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PREFACE

The following Working Paper for the participants in the 1962 International Congress of Jurists has been prepared with the assistance of National Sections and individual jurists who responded to the questionnaire submitted to them by the Commission. Replies from the following 55 countries were available at the time of the drafting of this Working Paper:

Argentina	Ecuador	Kenya	Sudan
Australia	El Salvador	Liberia	Tanganyika
Austria	France	Malagasy Republic	Thailand
Belgium	Germany	Malaya	Trinidad
Bolivia	Ghana	New Zealand	Tunisia
British Guiana	Greece	Nicaragua	Turkey
Cameroun	Honduras	Nigeria	Uganda
Canada	India	Northern Rhodesia	United Arab Republic
Ceylon	Iran	Norway	United Kingdom
Chile	Israel	Peru	United States of America
Colombia	Ivory Coast	Puerto Rico	Uruguay
Costa Rica	Jamaica	Senegal	Venezuela
Denmark	Japan	Singapore	Vietnam
Dominican Republic	Jordan	South Africa	

The Commission wishes to express its appreciation and gratitude to those lawyers who cooperated in the replies to the questionnaire and facilitated greatly by their efforts the preparation of this Working Paper. The quotations from selected replies and used below do not represent a survey of the comments submitted on the respective questions; they have been used here merely for illustrative purposes.

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INTRODUCTION

THE RULE OF LAW

All participants in this Congress are aware of the worldwide concern for the Rule of Law manifested in recent years. The International Commission of Jurists has been active in strengthening that concern and promoting the principles embodied in the Universal Declaration of Human Rights of 1948. International meetings of jurists sponsored by the Commission have proclaimed three fundamental statements of the Rule of Law: the *Act of Athens*, put forward at the International Congress of Jurists in Athens, Greece, in June 1955; the *Declaration of Delhi*, at a second Congress held in New Delhi, India, in January 1959; and the *Law of Lagos*, at the first African Conference on the Rule of Law which met in Lagos, Nigeria, in January 1961. Those statements are reprinted in the Appendix, together with related *Conclusions*.

The provocative analysis of the origins of the Rule of Law that appears in the Working Paper of the New Delhi Congress is not reprinted or rephrased here (see *The Rule of Law in a Free Society* 1959, pp. 187-197). These conclusions of that analysis, however, merit special emphasis:

(1) The Rule of Law is a convenient term to summarize a combination of ideals and practical legal experience concerning which there is over a wide part of the world, although in embryonic and to some extent inarticulate form, a consensus of opinion among the legal profession.

(2) Two ideals underlie this conception of the Rule of Law. In the first place, it implies, without regard to the content of the law, that all power in the State should be derived from and exercised in accordance with the law. Secondly, it assumes that the law itself is based on respect for the supreme value of human personality.

(3) The practical experience of lawyers in many countries suggests that certain principles, institutions and procedures are important safeguards of the ideals underlying the Rule of Law. Lawyers do not however claim that such principles, institutions and procedures are the only safeguards of these ideals and they recognize that in different countries different weight will be attached to particular principles, institutions and procedures.

(4) The Rule of Law, as defined in this paper, may therefore be characterized as: " The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures

and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man."

Even more vital is this statement from the *Declaration of Delhi:*

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

At this Congress our aim is to focus attention on problems concerning executive action and the Rule of Law. In analyzing those problems we will be aided by the wisdom and experience of our fellow participants, by the replies to a special questionnaire which was sent to all participants, by the publications of the International Commission of Jurists and materials collected by its staff. Replies have now been received from 55 countries of the world, and we can be grateful indeed for the significant data thus made available.

For easy reference during the discussions, the inquiries of the questionnaire that related to our four committee topics appear in the Appendix. The four committee topics are:

Committee One — Procedures Utilized by Administrative Agencies and Executive Officials;

Committee Two — Control by the Legislature and the Courts over Executive Action;

Committee Three — The Responsibilities of Lawyers in a Changing Society;

Committee Four — The Role of Legal Education in a Changing Society.

As we begin to examine each of those critical matters let us stress again the questionnaire's general preface, which must highlight all our varied interests:

> Today all societies face the need for adjustment to the requirements of technological change and of social and economic development. In various areas of activity the executive branches are compelled to deal with problems for the solution of which no adequate machinery may exist and which constantly require governmental and legislative intervention for the good of society and the individuals within it. The major dilemma confronting governments and citizens alike is how to strike a balance between the freedom of the Executive to act effectively and its trend to enlarge its powers on the one side, and the protection of the community and the individual in the enjoyment of his rights on the other. *The object of this Congress is to examine the role of judges, lawyers, whether in private practice or government, and teachers of law, in striking that balance and thus preserving and advancing the Rule of Law side by side with social and economic development.*

COMMITTEE ONE

Procedures Utilized by Administrative Agencies and Executive Officials

The topics of Committee One and Committee Two are closely related. Both topics involve this *Conclusion* of the Delhi Congress (1959), adopted verbatim at Lagos (1961):

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

That last sentence, particularly, is echoed in the documents of this Congress. The burden of Committee One will be to decide whether executive action that may be essential to assure " a reasonable standard of economic security, social welfare and education for the mass of the people " can, procedurally, conform with honoured traditions of the Rule of Law.

In times of crisis the temptation to depart from the Rule of Law is often great, but even in the most trying circumstances we insist that the Executive must be bound by the appropriate application of the Rule of Law. It is to be noted in this connection that sound procedures should not be regarded as an impediment to governmental action established and designed to protect a competing interest of the citizen; departures from sound procedure, and particularly refusal to hear the views of the citizens affected will often lead to unsound executive decisions which will result in far greater waste and delay than would be entailed in fair and orderly procedures. In short, government under the Rule of Law is better government producing

better results for the country. As jurists we know that our continued efforts, as well as the vigilance of lawyers generally, will be required to maintain standards for executive and administrative justice comparable to what centuries of experience have forged for criminal and civil justice.

We can hardly overemphasize the total impact of administrative and executive action. Virtually all citizens encounter programmes for taxation, for social welfare, workmen's compensation, drivers' licences, other licences. Few decisions have such wide effect as those regarding taxes, subsidies, and public credit, the construction of schools, roads, and other public works, the fixing of prices for regulated industries. Administrative adjudication may be more devastating than even a criminal trial—when a doctor or a pharmacist loses his licence to practise his profession, when an allegedly ill person is confined to a hospital that in fact is a prison too, when a public or private employee loses his job or is proclaimed disloyal to his government. In nearly every country there are relatively few judges and legislators, relatively few court trials and statutes, if we compare the vast number of executive officials and of cases, opinions, and delegated legislation for which they are responsible. By whatever test one chooses to apply, administrative and executive procedure is a most vital part of the Rule of Law.

Two basic propositions channel our discussion:

A. The diversity of the functions which are served by administrative and executive action is so marked and so immense, among countries and within countries, that it would be futile for the Congress to prescribe detailed procedures which could be recommended for all governmental activities.

To illustrate: an administrative proceeding is by no means like a criminal trial, for which world-wide rules may be feasible. (See the report on " The Criminal Process and the Rule of Law " at the Delhi Congress.) There is no typically fit model that tells executive officials how they should proceed. Licensing proceedings and passport proceedings and tax proceedings may or may not resemble each other. Normally they will have no resemblance whatever to procedures for deciding which private property is needed for highways, which children are entitled to improved schools, which hazards at a factory unduly jeopardize the workmen's safety, what measures are required to protect public health, who among the citizens should receive subsidies or land grants. Moreover, the practices of local bodies and of state or provincial governments often vary from the practices of the national government.

B. This Congress should search for minimum standards. But in searching we must not be misled by an easy assumption that court procedures can simply be transplanted without change or re-examination. Most countries can take pride in their fairly run criminal and civil trials. A great deal of administrative and executive action, however, is more like the process of enacting statutes than like the trial process. Much government adjudication, even, is critically different from judicial adjudication (as when thousands of social security claims are acted upon, for example, or when scarce commodities must be rationed). Most important of all: judges are not the officials we employ to drain swamps or manage schools or redistribute land or encourage industrial expansion. To overjudicialize the proceedings which have those objectives would mean, in many countries,

that progress towards ensuring what the Delhi *Conclusion* calls " a reasonable standard of economic security, social welfare and education for the mass of the people " is not a favoured policy. Judicial procedures will often be an important point of reference, but they are not, *per se*, what we most need to establish the economic, social, educational, and cultural conditions under which the individual's legitimate aspirations and dignity may be realized.

What, then, are minimum standards that the Rule of Law does imply? How best can such standards be established and enforced? Here are suggested guides.

I. Formal Adjudication

In nearly every country certain action of administrative agencies and executive officials is regarded as quasi-judicial. The decisions made are similar to judicial decisions; the process is similar to judicial adjudication.

There are many explanations of why the lawmakers have assigned such duties to executive adjudicators rather than to judges. Committee One has not been asked to assess those explanations. Instead, our basic question should be: *Do executive adjudicators who make decisions that are like court decisions need rules of procedure that differ from fundamental court rules?*

We stress the word " fundamental " because the principles of the Rule of Law are not equivalent to the detailed rules of procedure of many courts. Thus, obviously, a court may act in full accord with the Rule of Law even though it has rejected the Common Law rules of evidence. Principles that do seem basic are:

1. Adequate notice to the interested parties.
2. Adequate opportunity to prepare a defence, including access to relevant data.
3. Adequate opportunity to present the defence and meet opposing arguments.
4. The right to be represented by counsel or other qualified person.
5. Adequate notice of the decision and of the reasons therefor.

At Delhi the Committee on the Executive and the Rule of Law declared:

> ... it is essential that the procedure of such *ad hoc* tribunals and agencies (which include all administrative agencies making determinations of a judicial character) should ensure the fundamentals of fair hearing including the rights to be heard, if possible in public, to have advance knowledge of the rules governing the hearing, to adequate representation, to know the opposing case, and to receive a reasoned judgment.

Should that declaration be expanded? Modified? We assume that exceptional circumstances such as riot, fire, and disease may

justify short-cuts. That assumption seems implicit. Are there other modifications, not implicit, that may be essential to ensure executive efficiency? Conversely, are phrasings like the five listed above too vague; and should we therefore articulate detailed rules relating to the content of the " notice ", access to government papers, the privilege to call witnesses who are friendly, to cross-examine those who are not, to confront the deciding officials, to demand a public hearing?

Those are some of the troublesome questions, and Committee One must struggle with them.

II. Action which is not Quasi-judicial

Few countries set procedural rules for administrative and executive action that are not regarded as quasi-judicial. Included in this category are discretionary acts, delegated legislation, informal adjudication—in fact, most kinds of decision-making we normally have in mind when we refer to " the process of governing ".

In some countries there have been experiments. Those experiments encouraged our predecessors at Delhi to formulate these two proposals:

> Irrespective of the availability of judicial review to correct illegal action by the Executive after it has occurred, it is generally desirable to institute appropriate antecedent procedures of hearing, enquiry or consultation through which parties whose rights or interests will be affected may have an adequate opportunity to make representations so as to minimize the likelihood of unlawful or unreasonable executive action.
>
> It will further the Rule of Law if the Executive is required (1) to formulate its reasons when reaching its decisions of ... [an] administrative character and affecting the rights of individuals and (2) at the request of a party concerned, to communicate them to him.

Of special interest are these two excerpts from the Federal Administrative Procedure Act of the United States passed in 1946:

> So far as the orderly conduct of public business permits, any interested person may appear before any [administrative] agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function — § 6 *(a)*.
>
> ...
>
> General notice of proposed rule making (*i.e.*, notice of the intent to promulgate delegated legislation) shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved... The agency shall afford interested persons an oppor-

tunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose — §§ 4 *(a)* and *(b)*.*

Also of interest are twentieth century counterparts of the ancient right " to petition ". The words on a stone tablet in Thailand, believed to date from 1214 A.D., are said to read as follows:

In the porch outside the door of the palace there is a gong suspended; if any inhabitant of the kingdom has grief or any matter which ulcerates his bowels and torments his soul, and which he wishes to lay before the prince, it is not difficult of accomplishment; he has only to beat the gong which is hanging there.

Compare this section of the Administrative Procedure Law of Spain passed in 1958:

Section 34:

1. In every non-military Ministry there shall be a Suggestions and Complaints Office, within the Technical Secretariats or, where these do not exist, within the Undersecretariats. This Suggestions and Complaints Office shall receive, study and comment on the suggestions of officials and public in general, for the purpose of improving the structure, functioning and the service of the administration; it shall also hear complaints relating to delays, inattention or any other anomalies observed in the functioning of the administration. These Offices shall also exist in the autonomous Agencies and, in general, in every large administrative unit.

2. If the complaints introduced before the Office mentioned in the paragraph above have no effect, they can be reproduced in writing before the Office of the President of the Council of Ministers, which shall bring it to the attention of the Head of the respective Department for the adoption of the necessary steps, if any.

3. The Office of the President of the Council of Ministers shall establish an advisory and inspectorate service within the Suggestions and Complaints Office, to supervise the correct observance of the procedure regulations and also hear the complaints mentioned above and in Section 77.

In France, it is open to every individual to request that an executive decision affecting him be reconsidered, either by appealing to the person directly responsible for the decision *(recours gratieux)* or to his departmental superior *(recours hiérarchique)*. These appeals, called administrative appeals as opposed to " contentious " appeals, are broadly open to all and are distinctly encouraged.

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* The provisions do not apply " to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts ". Nor do they apply " to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest ".

The utility in a modern administrative state of using the postage stamp as the equivalent of the gong in Thailand is illustrated by these words of the California Administrative Procedure Act of 1945:

> Any interested person may petition a state agency requesting the adoption or repeal of a regulation ... [and the] agency shall within 30 days deny the petition in writing or schedule the matter for public hearing.

Compare too Section 6 *(d)* of the Federal Act:

> Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

III. Publication and Publicity

When Caligula was Emperor his laws were written in fine script on pillars too high for the ordinary passer-by to read. Do we tolerate the twentieth century equivalent of that outrageous Roman precedent? Some replies to the questionnaire show that the Executive is not always zealous in publishing its regulations.

* * *

The 1957 Report of the British Committee on Administrative Tribunals and Enquiries marked openness as one of the three essential characteristics of adjudication (" openness, fairness, and impartiality"). Consider this observation from a reply to the questionnaire:

> I should like to mention one safeguard which in my opinion is of great importance under the existing conditions in Norway and in all other modern welfare states, namely the so-called *publicity principle*. This principle is obtained in Swedish and Finnish administration, and the proposed Norwegian act contains provisions which lay down that the general public as a rule shall have access to the documents of the administration—in other words: the administration's documents should be public. This is, of course, a controversal issue, and the publicity principle is at the moment not practised in other countries than in Sweden and Finland. As a safeguard it is, however, in my opinion important and effective. Of course, the publicity principle can only be exercised with many exceptions; nevertheless the fact that the administration knows that the general public and the press will have access to the documents will have great weight in regard to the observance of the Rule of Law and prevent abuse of power.

In many countries governments insist on non-disclosure in respect of many matters and on government officials having the decisive role in determining when there should be publicity. Is secrecy justified only in the interests of national security so as to suppress espionage, or throughout every branch of international affairs, or whenever disclosure would reveal the identity of police informers? Or must we accept in every case a government statement (unsupported by detailed reasons) that it would be contrary to the public interest to produce a particular item of information?

IV. The Need for Norms

If the Rule of Law does prescribe minimum standards of procedure, how should those minima be articulated: As rules of natural justice and due process? As specific requirements in a written constitution? As model rules that every administrative agency should promulgate? As the provisions of a general statute applicable to all executive action that is not specifically exempted?

One participant reports:

> The suggestion of the introduction of a uniform code of practice and procedure applicable to all administrative tribunals has received mixed reaction in Canada. The Gordon Report favours the adoption of such a Code whereas the Franks Committee [in Britain] warns against overestimating the importance of having paper rules of theoretically fair procedure. What really counts is a fair mind in the officials in whom responsibility is vested. The interests of efficient administrative adjudication are best served by the minimum procedural requirements ordained by the courts under the concept of natural justice; or procedures should be prescribed in individual statutes to suit the need of the subject matter.

V. Some Provocative Comments

Here are some specially interesting excerpts from replies to the questionnaire:

> (1) What should be pursued, in my view, is an improvement of the economic and social conditions of a large part of the population, in order that these safeguards of the Rule of Law can be made to work. In other words, what good are the procedures applied in administrative practice, based on the principles that have been mentioned, to an illiterate person who because of his precarious living conditions never pays taxes, and will never have an opportunity of utilising such procedures?
>
> (2) In a newly independent country, probably the most urgent need is a sound and expanding economic system. Also, effective control of public health and land. Husbandry is essential. To achieve those aims some interference with the freedom of the subject may be justified for a time; ... e.g., compulsory acquisition of land where the occupier has persistently failed to develop it. This is a feature of land tenure under the Irish Land Commission.
>
> (3) Far reaching agrarian reforms might call for certain modifications of the safeguards of the Rule of Law mentioned, especially those in the questionnaire under A (2) [" access to necessary information, including the relevant files of the agency or official "] and A (4) [" opportunity to present facts and arguments before the appropriate agency or official "].
>
> (4) Where measures are taken, in underdeveloped countries or elsewhere, to solve economic and social problems, and those measures would spell a destruction of the delicate fingers of human values, to the extent that a right should be taken away, and a life smothered, it were better the particular " modifications " were abandoned and much less harmful solutions sought. Put in legal language, the only " modifications " of the [Rule of Law] safeguards which may be allowed must be those which at every stage recognise the right of the individual to his life, property and liberty. The individual must be given an opportunity to question any interference with his rights for which he has not given his consent.

(5) In underdeveloped countries, social legislation as it is known in Europe is, to a great extent, in its infancy. Therefore there are not so many administrative agencies as there are in a developed society. This creates an ideal opportunity to introduce at the earliest stages and at every level these [Rule of Law] safeguards which more-developed countries have developed over the centuries. The mere fact that the people are unable to appreciate and understand such refinements is rather an added reason for their introduction than for delaying them; for such people require greater protection than those more highly educated and aware of their rights. In my country, where in vast areas of sparcely populated territory the majority of the people in the rural areas live at a subsistence level, the demand for such refinements may not be very great and the cost may be prohibitive. However, the dangers of failing to introduce necessary measures are far greater than in providing them.

COMMITTEE TWO

Control by the Legislature and the Courts over Executive Action

The Committee Two agenda, like the Committee One agenda, can be introduced best by this *Conclusion* of the Delhi Congress (1959), adopted verbatim at Lagos (1961):

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

That conclusion reminds us that a control exercised by Legislatures which *are* subject to executive manipulation or by courts which are *not* independent can hardly be an effective control, consistent with the Rule of Law.

The most intriguing inquiries that are of concern to Committee Two may be those which relate to the Delhi *Conclusions:*

> A. When do judicial and legislative controls unreasonably impair the power and resources of the Executive to discharge its functions with efficiency and integrity?
>
> B. Are judicial and legislative controls designed merely to "protect the individual", or can they also reinforce the endeavour of government to achieve the conditions within a society that will ensure a reasonable standard of economic security, social welfare, and education for the mass of the people?

Jurists must not ignore the fact that, on occasion, courts and and legislatures have been dominated by private interests—for selfish ends. We do not promote the Rule of Law by tolerating judicial procedures which are used mainly to block reform, or by

fabricating a system of legislative supervision which has as a main aim the preservation of the *status quo*. It should also be emphasized at the outset that there are infinite degrees and many techniques of legislative and judicial control.

I. Judicial Controls

In practically every country some actions of the Executive are immune from judicial review—in theory and (especially) in practice. When executive action directly affects private interests it generally is subject to judicial review. The procedures which can be used to secure that review, however, are notably diverse—as are the rules that govern the scope of the review, once the case is in court.

Whether the methods of review are adequate; whether a party adversely affected has the standing to sue; whether the issues of fact as well as the issues of law are before the court; whether administrative rule-making and discretionary acts may be examined; whether the fairness of the administrative procedure may be reviewed—those are the kinds of questions, long the concern of Administrative Law scholars, that were discussed at length in the answers to the Committee Two questionnaire. The legal technicalities seem endless.

Nearly all our correspondents replied specifically to this question: *What improvements should be made in the checks on executive action?* Excerpts like these suggest possibly profitable lines of inquiry:

> (1) In order to improve the functions of tribunals that adjudicate upon administrative disputes it would be necessary to:
>
> (i) extend jurisdictional protection to general interests as it is not enough, in the complex society of our times, where administrative activity constantly increases, to protect only particular interests;
>
> (ii) eliminate in the adjudication of administrative disputes the distinction now existing in the Constitution between non-discretionary and discretionary actions of the administration, so that in cases of discretionary action there can be control not only of defects in form and procedure but also of wrong exercise of the discretion;
>
> (iii) prohibit the administration from revoking rights already declared and recognized by the administration and establish a special procedure known as *proceso de levisidad* in Spanish legislation, with a view to making it necessary for the administration to have recourse to administrative tribunals if it wishes to have such rights revoked; this assures citizens that favourable administrative decisions are sustained so long as they are not annulled by such tribunals . . .
>
> (2) Among the improvements that could be made in the checks on Executive action exercised by the Legislature and the Judiciary, I would mention ameliorations in the legislation concerning the right of *habeas corpus* and the appeal for the protection of constitutional rights *(recurso de amparo)*, which in its present form is long outdated and incompatible with our Constitution; revision of the law respecting the responsibility of public officials, to render more effective the penalties provided for breaches of the law by public officials; and better concretization in the laws of certain principles laid down in the Constitution.
>
> (3) One desirable improvement would be to incorporate into the fundamental liberties guaranteed by the Constitution appropriate words which will either

expressly or by implication enable the Courts to enlarge their jurisdiction to curb and control executive excesses—such as the " due process " clause of the American Constitution or the requirement of " reasonableness " in the restrictions that may be imposed by law under the Indian Constitution ... To the extent to which the Legislature becomes more and more the creature of the Executive to shape and mould it according to its pleasure because of its majority, and develops an irresponsiveness to the will of the people, such as never can be found in the more ancient democracies, to that extent an enlargement of the area of judicial power, in the judicial process itself, appears to be the crying need.

Perhaps our task will be eased if we seek to isolate the fundamental rules, leaving the scholars and reformers in each country to articulate whatever detailed rules seem necessary to ensure effective review. With that in mind we could re-examine these Delhi and Lagos *Conclusions*, asking ourselves whether they are sufficiently explicit:

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

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

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

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

Lagos: The Judiciary should be given the jurisdiction to determine in every case upon application whether the circumstances have arisen or the conditions have been fulfilled under which the power to make rules or regulations having legislative effect is to be or has been exercised. While recognizing that inquiry into the merits or the propriety of an individual administrative act by the Executive may in many cases not be appropriate for the ordinary courts, it is agreed that there should be available to the person aggrieved a right of access to:

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

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

It is desirable that, whenever reasonable in the prevailing circumstances, the action of the Executive shall be suspended while under review by the courts.

We should keep in mind that the aims of Committee Two are greatly affected by the accomplishments of Commitee One. The scope of judicial review can be narrower when the administrative procedures are ample rather than when they are restrictive. And even

the availability of judicial review reasonably can be limited if systems of review within the administrative process are fair.

We might wish to consider this question: **Is there a danger that lawyers may sometimes over-emphasize court procedure, unwisely diverting attention from the more critical need for reform at the administrative level ?** A German reporter has commented that " subsequent judicial control—particularly in contemporary economic administration—is often not worth the citizen's while. It comes too late and takes too long; it costs money and may render subsequent collaboration with the Administration difficult ".

II. Legislative Controls

Legislatures create administrative agencies and modify their powers. They enact statutes, review budgets, appropriate funds, advise and consent, investigate, and in other ways affect the execution of laws. Happily, the reply that " At present we have no Legislature " did not often appear among the answers to our questionnaire. In accordance with the enunciation at the Delhi Congress, most participants here may assume " the existence of a Legislature elected by democratic process ". Very few of us, however, can boast of optimum efficiency *vis-à-vis* the legislative control of executive action.

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

Committee Two might wish to channel its discussion by considering the proposals and philosophies that underlie these three observations:

(1) Checks on Executive action could be made more effective and far-reaching by use of the " Ombudsman " device (i.e., assigning to an independent official the responsibility for inquiring into complaints of citizens against the bureaucracy). Such an official could be made responsible, as in Scandinavia, for investigation and report to Parliament on unfair and arbitrary administrative action. The device would be a very useful supplement to the present procedures in Parliament, such as question time, which are widely used to raise the grievances of citizens. It would do much to remedy the present haphazard and incomplete consideration given to complaints.

An alternative improvement (which would probably be more suited to Australian conditions) would be the establishment of an authority on the lines of the English " Council on Tribunals ". The proposed authority would ideally comprise a small, high-level committee of judges, legal practitioners, civil servants, university representatives and the like, supported by a permanent secretariat. It could be entrusted with responsibility for matters such as the following:

(i) Investigation and analysis of the powers currently exercised by the Executive with particular reference to their impingement on the rights and interests of the citizen, and to suitable methods of control.

(ii) Continuous supervision and investigation of existing administrative tribunals and bodies holding discretionary powers.

(iii) Initiation of procedural reform designed to further the Rule of Law.

(iv) Investigation of complaints by citizens as to unfair or discriminatory application of governmental powers.

The Committee could be required to report to Parliament annually in addition to submitting reports on particular matters.

(2) While every lawyer, indeed every good citizen, would and should undoubtedly require that arbitrary exercise of power by the Executive must be prevented and controlled, it is permissible to entertain some doubts as to the extent of effective control that a Legislature can really have over the Executive . . .

A control by the Legislature in the final resort is a control by the people or the electorate; and, except in societies which have developed a high sense of awareness of private rights and public duties, an elected legislature under a parliamentary democracy is more likely to permit or condone or be indifferent to executive arbitrariness so long as it promotes the selfish interests of the party in power. Recent histories of new Asian and African Nations have underlined this fact. Elected Legislatures are less a means to an end (i.e., good Government) than the end itself. So long as the Executive—from the Minister downwards—is a limb of the dominant party in power, so long will the Legislature and, therefore, the party in power desire to control the Executive for its own purposes.

(3) The administration of a country has become so complex and vast that its Head (or The Executive) appears as the rightful holder of power. The Legislature has relinquished a large part of its natural influence in government affairs, to judge at least from what may be observed in my country [a Latin American country] and most others. More than a law-making body it appears today to be almost exclusively a forum where leaders gather to discuss in impassioned tones political topics, often merely partisan ones, to the indifference of the people, who are interested in and concerned about economic matters only on a practical, and not a theoretical, level—concerned, in short, for their personal *security* and that of their families in a world where insecurity grows without stop.

It is quite difficult, it seems to me, to improve the institutional system through external measures alone, inasmuch as life as it is constituted at present seems to indicate that it is not so much the system which is at fault as it is the men who apply it. They—all of us—are enveloped in an atmosphere of unrest and even fear, which has come about above all because of economic causes. The jolts to the economic aspect of existence have unsettled, to a greater or lesser degree according to the particular country, the juridical patterns of nearly all organised systems during the last century.

III. What Special Measures do you suggest in Matters of Social and Economic Development ?

The draftsmen of the Committee Two questionnaire hoped that in the replies there would be guidance as to special systems of judicial and legislative review which could be adapted to widely recognized needs for social and economic development. Thus, for example, the replies were searched for suggestions on the role of judges and legislators as to major land reforms, major fiscal reforms, major reforms affecting education. It was known that the British Parliament has had to develop techniques for dealing with the nationalized industries and that in the United States (where, as in several other federal nations the courts often deal with questions of public policy)

judges have had a very limited impact on the administration of the T.V.A. and other natural resources projects.

The replies to the questionnaire in this respect have not been satisfactory. From two Latin American countries these comments were submitted:

> In my opinion it is entirely futile to propose any measures relating to social and economic development as long as the public authorities of the country maintain their existing organisational structure. Advancing the social and economic development of this country would not present any great difficulties if the organs of government were to function in independence and also in harmony.
>
> The public administration must be decentralized, and technical agencies set up, in order to promote social and economic development.

Nearly all other proposals related not even vaguely to our precise question. Instead, there were substantive suggestions such as:

> The continual increase in adult education, and increased contact between the public and the Bar Association.
>
> A development that will promote in the electorate a greater awareness of its rights and an equally greater readiness to fight for them would appear to be the primary need.
>
> Adequate legislation to avoid discrimination on racial or other grounds; effective steps to combat ignorance; elimination of legislative measures which hamper free enterprise; ... measures to safeguard private property, without prejudice to proper distribution of land ...
>
> The setting up of a Ministry of Social Welfare entrusted, for the benefit of the individual and the good of society as a whole, with the solution of all those problems springing from the organisation of society in modern times which concern prevention and rehabilitation; the standardisation of law regarding desertion of family, so that all those who incur such a responsibility receive the punishment deserved; an adequate agrarian reform which would allow everyone to own and cultivate land; and a planning office to ensure that resources of national wealth and production are not wasted.
>
> I believe that it is essential, at least in my country, for workers to share in the profits of undertakings.

In total those and similar ideas may be worthy. They seem broader, though, than the topic which has been assigned to Committee Two. The *Declaration of Delhi* does state that the Rule of Law is a dynamic concept which should be employed to establish the social, economic, educational, and cultural conditions under which the legitimate aspirations of the individual, and his dignity, may be realized. Before we undertake the task of identifying and defining those conditions in detail, perhaps as lawyers we should be sure that the machinery of legislative and judicial controls is truly designed to meet the challenges of that new era.

IV. Illustrative Concluding Comments

> (1) The above statements [concerning a Latin American country] exempt me from replying to the questionnaires, since my answers to them would be only theoretical, and would not reflect the facts, because at the present time

we actually do not have a true Administration of Justice, neither do we have true Judges or the Rule of Law. That means that we have neither legislative nor judicial nor personal guarantees. We know about Human Rights only from the books, not in practice.

(2) Since May 1955 my country has been faced with troubles which it was not possible to overcome before the proclamation of independence on 1 January 1960. This exceptional situation has led those responsible for public authority to adopt exceptional measures to ensure maintenance of order, peace and national unity. It is true that these measures, which were intended to deal with a particular situation, may shock some people as apparently infringing certain fundamental liberties; but good sense and respect for human dignity require that these measures be maintained until tranquility is restored throughout the Federation.

(3) With the constitutional position as it is in my country, with the power of the Executive Council in the hands of the Governor and the Legislative Council virtually powerless to act contrary to the Governor's will, there is little to recommend except a complete overhaul of the system to comply with accepted standards of Government subject to The Rule of Law. Such an overhaul is sorely necessary so that the accepted standards can be understood by the people who as yet have no knowledge or experience outside the present system.

(4) Generally, it would seem fair to comment that practices in Australia tend to deny the proposition [set forth in the questionnaire] that " unbridled executive power becomes arbitrary ". In the areas in which executive action is relatively uncontrolled, there is little evidence of arbitrary action in Australia. Ultimately, in any given community, the measure of freedom enjoyed by the citizen depends upon the traditions of that community ...

(5) The formal legal provisions [of a Latin American country] described above seem sufficient to control and check the Executive and to safeguard human rights fully, and to ensure that there is an adequate remedy to every arbitrary or unjust action, and that the appropriate penalty is applied. Perhaps provisions could be enacted to speed up the legal processes, or to eliminate or reduce minor gaps in the system and thus render the law more effective. These matters, however, are not of very great significance... The most serious matter is that the law is in large measure not complied with. It is disregarded or ignored whenever the political regime in force finds its provisions inconvenient.

COMMITTEE THREE

The Role of Lawyers in a Changing Society

The key question posed by the questionnaire for Committee Three was, Does the legal profession in your country contribute to the keeping of executive and administrative determinations within the framework of the Rule of Law in a changing society?

Related inquiries concerned three types of lawyers: private practitioners; lawyers in government; and judges. With respect to judges our correspondents were asked, To what extent do practices in your country meet the *Conclusions* reached by the International Congress of Jurists at New Delhi, and by the African Conference on the Rule of Law held in Lagos? With but few exceptions the answers to that question were " They do ", or " Substantially in accordance with the conclusions ". The Delhi and Lagos *Conclusions* had been appended to the questionnaire, as they are appended here; and it might be useful for the Committee Three participants to review them now.

That lawyers in government have major responsibilities and influence is undoubted. Whether a lawyer in government has any degree of independence if his advice is rejected is a matter for discussion. He cannot, so to say, decline his brief. But there are standards of rectitude to which he must conform and if he is imbued with the principles of the Rule of Law his influence should be considerable and beneficial.

The questions on " lawyers in government " reveal serious terminological difficulties. In some countries the phrase " government lawyer " includes the courtroom advocate for the government (either prosecutor or civil lawyer) and also the bureaucrat who serves a government agency as legal adviser. The phrase usually does not include legislators, though a substantial proportion of all legislators may in fact be lawyers. In some other countries " lawyer in government " apparently means only the criminal prosecutor. In still others the bureaucracy may be filled with people who have law degrees but whose tasks do not involve solving legal problems. With so much diversity it is not surprising that the answers to these two questions were most varied.

What special contribution should a lawyer in government make to social and economic development and to strengthening the Rule of Law?

Does a lawyer in government have a special responsibility in the performance of executive or administrative duties because of his professional and ethical responsibilities?

That terminological problem does serve as a reminder of the limits to generalization about the Rule of Law. The structure of legal communities varies greatly. In some countries the bench is selected only from the Bar; in others judges are separately trained, and there is virtually no movement from private practice to the Bench. In some countries the profession includes both barristers and solicitors. Legal training within a country may be widespread, but few graduates may earn their living as lawyers. Those kinds of differences caution us not to insist on virtues that could make one type of structure impossible.

The diversity of the legal community in various countries also may require a shift in emphasis from the *Conclusions* reached at Delhi and at Lagos (see Appendix). There the delegates sought to establish minimum requirements for a society governed by the Rule of Law. Standards regarding the role of the private practitioner, however, are more complex. The conclusions proposed here do not reflect traditions which have always been followed. What seems desirable is agreement that such conclusions are acceptable goals—and we lawyers should work for them.

The hope is that the following summary of questionnaire responses will supply sufficient information to support a discussion of what a society dedicated to the Rule of Law should aim to achieve, in contrast to what—in the past—actually may have been accomplished.

I. How Many Lawyers?

The problem of numbers is critical. If there are too few lawyers the effect can be devastating—the right phrased at Delhi, for example, of an arrested person " to consult a legal adviser of his own choice ", is devoid of meaning. On the other hand, it is reported that:

> [In a Latin-American country] lawyers without sufficient clients and pressed owing to the lack of money take on cases which are indefensible from the point of view of law and justice and attempt in all possible ways to prevent light from being shed on the true facts of the case.
>
> An effort should be made [as in a European country] to keep the quality of all kinds of lawyers at a high standard by increasing the emoluments of the Judges and the teachers of law, and by decreasing the admittances to the Bar. A large number of practising lawyers is always open to the detriment of their quality.
>
> Owing to the fact that the legal profession [in an African country] is grossly overcrowded there are no doubt many instances of malpractice which never come before the Disciplinary Committee. Speculative litigation is another symptom of professional superabundance but at least that does have the effect of providing an impromptu, if cynical, legal aid scheme for litigants.

We can hardly suggest a precise or even rough percentage of the population that should earn a living by practising law; much depends on the role of law and legal procedure generally. But surely we can agree that (1) the legal profession could be cheapened by overcrowding, and (2) a minimum number of lawyers is necessary to provide legal assistance to those who need it.

Consider this thoughtful comment:

> In Northern Rhodesia, the vast majority of lawyers in the profession today are Europeans. The lawyers of tomorrow will be to an increasing extent African by race. The existing lawyers have a particular task in not only trying to maintain the high standards they have inherited from a long-established legal system but also to foster and bring on new local lawyers without their looking upon any restrictions upon entry into the legal profession as an attempt to retain vested interests and hold back local entrants.

The same problem is encountered in the United States, where a reporter states that there are not enough Negro lawyers in many parts of the country. One suspects that the problem may be typical of other countries where there are minority groups.

II. Representation of the Indigent

Almost everywhere there is dissatisfaction with the quality of representation for indigent clients. Nearly all countries provide some free legal service for those charged with serious criminal offences. Those involved in lesser offences and civil litigation often are not similarly assisted.

In England, the government and the legal profession work harmoniously together so as to provide legal representation for indigent clients. This scheme enables the citizen to be represented in both criminal and civil actions and also to obtain legal advice. Whether he has to pay anything for this and, if so, how much, depends upon his financial means. The large majority of lawyers participates in this scheme: they are paid out of public funds to the extent that a litigant cannot afford to pay, but they must accept rather less than their normal fee for their services.

Australia, for example, reports that legal aid

> varies in nature and extent from State to State, and is not entirely adequate in all cases. Generally speaking, it tends to be more adequate in relation to criminal matters than civil matters.

The problem can be divided in two: (1) who gets legal aid? (2) who pays for it? As to the first,

> Tanganyika is not rich enough to make provision for legal assistance for those who cannot afford to pay for the services of a lawyer. The Law Society has launched into a scheme which if it materializes will provide for some limited legal assistance to the poor. Under the Poor Prisoners Defence Ordinance, any person charged with murder will, if the magistrate is satisfied that he has no means to pay for a lawyer to defend him, be defended by a government engaged lawyer and the cost will be paid by the government.

Some statutes require free service to persons earning less than a set amount. Such provisions can be deceptive; e.g.,

> Legal assistance exists in theory under the procedural laws, but a requirement is that in order to qualify for it an applicant's earnings must not exceed about 65 dollars a year. Earnings above this amount disqualify him for legal assistance. In practice, therefore, legal assistance is unknown, as nobody can fulfil these conditions.

Legal aid may be available only in some of the courts. Within the United States many States provide public defenders for the indigent criminal, but there is no paid public defender in the federal courts (though legislation to provide this service is pending). Northern Rhodesia reports a comparable problem:

> Legal assistance is available by virtue of the Poor Persons Defence Ordinance in criminal cases. This allows legal aid in cases considered important by the courts where the accused is unable to afford it and in similar cases involving an appeal.
>
> The decision is in the hands of the courts themselves and aid is readily granted in the High Court even in hopeless cases, but not often granted in the Subordinate Courts. This is a defect as many serious offences are triable in the Subordinate Courts of Northern Rhodesia.

With respect to the financing of legal aid, in some countries (e.g., Germany) the government bears the expense. In Kenya the cost apparently is shared:

> In criminal cases the Chief Justice has a special financial vote which enables him, in his discretion, and in deserving cases to defray the cost of professional assistance. In capital cases this is done as a matter of course. The professional fees paid in such cases are modest, almost nominal, and a list of advocates willing to appear in such cases (which are not limited to offences carrying the death penalty) is kept in the Supreme Court. In actual practice, when the Chief Justice considers that a case is deserving, any request for representation is not limited to the names appearing on the list, and I know of no instance where an advocate, whose assistance in a criminal case has been requested by an accused person or suggested by the Court, has refused his services.

The same is true in the United States, where assigned counsel frequently will be granted a nominal fee covering little more than out-of-pocket expenses.

In some countries the Bar carries the entire burden. For example in Costa Rica:

> All lawyers, bachelors of law and solicitors with an office open to the public are under the obligation to accept up to two official defence cases at the same time and may only be released from this obligation for a reason which is considered to be fair in the opinion of the respective court.

The same system apparently applies in Greece. It has dangers. In France for example,

> There is a system of legal aid for those who cannot afford to pay for the services of lawyers. Grants are awarded them by a special department and a lawyer is appointed by the President of the Bar to give his services free of charge. The costs of trials of needy persons should be borne by society and not by the young probationary lawyer, who, since he has to work for nothing, runs the danger of not devoting to these cases all the attention they deserve.

In Ceylon there is a legal aid scheme run by the Law Society which also receives a grant from the Government. Further, in cases of grave crime, lawyers are assigned by the Court to defend accused persons incapable of bearing the cost of their defence, such lawyers being remunerated by the State. In the United States several State governments employ a public defender for criminal cases. Legal aid in civil matters and in criminal matters where there is no public defender is supported by charitable contributions, with lawyers frequently donating their time.

Our correspondents generally agree that the distinction between criminal and civil proceedings, or between serious and less serious criminal proceedings, in theory is indefensible. It makes sense only as a rough measure of importance in those societies which cannot afford to support legal aid adequately.

The answers to the questionnaire give no evidence of trouble with government financing of legal aid though such is, of course, a potential source of official interference with the Rule of Law. At Delhi there was dispute whether the obligation to provide legal advice to the indigent rested on the State or on the Bar, which eventually was resolved in this statement:

> The primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility.

The following proposition is put forward as a summary:

> The Rule of Law requires professionally competent lawyers who are available to, and do in fact, represent the whole community regardless of race, religion, political persuasion, or other difference. The Bar should be large enough to serve the needs of the community in all cases of sufficient moment to justify the services of a legal technician, and diverse enough to ensure that no client so desiring will have difficulty in obtaining adequate representation by a lawyer of his own choice.
>
> Individual lawyers, bar associations and governments should strive to provide the indigent client with adequate legal service whenever he becomes involved in legal matters that directly affect him.

III. Ethics; Admission; Discipline

It may not be possible to formulate meaningful ethical standards that have worldwide application. The replies to the questionnaire recognize that, to protect the repute of the profession, morality must be observed, in both the lawyer's professional and his private life. Conflicts of interest are disparaged, but no clear definition of what exactly is a prohibited conflict is suggested. For example, France and other countries regard it as improper for a lawyer to

> make a " de quota litis " agreement, whereby his remuneration is calculated according to the importance of the case under dispute; this remuneration should in principle depend solely on the work done, whatever the importance of the interests involved.

In countries of the Commonwealth, champerty and maintenance are illegal. Thus an agreement whereby a solicitor brings an action against a bank on the basis that he receives 25 per cent of the amount recovered in lieu of costs is champertous and illegal. Maintenance of an indigent plaintiff with him agreeing, if successful, to pay a sum over and above the usual legal costs is equally illegal.

In the United States the contingent-fee system may be used in some types of litigation, whereby the lawyer's compensation is dependent on success in the case and is a percentage share of the fruits of the lawsuit. It is difficult to say that this is necessarily inconsistent with the Rule of Law.

Virtually all countries report that there is a recognized system of legal ethics, and some authority to enforce it, though enforcement activity is frequently reported as inadequate. It should be stressed that a lawyer is primarily an officer of the Court. The Congress at Delhi concluded:

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

In general the replies to the questionnaire indicate that that requirement has been met. The extent of " organization " varies greatly, however, as does the structure of the legal profession. Where the profession is split between solicitors and barristers certain problems are obvious; they no less exist in countries where the legal profession is regional in organization. Where the practice is divided according to the court (for example in Egypt, where the High Court Bar is confined to the most senior and honoured members of the profession) there are additional problems. What seems vital is the presence of disciplinary authority, and experience may suggest that that authority is best exercised through the profession.

Regional organizations are often dominant.

In the United States the legal profession is regionally organized within the 50 States; the State association is often delegated the tasks of examining applicants for admission and disciplining members for breaches of ethics. State courts sometimes supervise those admission and disciplinary functions, and there is always judicial review of contested exclusionary or disciplinary orders. The Legislature generally prescribes the standards for admission and sometimes the grounds for discipline.

A similar system is followed in most countries, with greater or less participation by bar associations. For example,

> France: Admission is granted by the Order of Advocates of whatever Bar is envisaged under the control of the judicial courts. The lawyer remains " a probationary " for 3 to 5 years, and his name is then entered on the " Grand Roll ". Disciplinary action in respect of any breach of professional rules or conduct is taken by this Order, always subject to judicial control.

Kenya: The governing body of the Legal Profession is the Council of the Law Society of Kenya, a statutory body corporate created by the Law Society of Kenya Ordinance of 1949. The Law Society itself consists, to put the matter briefly, of all those persons who are entitled to practise law in Kenya and who have taken out Practising Certificates. The persons who constitute the Council, i.e., the President, the Vice-President and six other persons, are elected at the Annual General Meeting of the Law Society by normal democratic means. The management of the affairs of the Law Society is vested in the Council which has power to appoint and act through committees and to appoint paid or unpaid officers such as Secretary or Treasurer.

Application for admission as an advocate is made by way of petition to the Chief Justice. Copies of the petition are required to be served on the Secretary to the Council of Legal Education, a body created under the 1961 Ordinance to exercise general supervision and control over legal education in Kenya and also on the Secretary to the Council of the Law Society. The Council of Legal Education consists of:

(a) The Chief Justice, or a judge appointed by the Chief Justice as Chairman;

(b) A judge appointed by the Chief Justice;

(c) The Attorney General *or* the Solicitor General;

(d) Four advocates to be nominated by the Council of the Law Society; and

(e) A person associated with the teaching of the law in East Africa, to be appointed by the Attorney General.

Advocates can only be removed from the Roll of Advocates, i.e., deprived of the right to practise, in accordance with the statutory procedure provided for that purpose. This involves, firstly, the making of a complaint; secondly, the sifting of that complaint by a Board of Inquiry; and thirdly, if at this stage the matter is considered sufficiently serious, a hearing before the Disciplinary Committee. This is a statutory committee consisting of:—

(a) The Attorney General and the Solicitor General ex-officio; and

(b) Three advocates (other than the President, the Vice-President or the Secretary of the Law Society) of not less than ten year's standing, all of whom are elected by the Law Society and hold office for three years.

The Disciplinary Committee, on the termination of a hearing, embody their findings and orders in a report to the Supreme Court. Any advocate aggrieved by the report may appeal to the Supreme Court, which thereupon proceeds to deal with this matter as an appeal and to take such disciplinary action as may appear just. The powers of the Supreme Court in this respect cannot be exercised by less than two judges. There is a further right of appeal to the Court of Appeal for Eastern Africa.

Egypt: Disciplinary action against lawyers is exercised by a committee consisting of the President of the Court of Appeal at Cairo, two senior lawyers at the same court, and two members of the Bar Council nominated by the lawyer against whom disciplinary action is being taken and by the Bar Council respectively. It is always open to the Bar Council to remind the lawyer of his obligations and to admonish him.

Are the following generally acceptable goals?

The Rule of Law requires some authority which has the power to, and does in fact, screen applicants for qualifications and competence, as well as impose discipline for failure to abide by the code of ethics. Those functions are best performed by self-governing, democratically organized bar associations; but in the absence thereof the State should act instead. The officials of the governing authority must administer the code of ethics in substantially the same manner as courts administer civil punishments, and judicial review must be available. The bar association must be open to all qualified lawyers without discrimination based on race, religion, or political persuasion. The officials of the association should be representative of the practising bar and the community which it serves.

IV. The Lawyer and his Client

The Delhi Congress dealt with several matters concerning the relation between the lawyer and his client, as follows:

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

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

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

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

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

The questionnaire for Committee Three did not probe those issues; perhaps also the reference in the questionnaire to representation of clients whose causes are unpopular was too casual. One point noted in the replies, however, deserves mention. Virtually all countries reported that the confidential relation between the client and his counsel is respected, with only well-defined exceptions. For example in Norway:

The lawyers have in all cases free access to the clients and the right to confer with them under four eyes. This holds in both civil and criminal cases. Special legislation has to some extent restricted the general right of lawyers to refuse disclosure of matters confided to them by their clients, for instance when a lawyer is informed of plans to commit any serious crime, or where disclosure is necessary to avoid condemnation of an innocent person. Further the tax laws and the foreign exchange laws impose on the lawyers the duty in a few specified cases to answer questions by the authorities regarding a client's financial circumstances.

The importance of the confidential relation seems to justify this proposition, in addition to those stated at Delhi:

> It is essential to the Rule of Law that with but few and clear exceptions the client be free to discuss all relevant matters with his lawyer without fear of subsequent disclosure by the lawyer, either voluntarily or by legal compulsion.

V. The Organized Bar and Law Reform

With remarkable uniformity almost all countries report no governmental interference with the bar association. In some instances this may be because the association is so inactive as not to justify the trouble of interference. The testimony as a whole is impressive, nonetheless, and indicates a fine tradition of independence of the Bar.

There is, on the other hand, an impressive lack of uniformity on the extent to which bar associations are active in reform. Many countries report very little activity. In some instances the lack seems structural; in other instances the composition of the Bar causes problems. For example:

> The Law Society [of Tanganyika] could become an effective instrument of legal reform if it had a stronger support of all practising lawyers. The majority of practising lawyers are non-Africans and many of them have not shown much interest in the necessary legal reforms, but now that the country has a Law School at Dar-es-Salam and the number of trained African Lawyers increase steadily, there is a bright future that the Bar Association that will be formed in the near future will be able to bring an effective legal reform.

In many countries, unhappily, there is too little action because lawyers are indifferent.

Where there is movement for reform it is most frequent in matters of peculiar interest to lawyers; for example, court procedure. Peru reports:

> As a recent example of effective intervention of the Bar Association in the process of legislative reform, it may be mentioned that in 1959 the Executive Board appointed a committee to prepare a draft law amending the Code of Civil Procedure. This committee has now completed its task and presented its report. Of course, the effectiveness of such intervention derives more from the standing of the Bar Association as an institution and from its prestige among the legal profession than from the letter of the law.

Broader participation is less frequently encountered, but it exists. Committees of the bar associations in many countries have close liaison with legislative committees and assist them in drafting and other technical matters. A noteworthy accomplishment is by the Solicitor's Law Society in Jamaica:

> The Solicitors' Society is constantly making representations to Government as to additions and amendments to the Law and recently took a prominent part in the framing of the new Constitution for an Independent Jamaica—especially in relation to entrenching the provisions in protection of the fundamental liberties.

The success of those associations which are active and broadly based suggests this formulation:

> A self-governing bar association must be substantially free of executive interference. It should to the extent practicable provide technical assistance to the Legislature and the Executive. It has a duty to present to the appropriate authorities programmes of reform, particularly in areas where public understanding is slight and the techniques and knowledge of the lawyer are of great importance.

COMMITTEE FOUR

The Role of Legal Education in a Changing Society

This is the first Congress of the International Commission of Jurists where legal education has been marked as a major topic. Never before have distinguished jurists representing so many countries assembled to examine the world's legal education systems. The preface to this part of the questionnaire reads as follows:

> We in the law need fresh approaches to legal education and the role of the legal profession in society if the profession is to equip itself for the task of ensuring that Executive Action in a changing society remains within the bounds of the Rule of Law. In legal education, it is necessary to place increasing emphasis on two aspects of law: the processes by which the law changes and can be adapted to meet new situations as they arise, and the fundamental considerations underlying the protections and safeguards to the group and the individual which have evolved in judicial proceedings. Finally, but not the least important, the teacher of law must, through legal education, take increased responsibility for instructing the law student in the great significance of the principles of the Rule of Law, for stressing the importance of meeting the challenges of a changing society, and for inculcating in him the personal qualities necessary to maintain the highest ideals of the profession.

Surely we aver that the Rule of Law cannot be preserved unless there are leading citizens—judges, lawyers, government officials—who have benefited from proper training in the law. Surely we aver, too, that excellent rather than inferior legal training is a crucial goal for nations that hope to resolve what we have called " the major dilemma confronting government and citizens alike ": how to strike a balance between the freedom of the Executive to act effectively and its trend to enlarge its powers, on the one side, and the protection of the community and the individual in the enjoyment of his rights, on the other.

What must be stressed at the start of our discussion is that nations which do strive to provide excellent legal education may choose from widely varied systems. We will not profit much if individual participants in the Committee Four meetings merely describe to us their own local traditions and experiences. Yet we should note that among the honoured jurists who are participants here are men who have been educated in small schools as well as in great universities, in countries that support only one law school as well as in countries that boast of many, in schools that are privately as in those that are publicly managed, in schools abroad as in those at home. There

does not exist, anywhere in the world, " a typical law school " or " a model law school ". Even among countries that share a common language and a common legal history the methods of legal education vary remarkably. Even within some countries there are immense variations.

The replies to the Committee Four questionnaire supply much important information as to legal education. The headings of the questionnaire, however, are not fit agenda, because in large part they were designed to secure detailed data which now may be summarized when appropriate. The delegates should ask themselves whether they can agree on an agenda for Committee Four which will be instructive on what the questionnaire calls " fresh approaches to legal education ". Specifically, to what extent should institutions and individuals whose duty it is to train lawyers take responsibility for teaching not only rules of law, but also a true understanding of the Rule of Law? Not only what " the law " is, but also how and why it became what it is—as well as how and why it should be improved? Not only the duties of a lawyer to his client, but also his civic duties, his responsibilities to law reform and the Rule of Law.

Those questions are critical when we assay The Role of Legal Education in a Changing Society. They are as critical for countries with well-established education systems as for countries that are only beginning to establish their systems. But those questions differ from the inquiries that normally have concerned those engaged in legal education. Thus, for example, professors and deans who suffer from inadequate libraries and inadequate salaries understandably focus on physical needs and personnel needs, rather than on law reform and the Rule of Law. Similarly, those latter items tend to be underemphasized by courts, bar associations, and other governing groups whose main worries relate to lawyers who lack elementary knowledge of the rules of law, or elementary legal skill, or basic professional ethics.

Will not our meetings be most valuable if the delegates seek to avoid what might be called " elementary problems ", and instead focus on " Rule of Law problems "? With that in mind, would it not be interesting to see if there is agreement on introductory propositions like these (thus reserving most of our hours for discussion of more difficult questions)?

A. In every country the long-term aim of legal education should be to ensure that the needs of government and of private clients for ordinary legal services are met by a sufficient number of men and women whose standards of competence and ethics are equal to those needs.

B. Those specially concerned with legal education will and should have a significant impact on the quality of the services rendered by lawyers. Nonetheless that quality also will be affected

by natural abilities, by extra-legal education, by the environmental influence of family, community, church, etc.

C. All those who are concerned with legal education must strive to inculcate in all law students a respect for the Rule of Law. Further the climate of opinion should be such that the development of diverse political views is encouraged.

D. Though local needs will often require special attention, legal education will be most effective in the long run (1) if universities are assigned a major role, (2) if judges, legislators, and executive officials are restrained in the degree of control they exercise over legal educators, and (3) if institutions that can vie with each other are encouraged, so that experimentation, specialization, and related goals of training in the law will be fostered.

If introductory propositions similar to those could be agreed on, then these matters could be discussed:

I. An Enriched Curriculum ?

This was the initial inquiry of the Committee Four questionnaire: *Do the law schools of your country prepare their students to deal with the problems of applying the principles of the Rule of Law to a period of economic and social development ?*

Subsidiary inquiries related to legal ethics, civil liberties, and the breadth of curricular aims. Here are some sample answers to Question No. 6, " What could be done to improve the training of law students in the above respects ? ":

> It is undoubtedly desirable that in a constantly developing society [as in one Latin American country] there should be other courses within faculties of law on subjects of decisive importance for juridical science. There should, for example, be a chair of sociology helping to seek the foundations of law and to explain the reasons for its institutions. There should also be not only a chair of the philosophy of law there should be teaching of philosophy in general. This reflection will be seen to be quite obvious if it is considered that law is nothing other than the life of mankind. In addition, a chair of political science should be established in order to teach new standards in the development of present-day political activities, in an analytical and critical view, with particular reference to the undesirable features. To put it in a nutshell, teaching of law should bear a stronger stamp of humanism.
>
> It is always a difficult question, if it is possible, to intensify the teaching in any of the fields mentioned above. Owing to the great number of subjects that have to be taught, and the corresponding vast curriculum that has to be studied, it is doubtful if it is possible [in Norway] to give more attention to Rule of Law problems than already given. It is also a question of monetary grants, of more chairs at the faculty, and of more Norwegian literature on the subjects.

Committee Four may wish to reflect on the following briefer observations:

Reorganize various subjects, such as the History of Law, Constitutional Law, and Philosophy of Law.

I urge that law students should be given a training in Philosophy which is both general in scope and profound...

It would be desirable to increase within the French system the importance given to comparative law.

The syllabus of the faculty could be modified, and foreign teachers asked to collaborate in subjects for which there are no qualified national teachers.

I feel that a special course in the ethics of the legal profession should be organized, the remuneration of law teachers should be increased, and standards of discipline improved.

That one should not lose sight of practical problems is demonstrated by this excerpt:

Legal education is in its incipient and, therefore, perhaps an experimental stage in Ghana. Short periods spent by Ghana law teachers in foreign institutions may enable them to bring fresh ideas which could help considerably in improving our own legal education. Furthermore, considerable research into legal history and the local law is required in order to provide adequate study material for the student. In this regard very little work has been done so far. The incentive for such work was perhaps not quite so great when there was no local system of legal education. Now that we have our system of legal education such research will necessarily take place subject, of course, to the necessary funds being available.

It should be noted that countries with highly developed education systems are by no means ready to propose their systems as models. Thus,

The questions put here have been, since the reopening of universities after the war, the subject of extensive and at times heated discussions, with reference to reforming German universities and law schools in particular. These discussions are now partly revived, partly set aside by far-reaching plans to extend existing universities or form new ones. We cannot go into these voluminous disputes within the framework of this questionnaire.

What, then, are practicable goals as to teaching the historical evolution of law and its political, social, and economic setting? Practicable goals as to teaching the methods, processes, and techniques by which law grows and develops? Practicable goals as to curricula that include ample reference to public law and public service? What emphases are appropriate as to professional responsibility (including legal ethics), and civil liberties? Is the following a proposition for a nation's lawyers that could involve more than pious hopes and an empty promise?

Law schools and legal educators constantly must be alert to the dangers of law training that is too narrow in scope, too provincial in outlook, too technical. That does not mean that local law and other practical subjects may be ignored. On the contrary, they are sometimes wrongly underemphasized. Whatever his practical skill, however, a lawyer cannot be considered properly educated unless he has been instructed regarding the historical and present-day relations between the principles of the Rule of Law and the needs of economic and social development.

II. Who Should Study Law ?

The fitness of applicants for law school is determined in part by innate ability, in part by prior training, in part by qualities that concern character and dedication to justice. These conclusions are suggested:

(1) Academic tests for admission should be required, and other tests may well be supplemental. Only those applicants who seem able to meet the requisite standards should be admitted to law school, so that resources available for legal education will not be wasted on students who are unfit.

(2) Jurists must be vigilant to ensure free access to legal education. Racial, religious, political, and other discriminatory tests are not in accord with the Rule of Law.

Far too many replies to the questionnaire have indicated that legal education, too often, is available mostly to those who can finance their own studies. Jurists must bear responsibility for plans that assure loans and scholarships—plans that may be just as critical for a law school as are classroom and library facilities. The Rule of Law conceivably could be jeopardized by a Bench and Bar whose members have been recruited from wealthy families only.

III. Who Should Teach Law?

In some countries the law teachers are highly honoured jurists; in others, their repute is questionable. Some law schools pay high salaries; others seem satisfied with the mediocre teachers that low wages may attract. Some critics argue that the full-time teacher is often too theoretical; others contend that academic achievement is rarely an attribute of the part-time teacher, particularly when he is engaged in the active practice of law.

Committee Four will have to examine the role of the law teacher after it articulates its conclusions as to law school objectives. Most of us know from personal experience how a fine teacher can enhance a student's abilities and aspirations. Justice Benjamin Cardozo once addressed a group of law students as follows:

> You will study the wisdom of the past, for in a wilderness of conflicting counsels, a trail has there been blazed. You will study the life of mankind, for this is the life you must order, and, to order with wisdom, must know. You will study the precepts of justice, for those are the truths that through you shall come to their hour of triumph. Here is the high emprise, the fine endeavour, the splendid possibility of achievement, to which I summon you and bid you welcome.*

Our question must be, How best can nations strive to choose the teachers who will match the Cardozo challenge?

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* " The Game of the Law and Its Prizes "—Address at the Seventy-Fourth Commencement of the Albany Law School, June 10, 1925.

IV. Who Should Regulate Legal Education?

As an introductory proposition, it was suggested above that judges, legislators and executive officials should be restrained in the degree of control they exercise over those concerned with legal education. Yet from several reports we know that, in some law schools, unfit and even unscrupulous administrators (on occasion motivated by the desire for money profits) exploit the willingness to make personal sacrifice and the noble ambitions which characterize many young people who wish to become lawyers.

The forms of regulation that are necessary to assure compliance with essential standards, to guarantee that public funds and charitable funds are used efficiently, and to promote aspirations which relate to the Rule of Law will vary tremendously among countries. In general, the objective in every country should be a system whereby the law teachers themselves, working in conjunction with other jurists, have the training and the enterprise and the imagination which are required to organize curricula, to fix rules of admission and graduation, to govern law schools wisely.

Further, all governors of legal education must be instructed regarding the need for academic freedom. The Rule of Law will not flourish among teachers and students whose ideas or research reports are censored, whose private political activities are restricted, whose channels of inquiry are clogged by government decree. The free pursuit of truth is an essential attribute of the kinds of legal education we here endorse.
