. Daniel H. Martins, member of the Inter-American Commission on Human Rights.
(Organization of American States, Washington, D.C. 1966)

Sauvegarder, Developper et Harmoniser les Droits de l'Homme et les libertés fondamentales (reflexions sur l'article 60 de la convention européenne du 4 novembre 1950)

par F. Marquet

(Ligne des Intérêts Familiaux en Matière d'Enseignement Anvers, 1967)

The International Protection of Human Rights

Edited by E. Luard

(Thames & Hudson, London, 1967)

The Right to Privacy and Rights of the Personality

A comparative survey by Stig Strömholm

(P. A. Norstedt & Soners Förlag, Stockholm, 1967)

La Déclaration Universelle des Droits de l'Homme et le Catholicisme

par Philippe de la Chapelle

(Librairie générale de droit et de jurisprudence, Paris, 1967)

Human Rights and International Law

by Dr. Karel Vasak and Dr. Waiklee

(Manchester University Press, 1967)

International Protection of Human Rights

by A. H. Robertson

(Manchester University Press, Oceana Publications, 1968)

La Commission Interaméricaine des Droits de l'Homme

par Karel Vasak

(Librairie de Droit et de Jurisprudence, Paris 1968)

The Rule of Law and Human Rights (Principles and Definitions)

(International Commission of Jurists, Geneva 1966)

Working Papers prepared for Conferences of the International Commission of Jurists (Geneva):

The Right to Privacy (Stockholm, 1967)

The Right to Freedom of Movement (Bangalore, 1968)

Working Papers prepared for the Geneva Conference of Non-Governmental Organisations (January 1968)

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