

INTERNATIONAL CONGRESS OF JURISTS

RIO DE JANEIRO (PETROPOLIS), BRAZIL

December 11-15, 1962

Appendix
to
Working Paper

INTERNATIONAL COMMISSION OF JURISTS
GENEVA, SWITZERLAND

1962

TABLE OF CONTENTS

ACT OF ATHENS, 1955	5
DECLARATION OF DELHI, 1959	6
DELHI CONCLUSIONS	7-17
LAW OF LAGOS, 1961	18
LAGOS CONCLUSIONS	19-24
QUESTIONNAIRE, 1962	25-31

ACT OF ATHENS

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

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

Do solemnly Declare that:

1. The State is subject to the law.
2. Governments should respect the rights of the individual under the Rule of Law and provide effective means for their enforcement.
3. Judges should be guided by the Rule of Law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties on their independence as judges.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law and insist that every accused is accorded a fair trial.

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

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

Done at Athens this 18th day of June, 1955

DECLARATION OF DELHI

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

NOW SOLEMNLY

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

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

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

Requests the International Commission of Jurists

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

This Declaration shall be known as the Declaration of Delhi.

Done at Delhi this 10th day of January 1959.

INTERNATIONAL CONGRESS OF JURISTS

NEW DELHI, 1959

CONCLUSIONS

REPORT OF COMMITTEE I

The Legislative and the Rule of Law

CLAUSE I

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

CLAUSE II

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

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

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

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

(c) provide for control, by the representatives of the people, over the exercise by the Executive of such subordinate legislative functions as are necessary to give effect to legislation; and

(d) organise judicial sanctions enforcing the principles set out on this Clause, and protect the individual from encroachments on his rights under Clause III. The safeguards contained in the constitution should not be indirectly undermined by devices which leave only the semblance of judicial control.

CLAUSE III

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

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

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

The Legislature must:

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

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

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

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

(e) abstain from retroactive legislation;

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

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

CLAUSE IV

(1) The principles stated in the foregoing Clauses represent the proper aspirations of all men. Every legislature and every government should endeavour to give full effect to the foregoing principles, not only

in relation to their own countries, but also in relation to any territories under their administration or protection, and should take steps to abrogate any existing laws which are inconsistent therewith.

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

REPORT OF COMMITTEE II

The Executive and the Rule of Law

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

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

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

CLAUSE I

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

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

Public emergency threatening the life of a nation may require extensive delegation of powers. Even in such cases, however, the

Rule of Law requires that every attempt be made by the Legislature to define as carefully as possible the extent and purpose of the grant of such delegated powers, and the procedure by which such delegated legislation is to be brought into effect.

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

CLAUSE II

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

CLAUSE III

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

CLAUSE IV

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

CLAUSE V

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

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

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

CLAUSE VI

A citizen who suffers injury as a result of illegal acts of the Executive should have an adequate remedy either in the form of a proceed-

ing against the State or against the individual wrongdoer, with the assurance of satisfaction of the judgment in the latter case, or both.

CLAUSE VII

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

CLAUSE VIII

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

REPORT OF COMMITTEE III

The Criminal Process and the Rule of Law

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

I. CERTAINTY OF THE CRIMINAL LAW

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

II. THE PRESUMPTION OF INNOCENCE

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

III. ARREST AND ACCUSATION

- (1) The power of arrest, whether in flagrante delicto or not, ought to be strictly regulated by law, and should only be exercisable on reasonable suspicion that the person concerned has committed an offence.
- (2) On any arrest the arrested person should at once be told the grounds of his arrest.
- (3) On any arrest the arrested person should at once and at all times thereafter be entitled to the assistance of a legal adviser of his own choice, and on his arrest should at once be informed of that right in a way which he would clearly understand.
- (4) Every arrested person should be brought, within as short a period as possible, fixed by law, before an appropriate judicial authority.
- (5) After appearing before such judicial authority, any further detention should not be in the hands of the police.

IV. DETENTION PENDING TRIAL

- (1) No person should be deprived of his liberty except in so far as may be required for the purposes of public security or the administration of justice.
- (2) Every arrested person should have a right, renewable at reasonably short intervals, to apply for bail to an appropriate judicial authority. He should be entitled to bail on reasonable terms unless either:
 - (a) the charge is of an exceptionally serious nature, or
 - (b) the appropriate judicial authority is satisfied that, if bail is granted, the accused is not likely to stand his trial, or
 - (c) the appropriate judicial authority is satisfied that, if bail is granted, the accused is likely to interfere with the evidence, for example with witnesses for the prosecution, or
 - (d) the appropriate judicial authority is satisfied that, if bail is granted, the accused is likely to commit a further criminal offence.

V. PREPARATION AND CONDUCT OF DEFENCE

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

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

VI. MINIMUM DUTIES OF THE PROSECUTION

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

VII. THE EXAMINATION OF THE ACCUSED

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

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

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

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

VIII. TRIAL IN PUBLIC

The Rule of Law requires that criminal trials should ordinarily take place in public. The proper existence of exceptions to this rule is, however, recognized. The nature of these exceptions should be

laid down by law and their application to the particular case should be decided by the Court.

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

IX. RETRIAL

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

X. LEGAL REMEDIES, INCLUDING APPEALS

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

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

XI. PUNISHMENT

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

REPORT OF COMMITTEE IV

The Judiciary and the Legal Profession under the Rule of Law

CLAUSE I

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

CLAUSE II

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

CLAUSE III

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

CLAUSE IV

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

CLAUSE V

The considerations set out in the preceding paragraph should apply to: (1) the ordinary civil and criminal Courts; (2) administrative Courts or constitutional Courts, not being subordinate to the ordinary Courts. The members of administrative tribunals, whether professional lawyers or laymen, as well as laymen exercising other judicial functions (juries, assessors, Justices of the Peace, etc.) should only be appointed and removable in accordance with the spirit of these considerations, in so far as they are applicable to their particular positions. All such persons have in any event the same duty of independence in the performance of their judicial function.

CLAUSE VI

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

CLAUSE VII

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

CLAUSE VIII

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

CLAUSE IX

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

- (1) Wherever a man's life, liberty, property or reputation are at stake he should be free to obtain legal advice and representation; if this principle is to become effective, it follows that lawyers must be prepared frequently to defend persons associated with unpopular causes and minority views with which they themselves may be entirely out of sympathy;
- (2) once a lawyer has accepted a brief he should not relinquish it to the detriment of his client without good and sufficient cause;
- (3) it is the duty of a lawyer which he should be able to discharge without fear of consequences to press upon the Court any argument of law or of fact which he may think proper for the due presentation of the case by him.

CLAUSE X

Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to

provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular in so far as "adequate" means legal advice or representation by lawyers of the requisite standing and experience. This is a question which cannot be altogether dissociated from the question of adequate remuneration for the services rendered. The primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility.

LAW OF LAGOS

The African Conference on the Rule of Law consisting of 194 judges, practising lawyers and teachers of law from 23 African nations as well as 9 countries of other continents,

Assembled in Lagos, Nigeria, in January 1961 under the aegis of the International Commission of Jurists,

Having discussed freely and frankly the Rule of Law with particular reference to Africa, and

Having reached conclusions regarding Human Rights in relation to Government security, Human Rights in relation to aspects of criminal and administrative law, and the responsibility of the Judiciary and of the Bar for the protection of the rights of the individual in society,

NOW SOLEMNLY

Recognizes that the Rule of Law is a dynamic concept which should be employed to safeguard and advance the will of the people and the political rights of the individual and to establish social, economic, educational and cultural conditions under which the individual may achieve his dignity and realize his legitimate aspirations in all countries, whether dependent or independent,

Reaffirms the Act of Athens and the Declaration of Delhi with special reference to Africa and

Declares

1. That the principles embodied in the *Conclusions* of this Conference which are annexed hereto should apply to any society, whether free or otherwise, but that the Rule of Law cannot be fully realized unless legislative bodies have been established in accordance with the will of the people who have adopted their Constitution freely;
2. That in order to maintain adequately the Rule of Law all Governments should adhere to the principle of democratic representation in their Legislatures;
3. That fundamental human rights, especially the right to personal liberty, should be written and entrenched in the Constitutions of all countries and that such personal liberty should not in peacetime be restricted without trial in a Court of Law;
4. That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such a manner that the *Conclusions* of this Conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory States;
5. That in order to promote the principles and the practical application of the Rule of Law, the judges, practising lawyers and teachers of law in African countries should take steps to establish branches of the International Commission of Jurists.

This Resolution shall be known as the Law of Lagos.

Done at Lagos this 7th day of January, 1961.

AFRICAN CONFERENCE ON THE RULE OF LAW

LAGOS, NIGERIA, 1961

CONCLUSIONS

COMMITTEE I

Human Rights and Government Security—the Legislative, Executive and Judiciary

CLAUSE I

1. The exigencies of modern society necessitate the practice of the Legislature delegating to the Executive the power to make rules having the force of legislation.
2. The power of the Executive to make rules or regulations having legislative effect should derive from the express mandate of the Legislature; these rules and regulations should be subject to approval by that body. The object and scope of such executive power should be clearly defined.
3. 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 such power is to be or has been exercised.
4. Every constitution should provide that, except during a period of emergency, legislation should as far as possible be delegated only in respect of matters of economic and social character and that the exercise of such powers should not infringe upon fundamental human rights.
5. The proclamation of a state of emergency is a matter of most serious concern as it directly affects and may infringe upon human rights. It is the sense of the Conference that the dangers of survival of the nation such as arise from a sudden military challenge may call for urgent and drastic measures by the Executive which by the nature of things are susceptible only to *a posteriori* legislative ratification and judicial review. In any other case, however, it is the Parliament duly convened for the purpose that should declare whether or not the state of emergency exists. Wherever it is impossible or inexpedient to summon Parliament for this purpose, for example during Parliamentary recess, the Executive should be competent to declare a state of emergency, but in such a case Parliament should meet as soon as possible thereafter.

6. The Conference is of the opinion that real danger exists when, to quote the words of the General Rapporteur, "The citizenry, whether by legislative or executive action, or abuse of the judicial process, are made to live as if in a perpetual state of emergency."

7. The Conference feels that in all cases of the exercise of emergency powers, any person who is aggrieved by the violation of his rights should have access to the courts for determination whether the power has been lawfully exercised.

CLAUSE II

The Conference, having considered the relative rights and obligations of legislative, executive and judicial institutions and their functions as affecting human rights and government security with particular reference to the observance of the Rule of Law in both independent and dependent countries in Africa and elsewhere; and having taken cognizance of allegations that discriminatory legislation based on race, colour or creed exists to the detriment of fundamental human rights of large sections of the population,

Requests the International Commission of Jurists to investigate, examine, consider and report on the legal conditions in Africa and elsewhere with particular regard to the existence of the Rule of Law and the observation of fundamental human rights.

COMMITTEE II

Human Rights and Aspects of Criminal and Administrative Law

The Rule of Law is of universal validity and application as it embraces those institutions and principles of justice which are considered minimal to the assurance of human rights and the dignity of man.

Further as a preamble to these *Conclusions* it is decided to adopt the following text from the *Conclusions* of the Second Committee of the International Congress of Jurists, New Delhi, India, 1959:

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.

1. Taking full cognizance of and incorporating herein by reference Clause III 3 (a) of the *Conclusions* of the First Committee of the above-mentioned International Congress of Jurists in New Delhi ¹ it is recognized and agreed that legislation authorizing administrative action by the Executive should not be discriminatory with respect to race, creed, sex or other such reasons and any such discriminatory provisions contained in legislation are considered contrary to the Rule of Law.

2. While recognizing that inquiry into the merits of 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.

3. The minimum requirements for such administrative action and subsequent judicial review as recommended in paragraph 2 above are as follows:

(a) that the full reasons for the action of the Executive be made known to the person aggrieved; and

(b) that the aggrieved person shall be given a fair hearing; and

(c) that the grounds given by the Executive for its action shall not be regarded as conclusive but shall be objectively considered by the court.

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

5. (i) No person of sound mind shall be deprived of his liberty except upon a charge of a specific criminal offence; further, except during a public emergency, preventive detention without trial is held to be contrary to the Rule of Law.

(ii) During a period of public emergency, legislation often authorizes preventive detention of an individual if the Executive finds that public security so requires. Such legislation should provide the individual with safeguards against continuing arbitrary confinement

¹ "The Legislative must . . . not discriminate in its laws in respect of individuals, classes of persons, or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes, or minorities."

by requiring a prompt administrative hearing and decision upon the need and justification for detention with a right to judicial review. It should be required that any declaration of public emergency by the Executive be reported to and subject to ratification by the Legislature. Moreover, both the declaration of public emergency and any consequent detention of individuals should be effective only for a specified and limited period of time (not exceeding six months).

(iii) Extension of the period of public emergency should be effected by the Legislature only after careful and deliberate consideration of the necessity therefor. Finally, during any period of public emergency the Executive should only take such measures as are reasonably justifiable for the purpose of dealing with the situation which exists during that period.

6. The courts and magistrates shall permit an accused person to be or to remain free pending trial except in the following cases which are deemed proper grounds for refusing bail:

- (a) in the case of a very grave offence;
- (b) if the accused is likely to interfere with witnesses or impede the course of justice;
- (c) if the accused is likely to commit the same or other offences;
- (d) if the accused may fail to appear for trial.

7. The power to grant bail is a judicial function which shall not be subject to control by the Executive. Although a court should hear and consider the views and representations of the Executive, the fact that investigation of the case is being continued is not a sufficient ground for refusing bail. Bail should be commensurate with the economic means of the accused and, whether by appeal or independent application, a higher court should have the power to release provisionally an accused person who has been denied bail by the lower court.

8. After conviction and pending review, the trial or appellate court should have discretionary power to admit the convicted person to bail subject to the grounds set forth in paragraph 6 above.

9. It is recommended that greater use be made of the summons requiring appearance in court to answer a criminal charge in place of arrest and the consequent necessity for bail and provisional release.

COMMITTEE III

The Responsibility of the Judiciary and of the Bar for the Protection of the Rights of the Individual in Society

The Conference reaffirms the *Conclusions* reached by the Fourth Committee of the International Congress of Jurists, New Delhi,

India, 1959, which are appended hereto*; and having regard to the particular problems of emerging states, wishes to emphasize certain points in particular, and to add others.

1. In a free society practising the Rule of Law, it is essential that the absolute independence of the Judiciary be guaranteed. Members of the legal profession in any country have, over and above their ordinary duties as citizens, a special duty to seek ways and means of securing in their own country the maximum degree of independence for the Judiciary.

2. It is recognised that in different countries there are different ways of appointing, promoting and removing judges by means of action taken by the Executive and Legislative powers. It is not recommended that these powers should be abrogated where they have been universally accepted over a long period as working well—provided that they conform to the principles expressed in Clauses II, III, IV and V of the Report of the Fourth Committee at New Delhi.

3. In respect of any country in which the methods of appointing, promoting and removing judges are not yet fully settled, or do not ensure the independence of the Judiciary, it is recommended:

(a) that these powers should not be put into the hands of the Executive or the Legislative, but should be entrusted exclusively to an independent organ such as the Judicial Service Commission of Nigeria or the *Conseil supérieur de la magistrature* in the African French-speaking countries;

(b) that in any country in which the independence of the Judiciary is not already fully secured in accordance with these principles, they should be implemented immediately in respect of all judges, especially those having criminal jurisdiction.

4. It is recommended that all customary, traditional or local law should be administered by the ordinary courts of the land, and emphasized that for so long as that law is administered by special courts, all the principles enunciated here and at New Delhi, for safeguarding the Rule of Law, apply to those courts.

5. The practice whereby in certain territories judicial powers, especially in criminal matters, are exercised by persons who have no adequate legal training or experience, or who as administrative officers are subject to the control of the Executive is one which falls short of the Rule of Law.

6. (a) To maintain the respect for the Rule of Law it is necessary that the legal profession should be free from any interference.

(b) In countries where an organised Bar exists, the lawyers themselves should have the right to control the admission to the

* See pp. 14-17 above.

profession and the discipline of the members according to rules established by law.

(c) In countries where an organised Bar does not exist, the power to discipline lawyers should be exercised by the Judiciary in consultation with senior practising lawyers and never by the Executive.

7. The Conference reaffirms Clause X of the *Conclusions* of the Fourth Committee at New Delhi, and recommends that all steps should be taken to ensure equal access to law for both rich and poor, especially by a provision for and an organisation of a system of Legal Aid in both criminal and civil matters.

8. The Conference expressly re-affirms the principle that retroactive legislation especially in criminal matters is inconsistent with the Rule of Law.

INTERNATIONAL CONGRESS OF JURISTS

DECEMBER 11-15, 1962
RIO DE JANEIRO (PETROPOLIS), BRAZIL

on

Executive Action and the Rule of Law

QUESTIONNAIRE

General Preface

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

Preface

The first protection for the citizen is the procedural framework adopted by the Executive in making determinations affecting his rights and interests. Judicial protection for the individual has evolved over a long period, but in modern societies the Executive is frequently compelled to devise procedures in situations where there has been no opportunity for the slow growth of such safeguards.

How the Executive should proceed in dealing with the citizen and in making decisions affecting the citizen is a proper concern of lawyers. Justice is not limited to trials in court, but has constantly to do with social and economic considerations in all aspects of Executive Action, whether concerning the individual or the community at large.

A. What are the procedural safeguards observed by the Executive in your country to avoid action contrary to the Rule of Law?

In determinations by administrative agencies and executive officials in the form of decisions affecting individuals or regulations affecting the community at large, are the parties concerned given:

- (1) adequate notice of proposed action and any applicable rules, principles and reasons?
- (2) access to necessary information, including the relevant files of the agency or official?
- (3) adequate time to prepare the case?
- (4) opportunity to present facts and arguments before the appropriate agency or official?
 - (a) in what form? is there a public hearing?
 - (b) is there an opportunity to present evidence? to call witnesses?
 - (c) is there an opportunity to confront opposing witnesses and the officials chiefly responsible for making the investigation or recommendations which support the proposed action?
- (5) the right to be assisted by a lawyer or other person?
- (6) full notice of the content and grounds of the decision?
- (7) some form of review or appeal within the executive branches of the government?

B. In the light of the existing situation in your country:

- (1) are there other safeguards which should be observed generally or in particular types of cases?
- (2) do measures which may be necessary for the solution of economic and social problems, especially in underdeveloped countries, suggest certain modifications of the safeguards mentioned under "A"? If so, which, and in what circumstances?
- (3) are there areas of Executive Action which raise particularly difficult problems regarding the Rule of Law?
- (4) what other matters concerning your country do you feel should be explored under the topic of procedures utilized by the Executive?

COMMITTEE TWO

Control by the Legislature and the Courts Over Executive Action

Preface

Unbridled executive power becomes arbitrary. The provisions for checking its abuses are fundamental to a free society. It is

through guidance and control by the Legislature and review by the Judiciary—and of course through the expression of the will of the citizens in the electoral process—that violations of the Rule of Law by the Executive can be avoided. All lawyers have a duty to watch over, and where possible, participate in the process through which the proper functioning of the Executive is achieved.

A. What are the safeguards provided through the Legislature and Courts in your country to prevent a course of Executive Action contrary to the Rule of Law? For example:

(1) do the Courts review determinations by administrative agencies and executive officials?

(a) with respect to what types of executive determination? is there review of decisions applying rules or regulations in particular cases (quasi-judicial action)? is there review of determinations establishing rules or regulations of general application (quasi-legislative actions)?

(b) does the court review extend to these questions:

- i) whether the Executive has exceeded the powers conferred upon it by the Constitution or the Legislature?
- ii) whether adequate procedural safeguards were observed?
- iii) whether the evidence supports the determination?
- iv) whether the application of a rule or regulation was fair and non-discriminatory or constituted a misapplication of discretionary power?

(2) to what extent does the Legislature seek to control delegated legislation or quasi-judicial determinations by the Executive:

(a) with respect to the procedural aspects of hearings?

(b) by requiring that administrative agencies and executive officials give reasons for their decisions?

(c) by establishing minimum periods of time which must elapse between the promulgation of regulations and their entry into operation?

(d) by establishing standards and other substantive rules of law to be applied by the Executive?

(e) by providing for review of Executive Action by the Executive itself, by the Judiciary or by an appointee of the Legislature, e.g., the Ombudsman?

(3) does the Constitution or Legislature provide that any of the usual controls over Executive Action shall be suspended during periods of national emergency?

(a) what are the circumstances constituting a national emergency?

(b) who may declare a national emergency?

(c) what controls over Executive Action are affected by a declaration of a national emergency?

B. In the light of the existing situation in YOUR country:

(1) what improvements, if any, should be made in the checks on Executive Action exercised by the Legislature and the Judiciary?

(2) having regard to the dynamic conception of the Rule of Law enunciated at the International Congress of Jurists held in New Delhi in January 1959, what special measures do you suggest in matters of social and economic development?

(3) what special measures for safeguards, if any, can be suggested in the wide field of executive discretion in fiscal matters and such administrative decisions as the granting of passports?

C. What other matters in respect of your country do you feel should be explored under this topic of control by the Legislature and the Judiciary over Executive Action?

COMMITTEE THREE

The Responsibility of Lawyers in a Changing Society

Preface

The lawyer today cannot content himself only with the conduct of his practice. He cannot remain a stranger to important developments in the economic and social field if he is to fulfil his vocation as a lawyer; he must take an active part in the process of change. He will do this by formulating new legal concepts which will enable him to inspire, guide and, whenever necessary, regulate social and economic development in a changing society.

In a changing society it is still not enough for the lawyer merely to formulate new ideas and new rules. In his day to day professional life he must be a visible example of efficiency, personal integrity and courage—in short, of the ideals of his profession.

A. 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? For example:

with respect to private practitioners:

(1) what policies govern admission to the practice of law and to Bar associations? by whom and on what grounds may practitioners be expelled, suspended or otherwise disciplined?

(2) how is your Bar association organized and managed? (please annex a copy of its Statute or rules);

- (3) is your Bar association organized and managed without governmental or other interference?
- (4) is your Bar association so organized and managed that it can be an effective instrument of legal reform?
- (5) does the Executive exercise influence over private practitioners, e.g., with respect to representation of clients (particularly in unpopular causes), access to clients, and privilege of non-disclosure of lawyer-client communications, etc.?
- (6) is there provision for making legal assistance available to those who cannot afford to pay for the services of lawyers?
- (7) please annex or describe the rules of legal ethics applicable to lawyers; are they strictly observed?

with respect to lawyers in government:

- (1) what special contribution should a lawyer in government make to social and economic development and to the strengthening of the Rule of Law?
- (2) does a lawyer in government have a special responsibility in the performance of executive or administrative duties because of his professional and ethical responsibilities?

with respect to the Judiciary:

- (1) to what extent do practices in your country meet the *Conclusions* reached by the International Congress of Jurists at New-Delhi, India, and by the African Conference on the Rule of Law held in Lagos, Nigeria? (See appendix to this questionnaire.)
- (2) in your country, are there pressures from the Executive which interfere with the judicial function against which there are no adequate safeguards?
- (3) do judges in your country engage in political or other extrajudicial activities, and does this prejudice judicial impartiality?
- (4) where a judge is seconded from his own country, or by an international agency, to work in the Judiciary of another country, are there special problems of maintaining judicial independence?

B. In the light of the existing situation in your country, what modifications, if any, should be made in the present organization and activities of the legal profession, i.e., judges, lawyers in private practice and government, and teachers of law?

C. What other matters in respect of your country do you feel should be explored under the topic of the responsibility of the legal profession in a changing society?

COMMITTEE FOUR

The Role of Legal Education in a Changing Society

Preface

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.

A. 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? For example:

- (1) do they teach, along with the law as it is, its historical evolution and its political, social and economic setting?
- (2) do they teach the methods, processes and techniques by which the law grows and develops?
- (3) do they take into account adequately the fact that lawyers must often function in matters of public law and private international law as well as private law; before executive agencies and tribunals as well as courts; in government positions, both in the Executive and the Legislature, as well as in private practice and in the courts?
- (4) do they teach the ethics of the legal profession and inculcate its traditions and duties?
- (5) do they conduct courses on the problem of civil liberties?
- (6) what could be done to improve the training of law students in the above respects?

B. How does one become a lawyer in your country? For example:

- (1) what are the requirements for admission to law school (academic, political, nationality, religious racial, other)?
- (2) is adequate financial assistance made available to those students who cannot finance their own law studies?

(3) what are the qualifications and conditions for financial assistance?

C. How do law schools function in your country? For example:

(1) are they controlled by the Executive branch of the government or the Legislature?

(2) how much autonomy is enjoyed by the law schools, especially with respect to recruitment and admission of students, faculty appointments and dismissals, curriculum, teaching methods and materials, budget?

(3) is the formation of student associations permitted in law schools? if so, on what terms, with what functions, and subject to what restrictions?

(4) are current legal issues and law-reform activities discussed in the classroom? in extra-curricular student groups?

(5) to what extent is the law teacher allowed academic freedom:

(a) within the law school (e.g., method and content of teaching)?

(b) elsewhere (e.g., political activities)?

(6) do your law schools have safeguards which help ensure such freedom (e.g., in tenure of office)?

(7) have you adequate inducements, financial and other, to encourage competent lawyers to enter the teaching of law as a career?

(8) do practising lawyers teach part-time? is this desirable?

(9) are there any special guarantees or restrictions with respect to teachers coming from abroad?

(10) do you advocate courses and lectures for lawyers in new legal developments and trends in a changing society?

D. What other matters in respect of your country do you feel should be explored under the topic of the role of legal education in a changing society?

APPENDIX 1

This Appendix reproduces the text of the Conclusions of the Committee on the Judiciary and the Legal profession under the Rule of Law of the International Congress of Jurists New Delhi, India, January 1959 (See pages 14-17 above).

Printed in Switzerland